Note

Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values when Considering Preliminary Injunctive Relief

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Preliminary injunctions frequently play an important role in public law litigation strategy.[1] In particular, plaintiffs challenging the validity of statutes often begin litigation by moving to enjoin enforcement of the challenged statute pending a trial on the merits.[2] Unfortunately, considerable confusion exists over the wide array of preliminary injunction standards used in federal courts.[3] Scholars and judges have proposed various reforms, but with little result.[4] In the absence of comprehensive

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1. Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 496 (2003) (calling the preliminary injunction a "common tool . . . in a wide variety of civil actions").

2. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 51 (2006) (reviewing a preliminary injunction against enforcement of the Solomon Amendment); Ashcroft v. ACLU, 535 U.S. 564, 572 (2002) (Child Online Protection Act); Miller v. French, 530 U.S. 327, 350 (2000) (Prison Litigation Reform Act). The plaintiffs in these cases were of course ultimately seeking permanent injunctions, which are the usual remedy for constitutional violations in public law litigation. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 803 (5th ed. 2003).

3. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978) (noting a "dizzying diversity of formulations, unaccompanied by any explanation for choosing one instead of another"). Leubsdorf argues that this confusion is not merely semantic, but instead reflects the absence of a "coherent theory about the purpose of preliminary relief." *Id.*

4. *See, e.g.*, Denlow, *supra* note 1, at 535–39; Leubsdorf, *supra* note 3, at 526.

Supreme Court guidance, various standards have proliferated among the circuit courts.[5]

The Supreme Court's most recent contribution to the doctrine came in *Winter v. Natural Resources Defense Council*,[6] a decision that at least one prominent commentator believes also created a heightened preliminary injunction standard.[7] *Winter* employed a philosophy of judicial restraint in vacating a preliminary injunction against the United States Navy[8] but failed to offer concrete guidance for the lower courts on how deference based on structural constitutional principles should be incorporated into traditional equitable doctrine.[9] Lower courts are currently grappling with the contours of preliminary injunction doctrine post-*Winter*.[10]

This Note suggests that a particularly useful lens through which to explicate *Winter*'s implications is *Planned Parenthood v. Rounds*, an Eighth Circuit case decided shortly before *Winter*.[11] In this case, the Eighth Circuit contributed to the doctrinal entropy among the circuit courts and opened an express circuit split[12] by creating a heightened version of its traditional preliminary injunction standard where a party seeks to enjoin the implementation of a state statute.[13] This new standard will also be used to evaluate motions to preliminarily enjoin the enforcement of federal statutes.[14] Furthermore, it may also apply to challenges of local government conduct and administrative agency action at all levels of government.[15] This set of circums-

5. *See* 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 to .4 (1995) (surveying the wide variety of preliminary injunction standards used by federal courts).

6. 129 S. Ct. 365 (2008).

7. *See* Erwin Chemerinsky, *Court Sets Higher Hurdle for Preliminary Injunctions*, TRIAL, Jan. 2009, at 58, 59.

8. *Winter*, 129 S. Ct. at 376–77.

9. *See* Save Strawberry Canyon v. Dep't of Energy, 613 F. Supp. 2d 1177, 1180 n.2 (N.D. Cal. 2009); Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 12 (D.D.C. 2009).

10. *See Strawberry Canyon*, 613 F. Supp. 2d at 1180 n.2; *Brady Campaign*, 612 F. Supp. 2d at 12.

11. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008) (en banc).

12. *Id.* at 731 (declining to follow *Rodde v. Bonta*, 357 F.3d 988 (9th Cir. 2004)).

13. *Id.* at 732–33 (noting that the traditional standard will still apply where "a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes").

14. *Id.*

15. *Id.* at 732 n.6.

tances exposes the tensions between equitable relief and structural constitutional concerns that must be confronted in crafting a comprehensive preliminary injunction standard applicable to government action.

This Note argues that federalism concerns can and should be accommodated within the equitable framework of the traditional preliminary injunction standard. Part I outlines the contours of traditional preliminary injunction doctrine and examines the Eighth Circuit's modifications, which were intended to give appropriate deference to state legislative choices. Part II argues that, although the Eighth Circuit properly raised federalism concerns, it did so at the expense of the equitable principles underlying traditional preliminary injunction doctrine. The result did violence not only to the familiar procedural standard, but also to the substantive constitutional rights that the traditional procedural standard protected from irreparable harm. Part III calls on the Supreme Court to articulate a comprehensive preliminary injunction standard for the public law context that minimizes potential irreparable harm and weighs all constitutional values at stake in the litigation.

I. FEDERAL COURTS' HAPHAZARD APPROACH TO PRELIMINARY INJUNCTION STANDARDS

The confusion surrounding preliminary injunction standards is not new.[16] The Federal Rules of Civil Procedure provide for the remedy but leave to the courts the job of deciding when it is available.[17] Certain statutes expressly provide for preliminary injunctive relief, but generally incorporate by reference traditional equitable doctrine instead of providing additional guidance.[18] The Supreme Court made a recent excursion into this area of law, but left important doctrinal questions un-

16. *See* Leubsdorf, *supra* note 3, at 525–26 (arguing in 1978 that the preliminary injunction doctrine was incoherent).

17. *See* FED. R. CIV. P. 65(a) (requiring nothing more than "notice to the adverse party" before granting a preliminary injunction).

18. *See, e.g.*, National Labor Relations (Taft-Hartley) Act § 10(j), 29 U.S.C. § 60(j) (2006) (authorizing a district court "to grant to the [National Labor Relations] Board such temporary relief or restraining order as it deems just and proper"); 35 U.S.C. § 283 (2006) (providing that a court "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable"); *see also* eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982), for the proposition that "a major departure from the long tradition of equity practice should not be lightly implied").

resolved.[19] The wide variety of standards that has proliferated in this vacuum has been guided in part by historic equity practice.[20] The following Sections explore the backdrop for modern preliminary injunction standards, offer a comparative look at the various standards employed among the circuits, and introduce the Eighth Circuit's recent contribution to this morass.

A. GROUND RULES FOR PRELIMINARY INJUNCTIONS

Two questions are particularly useful in comparing preliminary injunction standards. First, what factors do courts consider? Second, how do these factors fit together? Wright and Miller's treatise classifies preliminary injunction factors into four general categories: irreparable harm, balancing hardship to parties, probability of success on the merits, and public interest.[21] Irreparable harm encompasses two concerns: the nature of the potential harm to the moving party if the injunction is not granted and the ability of the court to remedy that harm after a trial on the merits if it declines to issue the preliminary injunction.[22] The balancing prong compares the potential harm to the moving party to the potential burden on the nonmoving

19. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376 (2008) (setting a threshold for irreparable injury and requiring courts to weigh the public interests at stake).

20. *See, e.g.*, Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1435 (7th Cir. 1986) ("[T]he equitable personality of injunctive relief requires the result to be a 'just' or 'fair' result rather than a 'correct' result."); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir. 1963) ("[The court] is to be guided by the principles long established in courts of equity."). *See generally* Leubsdorf, *supra* note 3, at 527–40 (tracing the evolution of preliminary injunction standards from eighteenth-century English Chancery practice, where it emerged as a procedural device for granting "relief in cases where the final decision on the merits was reserved to the courts of law").

21. 11A WRIGHT & MILLER, *supra* note 5, § 2948.1 to .4.

22. *See, e.g.*, Meis v. Sanitas Serv. Corp., 511 F.2d 655, 656 (5th Cir. 1975) ("[T]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits."). It should be noted that although "irreparable harm" is also a commonly articulated factor in granting permanent injunctive relief, the concept is more flexible in this situation than it is at the preliminary injunction stage. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 111–17 (1991) (contrasting preliminary and permanent injunctive relief). Courts often grant permanent injunctive relief where damages are economic in nature but difficult to measure, while limiting preliminary injunctive relief to substantive areas, such as intellectual property, civil rights and civil liberties, and environmental law, in which substitutionary relief is categorically insufficient. *Id.* at 113–16.

party if the injunction is issued.[23] The probability of success category limits the use of this extraordinary remedy to cases in which the action taken before hearing the merits is likely to be the appropriate action after the merits are heard.[24] Although the purpose of this prong is clear, the language used to apply it is much more ambiguous.[25] The public-interest prong requires courts to consider how a preliminary injunction will affect parties not present before the court, an especially relevant consideration when relief is sought against a government entity.[26]

Although courts generally agree that the above factors are the appropriate considerations, there is less agreement as to how the factors comport with one another. The traditional approach treats irreparable injury as the *sine qua non* for granting preliminary injunctive relief.[27] However, tradition is less helpful in explaining the relationship among the other factors. Instead, it is more useful to look at how courts actually apply the various factors.

Most circuits use a test involving the four traditional factors.[28] Some circuits require the moving party to establish each

23. *See, e.g.*, Hughes Network Sys., Inc. v. Interdigital Commc'ns Corp., 17 F.3d 691, 693 (4th Cir. 1994) (noting that the "balance of hardships" is the most important factor in considering an injunction (citing Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991))).

24. *See* LAYCOCK, *supra* note 22, at 120 ("What matters is the probability that the preliminary relief to be granted will be a part of the relief to be awarded at final judgment, or at least not inconsistent with the rights to be determined by the final judgment.").

25. Some of the variation appears to be substantive, while much of it appears to be merely semantic. *Compare* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 732 n.4 (8th Cir. 2008) (noting that "likely to prevail," "substantial probability of success," and "substantial likelihood of success" all seem to have been satisfied traditionally by a finding that the odds of success were "greater than fifty percent" or more probable than not), *with id.* at 730 (observing that the district court applied the *Dataphase* "fair chance" standard, "with a 'fair chance' meaning something less than fifty percent").

26. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

27. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 46 (1971) (calling irreparable injury "the traditional prerequisite to obtaining an injunction"); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506–07 (1959) (stating that "the basis of injunctive relief in federal courts has always been irreparable harm and inadequacy of legal remedies").

28. Denlow, *supra* note 1, at 515 (citing cases from the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, D.C., and Federal Circuits). Due to the inconsistencies in how some of the circuits apply the four traditional factors and the discrepancies between the courts' statements and their actions, Denlow's taxonomy, while useful, is necessarily imprecise.

of the four factors.[29] Other circuits take a pure balancing approach and weigh the various considerations regardless of whether each element is established.[30] Finally, a third group of circuits takes a hybrid approach, treating one or more factors as threshold requirements before balancing the remaining considerations.[31] For example, the Second Circuit requires a showing of irreparable harm and "either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, in addition to a balance of hardships that tips decidedly toward the movant."[32] The Seventh Circuit achieves a similar flexibility by employing a scale approach.[33] Under this approach, the required showing as to the likelihood of success decreases as the balance of other harms weighs more strongly in favor of the movant.[34] The inverse is also true: as a movant becomes less likely to succeed on the merits, she must make an increasingly strong showing that the balance of harms tilts in her favor.[35]

The Supreme Court has been no more consistent than the lower courts when considering preliminary injunctions, addressing various components without ever offering a comprehensive standard to harmonize the inconsistencies among the circuits.[36] It has often articulated the two-factor test requiring

29. *Id.* at 522–23 (Fifth, Eleventh, and Federal Circuits).

30. *Id.* at 516–19 (Fourth, Sixth, Eighth, and D.C. Circuits).

31. *Id.* at 520–22 (First, Third, and Tenth Circuits).

32. *Id.* at 526–27 (citing Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979)). The Ninth Circuit takes a similar approach, accepting a showing "that serious questions are raised and the balance of hardships tips in its favor" as an alternative to probable success and irreparable harm. *Id.* at 527–28 (citing Sammartano v. First Judicial Dist. Court *ex rel.* County of Carson City, 303 F.3d 959, 965 (9th Cir. 2002)). *But cf.* James M. Fischer, *"Preliminarily" Enjoining Elections: A Tale of Two Ninth Circuit Panels*, 41 SAN DIEGO L. REV. 1647, 1656 (2004) (noting that some Ninth Circuit decisions have treated these alternative tests as "merely extremes of a single continuum . . . which effectively marries the Ninth Circuit to the Seventh Circuit's sliding scale test" (citations omitted)). Fischer goes on to note that "[t]here are apparently now three tests" in use in the Ninth Circuit: the traditional test, the hybrid test, and the "alternative version of the hybrid test (in effect, an alternative to the alternative)." *Id.* at 1657–58.

33. Denlow, *supra* note 1, at 528–29 (citing Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386–87 (7th Cir. 1984)).

34. *Id.* The public interest should also be considered if "the preliminary injunction will have an impact beyond the immediate parties." *Id.* (citations omitted).

35. *Id.*

36. *See id.* at 510–14 (surveying rules the Court has given as well as cases in which it has declined to clarify the preliminary injunction standard).

a showing of irreparable injury and a likelihood of success, but has also instructed lower courts to balance the parties' interests.[37] The Court has clearly instructed lower courts to consider the "public consequences" of granting or denying an injunction in challenges to government action,[38] but it has given scant explanation of how to identify situations in which the public interest may override a showing of irreparable harm.[39]

The Court's most recent foray into the preliminary injunction arena once again failed to provide a comprehensive standard. In *Winter*, environmental organizations sought to enjoin the United States Navy from using mid-frequency active sonar in training exercises based on alleged violations of various environmental statutes.[40] In granting a preliminary injunction, the Ninth Circuit employed a sliding-scale approach, holding that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm."[41] The Su-

37. *Compare* Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 441 (1974) (utilizing a two-factor test), *with* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (instructing the lower court to "weigh carefully the interests on both sides"), *and* Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 542 (1987) (instructing the lower court to "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief").

38. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376–77 (2008) (challenging naval conduct); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497–98 (2001) (challenging a federal controlled substance statute).

39. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 440 (1944) (authorizing lower courts to withhold relief pending a final decision "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate"). *But cf.* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 430 (2d ed. 1994) (noting that courts often waive the bond requirement in public interest litigation because not doing so "would make preliminary relief generally unavailable in civil rights, environmental, and consumer litigation, to workers in labor litigation, and, in general, to nonwealthy plaintiffs").

40. *Winter*, 129 S. Ct. at 370–72.

41. *Id.* at 375 (citing Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 696–97 (9th Cir. 2008)). Prior to the Supreme Court's decision in *Winter*, the Ninth Circuit employed the traditional four-factor test and two alternative formulations. *See Winter*, 518 F.3d at 677 ("Alternatively [to meeting all four of the traditional criteria], a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor."). Because the Ninth Circuit affirmed the injunction based on the first alternative formulation, the Supreme Court had no occasion to consider whether the second alternative formulation is permissible. *See Winter*, 129 S. Ct. at 375.

preme Court found the "possibility" standard too lenient and instead held that a plaintiff must show "that irreparable injury is '*likely*' in the absence of an injunction."[42] However, it offered little guidance as to how the showings required of the moving party relate to the traditional balancing inquiry.

B. THE EIGHTH CIRCUIT'S NEW HEIGHTENED STANDARD

In 2005, Planned Parenthood brought a preenforcement challenge[43] against a South Dakota law that requires a physician to inform a pregnant women that an "abortion will terminate the life of a . . . living human being."[44] South Dakota has long been seen as the principal state battleground for testing the constitutional limits on restricting abortion access,[45] and this law was the latest in a line of increasingly restrictive abortion regulations.[46] The 2005 legislation, which codified the requirements for a physician to obtain informed consent from a patient before performing an abortion,[47] also defines "human being."[48] Planned Parenthood argued that the Act "would violate physicians' free speech rights by compelling them to deliver the State's ideological message" and moved for a preliminary injunction.[49]

42. *Winter*, 129 S. Ct. at 375.

43. Planned Parenthood Minn., N.D., S.D., v. Rounds, 530 F.3d 724, 727 (8th Cir. 2008).

44. Act of Mar. 16, 2005, ch. 186, § 7, 2005 S.D. Sess. Laws 356, 358 (codified as amended at S.D. CODIFIED LAWS § 34-23A-10.1 (2005)), *invalidated in part by* Planned Parenthood Minn., N.D., S.D. v. Rounds, No. CIV. 05-4077-KES, 2009 WL 2600753 (D.S.D. Aug. 20, 2009).

45. *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 992 ("South Dakotans seized the spotlight in 2006 by enacting the most restrictive abortion statute in the nation. In a direct challenge to *Roe v. Wade*, the state outlawed abortion, except where it would prevent the death of a pregnant woman."); Adam Liptak, *Putting the Government's Words in the Doctor's Mouth*, N.Y. TIMES, Aug. 6, 2007, at A12 (referring to South Dakota as "an innovator in abortion legislation").

46. *See, e.g.*, S.D. CODIFIED LAWS § 22-17-5.1 (2008) (prohibiting the procurement of an abortion, "effective on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy").

47. Act of Mar. 16, 2005, ch. 186, § 7.

48. *Id.* § 8(4) (amending S.D. CODIFIED LAWS § 34-23A-I (2008)).

49. Planned Parenthood Minn., N.D., S.D., v. Rounds, 530 F.3d 724, 727 (8th Cir. 2008). *See generally* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (discussing the First Amendment issues raised on the merits in *Rounds*).

The district court granted the injunction based on Planned Parenthood's "fair chance of success" and a finding that the "balance of harms" also favored the plaintiffs.[50] A divided Eighth Circuit panel affirmed the injunction.[51] Both courts relied on the circuit's traditional test from *Dataphase Systems, Inc. v. C L Systems, Inc.*, which requires a moving party to demonstrate a "fair chance of success" and that the "balance of harms" was in its favor.[52] The Eighth Circuit reheard the case en banc and not only vacated the injunction,[53] but also announced a "more rigorous" procedural standard for preliminarily enjoining state statutes.[54]

Rounds modifies the *Dataphase* test in two ways for the government-action context. First, it raises the standard for success on the merits from "fair chance" to "likely to prevail."[55] More importantly, it converts probability of success from one factor that a court must balance with other equitable considerations into a threshold requirement that a movant must meet before a court may consider equitable concerns.[56] Although the former change on its own might arguably have been merely a semantic difference,[57] the latter adds a threshold requirement

50. *Rounds*, 530 F.3d at 729 (citing Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005)).

51. *Id.* at 730.

52. *Id.* at 729 (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981)).

53. *Id.* at 738.

54. *Id.* at 730.

55. *Id.* at 731–32. The court acknowledges the ambiguity of the two standards, and although it does not conclusively resolve it, suggests that "likely to prevail" means that success is more probable than not. *See id.* at 732 n.4. The court drew the "likely to prevail" language from *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

56. *See Rounds*, 530 F.3d at 732 ("If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other *Dataphase* factors." (citation omitted)). Although the opinion later disclaims that its use of the term "threshold" means anything more than that the remaining *Dataphase* factors cannot tip the balance in Planned Parenthood's favor, *id.* at 737 n.11, this description of the court's reasoning is inaccurate. In the same footnote, despite recognizing that the nature of Planned Parenthood's alleged injury is inherently irreparable, the court implies that the threat of this harm cannot sufficiently counteract the state's interest in avoiding the injunction absent a showing of likely success on the merits. *See id.* In other words, likelihood of success is indeed operating as a threshold requirement—that which is necessary to gain preliminary relief.

57. *See id.* at 731 (noting that the court had previously used the "substantial probability," "substantial likelihood," and "fair chance" standards without clearly articulating any substantive difference among them).

for preliminarily enjoining statutes.[58] The rationale for these changes is "that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly."[59] The *Dataphase* "fair chance" standard continues to govern "where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes."[60] The following Part questions the Eighth Circuit's new approach to heightened deference and concludes that it violates both traditional equitable principles and substantive constitutional values.

II. PROCEDURAL AND SUBSTANTIVE FLAWS IN THE EIGHTH CIRCUIT'S NEW STANDARD

Challenges to statutes present a dilemma: how to harmonize constitutional principles with preliminary injunctive relief, which has its roots in English equity practice.[61] English Chancery courts did not have to navigate issues of deference to Parliament because they were not empowered to make legal determinations.[62] In contrast, American courts must take into account the deference due to federal and state political branches under principles of separation of powers and federalism, in addition to traditional equitable principles.[63] This Part argues that the Eighth Circuit's approach to this problem is doctrinally incorrect as a matter of equity, misplaced as a matter of structural constitutional law, and dismissive of the underlying substantive values at stake.

Part II.A explains how *Rounds*'s approach to state legislative deference strays from the traditional purpose of prelimi-

58. *See id.* at 732 n.5 (noting that the court "focus[es] on the likelihood of success on the merits as the threshold issue").

59. *Id.* at 732 (citing Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995)).

60. *Id*.

61. *See* Leubsdorf, *supra* note 3, at 529.

62. *See id.* at 532. (noting that the forerunners of the equitable factors considered in modern preliminary injunctions reflect "the awkwardness of protecting common law rights in a court [of equity] unqualified to declare whether the rights existed").

63. *See* Younger v. Harris, 401 U.S. 37, 46 (1971) (noting that the "fundamental policy against federal interference with state criminal prosecutions" places a gloss on the traditional irreparable injury requirement for obtaining an injunction).

nary injunctive relief. Although *Rounds* couches its new standard in the traditional language of equity, it effectively abandons equitable principles in favor of purely federalism concerns. The preliminary injunction doctrine was not designed to bear the federalism weight the court places on it. Instead, as outlined in Part II.B, equitable restraint doctrines are available to prevent federal courts from unduly interfering with state courts. By recognizing overriding federalism concerns in all but a narrow set of circumstances, these doctrines ensure that giving federalism concerns less than dispositive weight at the preliminary injunction stage of a challenge to a state statute will not significantly upset the established division of power between the federal government and the states. Finally, Part II.C considers the impacts of this procedural flaw on the substantive constitutional rights at issue in *Rounds*—those stemming from the First Amendment. *Rounds* discounts not only the irreparability of injuries to First Amendment rights, but also the unique interest the public has in preserving these rights for all speakers.

A. *ROUNDS* VIOLATES THE TRADITIONAL EQUITABLE PURPOSES OF PRELIMINARY INJUNCTIVE RELIEF

The *Rounds* standard is motivated by the court's structural constitutional concerns and not only enshrines a presumption of deference to state political choices, but also precludes any exceptions to this general rule. By abandoning equitable balancing with a threshold requirement for likelihood of success, this approach ignores what should be the fundamental purpose of preliminary injunctive relief—minimizing irreparable harm. The court blurs the distinction between the irreparable-harm and likelihood-of-success prongs, which exacerbates this problem. In addition, *Round*'s new doctrinal rigidity forecloses full consideration of the public interests in granting or denying the injunction. This rigidity is both inconsistent with *Winter* and antithetical to the unique nature of First Amendment free speech rights. This Section considers these problems in turn.

A comparison between how *Dataphase* and *Rounds* operate brings the implications of *Rounds* for plaintiffs into sharp relief. *Dataphase* requires a court to first consider whether the moving party faces a "threat of irreparable harm" if the court

declines to issue an injunction.[64] If so, the court then gives flexible consideration to the harm that an injunction would inflict on the nonmoving party, the probability of the movant's success on the merits, and the effect of the injunction on the public interest.[65] The *Dataphase* "fair chance" standard allows courts to grant injunctions even where the plaintiff's probability of succeeding on the merits is less than fifty percent so long as the balance of other factors favors the plaintiff, and the plaintiff "raise[s] questions so serious and difficult as to call for more deliberate investigation."[66] *Dataphase* functions much like the Seventh Circuit's sliding-scale approach,[67] accepting a lesser probability of success when the other traditional preliminary injunction factors favor the plaintiff.[68]

Rounds's "likely to prevail" threshold requires a probability of success greater than fifty percent.[69] In cases in which the alleged irreparable harm is not particularly severe, this standard might be no different than the "fair chance" standard. The "fair chance" standard, however, is significantly less rigorous when the threat of irreparable harm is sufficiently great. The *Rounds* court could have given increased deference while preserving the sliding-scale aspect of *Dataphase*. For example, the *Rounds* court could have applied the "likely to prevail" standard—instead of the "fair chance" standard—for minor irreparable harms and reduced the requirement as the harms became increasingly severe.[70] Instead, it abandons this flexibility and replaces it with a heightened threshold requirement.

64. *Cf.* Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 n.9 (8th Cir. 1981) ("[T]he absence of a finding of irreparable injury is alone sufficient ground for vacating the injunction.").

65. *See id.* at 113 ("In balancing the equities no single factor is determinative.").

66. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 727 (8th Cir. 2008) (quoting *Dataphase*, 640 F.2d at 113).

67. *See* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984) ("The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.").

68. *See Dataphase*, 640 F.2d at 114 ("[W]here the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.").

69. *See Rounds*, 530 F.3d at 732 n.4 (drawing on the pre-*Dataphase* "substantial probability" test, which "typically was satisfied by a showing of a greater than fifty percent probability of success").

70. In other words, the *Rounds* court could have required the "likelihood" standard instead of the "fair chance" standard in situations where the balance

By treating the likelihood of success as a threshold requirement, *Rounds* strives to avoid an erroneous guess as to the merits.[71] Although this approach minimizes the potential for unduly burdening the government with an erroneous injunction, it ignores the potential for irreparable harm from denying injunctions to plaintiffs whose cases eventually prove successful on the merits. This approach is contrary to the underlying purpose of equitable relief, which Professor Leubsdorf argues is "to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."[72] A court should consider the likelihood that the moving party will prevail at trial and then "assess the probable loss of rights to each party if it acts on a view of the merits that proves to be erroneous."[73]

Judge Posner attempted the most explicit implementation of Professor Leubsdorf's basic approach to preliminary injunctions.[74] Posner's formula failed to catch on,[75] although this fail-

of other factors does not favor the movant, but lowered the requirement as the degree of potential irreparable harm increases.

71. *See Rounds*, 530 F.3d at 733 ("By re-emphasizing this more rigorous standard for demonstrating a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis."); *see also* Smith v. Doe, 538 U.S. 84, 110 (2003) (Souter, J., concurring) (noting "the presumption of constitutionality normally accorded a State's law").

72. Leubsdorf, *supra* note 3, at 540–41; *see also* Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 391 (2005) (accepting the Leubsdorf model as a reasonable formulation of the traditional preliminary injunction case law). Leubsdorf argues that courts lack a "coherent theory about the purpose of preliminary relief," Leubsdorf, *supra* note 3, at 526, and that the historical roots of the preliminary injunction standards used by modern courts are no longer relevant. *See id.* at 531–32 ("The theme was comity [between courts of law and courts of equity], not premature adjudication."). He rejects as unpersuasive the rationales of preserving the court's power to decide the case and maintaining the status quo. *See id.* at 545–46 ("If [this rationale] mean[s] only that the court should not consider the plaintiff's injuries to the extent it can cure them at final judgment, [it is] just a confusing way to speak of irreparable loss of rights. . . . To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate." (footnotes omitted)). He also dismisses "the theory that it is worse for a court to inflict injury itself than to deny relief against its infliction by a defendant." *Id.* at 548. He argues that although this theory may provide a moral guideline for private actors, it cannot be applied to courts, which "are specifically commissioned to stop illegal action upon proper request and in many situations have a monopoly on the legal power to do so." *Id.*

73. Leubsdorf, *supra* note 3, at 541.

74. *See* Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) ("[G]rant the preliminary injunction if but only if $P \times H_P > (1 -$

ure was due to his attempt at quantifying the judicial decision-making process instead of the underlying purpose he offered for the preliminary injunction.[76] The distraction created by Posner's attempt at quantification overshadowed the more important theoretical point—that the relationship among the traditional equitable preliminary injunction considerations should be guided by the underlying purpose of minimizing the expected irreparable harm from judicial error.[77]

At first blush, *Winter* appears to take a similar approach to *Rounds* in rejecting a flexible sliding scale in favor of a heightened threshold requirement.[78] However, the Ninth Circuit's rejected sliding scale was not the traditional sliding scale exemplified by *Dataphase*, which required a threshold showing of

P) x H_D, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error."). Applying this process resembles Judge Learned Hand's famous "calculus of risk" model. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The court should multiply the probability that the moving party will prevail on the merits by its expected irreparable loss if the injunction is not granted. Leubsdorf, *supra* note 3, at 542. The court makes the same calculation for the nonmoving party. *See id.* If the moving party's "probable irreparable loss" if the injunction is denied exceeds the nonmoving party's "probable irreparable loss" if the injunction is granted, the court should award the preliminary injunction. *Id.*

75. *See* Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1346 (7th Cir. 1986) (affirming a preliminary injunction that a district court had granted based on the traditional standard); *id.* at 1347 (Will, J., concurring) (arguing that the district court would not have a reached a better result by using the Posner formula, which was now being "bur[ied] with kindness"); Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1434 (7th Cir. 1986) (clarifying that the Posner formula neither replaced the flexible equitable considerations of the traditional standard nor implied that a single correct result existed for every case); *see also* Linda S. Mullenix, *Burying (with Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 553–56 (1987) (concluding that although the courts paid lip service to Judge Posner's formula, the decisions turned on "the judges' rough sense of the probability of success on the merits").

76. *See* LAYCOCK, *supra* note 22, at 119 (noting that neither Mullinex nor any other critic of Posner's formula "has offered a clear hypothetical in which she thinks a judge would err by minimizing the risk of erroneous irreparable harm").

77. *See id.* at 119 ("Both Posner and Leubsdorf offered their approach as an analytic framework; neither expected courts to actually quantify the variables.").

78. *Compare* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008) (requiring plaintiffs to "demonstrate that irreparable injury is *likely*"), *with* Planned Parenthood Minn., N.D., S.D., v. Rounds, 530 F.3d 724, 731–32 (8th Cir. 2008) (describing its actions as imposing a "more rigorous standard").

irreparable injury[79] but made it possible to lower the necessary likelihood of success when the balance of harms favored doing so.[80] Instead, the Ninth Circuit had reversed the direction of the traditional sliding scale, reducing the irreparable injury requirement when other factors strongly tilted in the moving party's favor.[81] It was this bidirectional sliding scale, and its weakening of the irreparable injury threshold, to which the Court took objection.[82] Put differently, *Winter* makes it clear that a likely irreparable injury is always required for an injunction,[83] but does not take a position as to whether *Rounds* was correct in treating likelihood of success as an additional threshold requirement. This leaves open the possibility that a lesser showing as to likelihood of success is acceptable when the other factors tilt strongly enough in the moving party's favor.[84]

Once the Eighth Circuit turned plaintiffs' likelihood of success into a threshold requirement in *Rounds*, it was only a small step for the court to corrupt the traditional equitable doctrine further by blurring the line between likelihood of success and irreparable harm. Instead of treating each prong of the test as a separate inquiry, the court in effect makes a showing of irreparable-injury dependent on a showing of likelihood of success.[85] This is problematic not only because it ossifies the traditional sliding scale, but also because it fails to understand that the irreparable injury inquiry is about the nature of the injury, not its likelihood. Irreparable injury should be a binary in-

79. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 n.5 (8th Cir. 1981) (calling "irremediable injury" the "controlling reason" for issuing preliminary injunctions).

80. *Id.* at 113 ("[W]here the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.").

81. *Winter*, 129 S. Ct. at 375.

82. *See id.* ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.").

83. *Id.*

84. *See id.* at 392 (Ginsburg, J., dissenting) (arguing that the majority does not reject a sliding-scale approach); Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1, 12 (D.C. Cir. 2009) (agreeing with Justice Ginsburg that *Winter* did not foreclose the D.C. Circuit's traditional sliding-scale approach to preliminary injunctions).

85. *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 737–38 n.11 (8th Cir. 2008) ("[W]ithout a showing that it will likely prevail on its claim that physicians will be compelled to deliver an ideological message, Planned Parenthood's asserted threat of irreparable harm is correspondingly weakened in comparison to the State's (and the public's) interest . . . .").

quiry—either an injury is irreparable or it could be remedied after a trial on the merits—regardless of the likelihood of success. By melding likelihood of success with irreparable injury, the court articulates a test that no longer considers the severity of a plaintiff's irreparable injury relative to the defendant's cost of being enjoined. The implications of this approach become clearer through the concrete example in Part II.C, which considers the irreparable nature of injuries to First Amendment free speech rights.

Finally, lower courts read *Winter* as mandating flexibility in the preliminary injunction standard, not rejecting it as *Rounds* did.[86] *Winter* held that the district court abused its discretion by failing to consider the significant adverse impact an injunction would have on the public interest in national defense by curtailing the Navy's ability to conduct realistic training exercises.[87] The Court noted the need to "pay particular regard for the public consequences" of granting or denying an injunction.[88]

Rounds's consideration of the public interest is equally as cursory as that of the Ninth Circuit,[89] reaching the issue only in a footnote.[90] It is also fatally flawed in its one-sidedness: it recognizes only the public interest in providing information about abortion, as demonstrated by the statute,[91] and fails to consider whether there is any public interest in the plaintiffs' favor despite acknowledging the "unquestionabl[e]"[92] irreparable injury inherent in even a minimal loss of First Amendment freedoms.[93]

86. *Cf.* Save Strawberry Canyon v. Dep't of Energy, 613 F. Supp. 2d 1177, 1180 n.2 (N.D. Cal. 2009) (noting that although *Winter* rejected the first prong of the Ninth Circuit's preliminary injunction test, it did not foreclose injunctive relief under the second prong, which accepts a lower likelihood of success on the merits where "serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor" (quoting Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008))).

87. *Winter*, 129 S. Ct. at 382.

88. *Id.* at 376–77 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).

89. *Id.* at 378 ("Despite the importance of assessing the balance of equities and the public interest . . . the District Court addressed these considerations in only a cursory fashion.").

90. *Rounds*, 530 F.3d at 737 n.11.

91. *Id.*

92. *Id.* (quoting Kirkeby v. Furness, 52 F.3d 772, 775 (8th Cir. 1995)).

93. *Id.*

Established constitutional jurisprudence provides at least three background principles for balancing the protection of individual rights and the collective power of government in making a preliminary injunction decision. First, it is clear that collective action, whether exercised through the states or through the political branches of the federal government, does not enjoy an absolute priority under the Constitution.[94] This precludes an irrebuttable presumption of deference to the states or the political branches. Second, the Constitution casts light on the difference in harms faced by individual plaintiffs and the state. Democratic efficiency is not a value enshrined in the constitution.[95] Given the deliberate inefficiency of legislating even in the absence of injunctions, delay caused by an injunction should generally not be considered irreparable.[96] For example, it may be that an expedited-decision procedure would be sufficient to avoid imposing an irreparable burden on the legislative process, even though such a procedure would not remedy a plaintiff's constitutional harm.[97] Even assuming a public interest in avoiding delay, this makes it clear that a court must consider the public interest in both granting and denying the injunction of a statute instead of simply assuming the public interest lies entirely with the government.[98]

94. The long tradition of judicial review makes this clear. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

95. *See* INS v. Chadha, 462 U.S. 919, 959 (1983) ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

96. *See, e.g.*, Gebin v. Mineta, 239 F. Supp. 2d 967, 969 (C.D. Cal. 2002) (holding that preliminarily enjoining enforcement of a statute "would merely delay the implementation of a new statute," while avoiding a possibly unconstitutional deprivation of employment would advance the public interest).

97. *See* Denlow, *supra* note 1, at 534–35 (proposing an expedited trial on the merits that can be consolidated with the preliminary-injunction hearing); *see also* FED. R. CIV. P. 65(a)(2) (providing for consolidation).

98. In *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 377 (2008), the Court balanced the risk that an erroneous injunction would irreparably harm the public interest in national security against the risk that naval training exercises would irreparably harm marine life; given that the

With these principles in mind, Part II.C explores the special public-interest considerations that cut both for and against a government claim in a First Amendment free speech case. But before turning to that discussion, it is critical to examine the doctrines that ensure *Rounds*'s structural constitutional concerns are adequately addressed. The thesis of Part II.B is that there is no need to rework equitable doctrine to account for structural concerns because the limitations on federal judicial power imposed by these concerns are sufficiently addressed as jurisdictional questions at the outset of litigation, before it reaches the preliminary injunction stage.

B. EQUITABLE RESTRAINT AND JUSTICIABILITY DOCTRINES ARE SUFFICIENT TO LIMIT FEDERAL INTERFERENCE WITH STATE LAW

Unpacking the Eighth Circuit's dual deference rationales demonstrates that these concerns are properly considered under justiciability and equitable-restraint doctrines. Consequently, it is unnecessary to contort traditional preliminary injunction doctrine to accommodate these concerns.

The court's explicit argument in *Rounds* is that deference is due based on the "state's presumptively reasonable democratic process[]."[99] This is essentially a separation of powers concern, albeit one that is played out vertically with respect to a state legislature instead of horizontally with respect to Congress.[100] The role of the federal courts is to resolve actual disputes, this argument runs; therefore, until such actual disputes arise, a statute is presumed to be constitutional and courts may not be enlisted to give an advisory opinion as to the statute's constitutionality.[101] Justiciability doctrines exist in significant part to police this boundary between the judiciary and the state and federal legislative branches.[102] Even an allegedly unconstitutional state statute generally will not give rise to an injury-

plaintiffs' environmental claims were merely statutory, this balancing approach should apply *a fortiori* to claims of constitutional injury.

99. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 733 (8th Cir. 2008).

100. *See id.* at 732 n.6 (noting that the new, more deferential test should also be used to evaluate motions for preliminary injunctions of federal statutes because they are also crafted through "the full play of the democratic process" (quoting Able v. United States, 44 F.3d 128, 131–32 (2d Cir. 1995))).

101. *See* Younger v. Harris, 401 U.S. 37, 52–53 (1971).

102. *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148 (2009) (noting that standing is a limit on the judicial power "founded in concern about the proper—and properly limited—role of the courts in a democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))).

in-fact sufficient for standing for injunctive relief absent a genuine threat of prosecution for ongoing or future conduct.[103] However, once a dispute becomes live, courts should not shy away from it out of deference to the legislative branches.[104]

Although the Eighth Circuit's deference argument is couched largely in separation of powers terms, it also contains an unmistakable federalism dimension. Most obviously, despite the footnote suggesting the new preliminary injunction standard will apply to federal as well as state statutes,[105] it is a state statute actually at issue in the case.[106] Of equal importance, the court sees the state interest at issue as that of regulating the medical profession, a traditional state function that must be balanced with any First Amendment rights at stake.[107] But before turning to this federalism concern that is embedded in the substantive law discussed in the next Section, it is crucial to note a final component of federalism-based deference that applies independently of the particular substantive law at issue.

The South Dakota statute at issue is a criminal statute that makes it a misdemeanor for a physician to fail to provide the required information to a patient before obtaining her informed consent to an abortion.[108] Criminal law, like regulation of the medical profession, is a traditional area of state power upon which federal courts are hesitant to intrude.[109] Although *Rounds* does not explicitly discuss South Dakota's interest in

103. *See* Steffel v. Thompson, 415 U.S. 452, 463 n.12 (1974). The Court has generally not found sufficient injury to seek injunctive relief to restrain an imminent prosecution for past conduct because plaintiffs' injuries in this scenario lack irreparability; while being forced to forgo constitutionally protected conduct is considered irreparable, being forced to defend oneself against prosecution for an ultimately constitutional action is not. *See id.*

104. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) ("We will not shrink from our duty 'as the bulwar[k] of a limited constitution against legislative encroachments' . . . ." (quoting THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (J. Cooke ed., 1961))).

105. *Rounds*, 530 F.3d at 732 n.6.

106. *See id.* at 732–33 (noting that this is "a duly enacted state statute" crafted through "a state's presumptively reasonable democratic process[]").

107. *See id.* at 734 ("[T]he State has a significant role to play in regulating the medical profession." (quoting Gonzales v. Carhart, 550 U.S. 124, 157 (2007))).

108. S.D. CODIFIED LAWS § 34-23A-10.1 to .2 (2005).

109. *See* Younger v. Harris, 401 U.S. 37, 43 (1971) ("Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.").

administering its criminal laws, this interest is inherently intertwined with the state's power to regulate the medical profession insofar as criminal prosecution is the means of punishing noncompliance with medical regulations.[110]

Unlike the separation of powers issue, which requires courts to consider the point at which it becomes permissible to interfere with legislative decisions, the federalism issue regarding a state criminal statute asks an allocation question—when are federal courts instead of state courts the appropriate forum for challenging the constitutionality of a state criminal statute? Federal courts have crafted the doctrine of equitable restraint to answer this question. The governing doctrine comes from *Younger v. Harris*, in which the Supreme Court held that federal courts may not enjoin a state prosecution once it has been initiated because state courts are competent to adjudicate federal constitutional claims that are raised as defenses.[111] The *Younger* doctrine was later expanded to bar federal courts from hearing requests for declaratory as well as injunctive relief.[112] It was then extended even further to preclude federal courts from enjoining state prosecutions unless the federal court had reached "proceedings of substance on the merits" prior to initiation of the state prosecution.[113]

The narrow exception to the equitable-restraint doctrine was crafted in *Steffel v. Thompson*, in which the Court held that *Younger* abstention is not required where no state prosecution is pending.[114] The Court reasoned both that the state's federalism interest in noninterference was less strong here than when a prosecution is pending and that absent a pending

110. The court's citation to *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), in its First Amendment discussion is instructive on this point. *See Rounds*, 530 F.3d at 733. In *Wooley*, the Court upheld an injunction against New Hampshire prohibiting it from continuing to prosecute Maynard for refusing to display the motto "Live Free or Die" on his license plate. *Wooley*, 430 U.S. at 717. The Court noted that this holding is an exception to the general rule that "a court will not enjoin 'the enforcement of a criminal statute even though unconstitutional,' since '[s]uch a result seriously impairs the State's interest in enforcing its criminal laws, and implicates . . . concerns for federalism . . . .'" *Id.* at 710–12 (quoting Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935) and Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)).

111. *Younger*, 401 U.S. at 41, 54.

112. Samuels v. Mackell, 401 U.S. 66, 73 (1971).

113. Hicks v. Miranda, 422 U.S. 332, 349 (1975); *see also* Owen Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1135–36 (1977) (describing *Hicks* as creating a reverse removal power that allows state prosecutors to in effect remove cases from federal court).

114. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974).

prosecution the federal plaintiff (the theoretical state defendant) lacks a state forum in which to vindicate his constitutional claim.[115] The overall effect of *Younger* and its progeny is to keep most constitutional challenges to state criminal statutes out of the lower federal courts on federalism grounds. The small subset of cases that federal courts may hear under *Steffel* are those in which the state's interest in administering its statutes is at its nadir and the federal plaintiff's interest in having his constitutional claim heard is at its zenith.

Taken together, the justiciability and equitable restraint doctrines establish bookends around a narrow range of cases—those involving a genuine threat of imminent prosecution or requiring an actor to forgo constitutionally protected conduct, but where prosecution has not actually begun—in which federal courts may interfere with state legislative prerogatives. This class of cases is sufficiently narrow for the federal courts to act without unnecessarily upsetting the federalism and separation of powers boundaries between the federal courts and the states. Consequently, when a court determines that plaintiffs have surmounted these obstacles, it should consider preliminary injunction motions under the traditional equitable doctrine instead of rearranging that doctrine in an attempt to preserve federalism and separation of powers values that have already been sufficiently safeguarded.

C. *ROUNDS*'S NEW PROCEDURAL STANDARD FAILS TO GIVE SUFFICIENT WEIGHT TO FIRST AMENDMENT RIGHTS

Following *Winter*, a court must begin its preliminary injunction inquiry by deciding whether the plaintiff is likely to suffer an irreparable injury in the absence of an injunction.[116] The preliminary injunction doctrine does not provide a precise

115. *Id.* ("[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."); *cf.* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994) (suggesting that interference with state processes might be permissible where compliance with state law "is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented").

116. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.").

definition of irreparable harm;[117] instead, it is necessarily defined in terms of substantive law. The irreparability of even temporary injuries to First Amendment free speech rights, such as those asserted in *Rounds*, is well established.[118] Due to the inherent irreparability of First Amendment injuries, the inquiry into the irreparable-injury requirement in such a challenge is binary: either harm exists, in which case it is irreparable, or harm does not exist, in which case the injunction will not issue. For these reasons, a credible allegation of a First Amendment violation should almost always be sufficient to meet the irreparable-harm showing required for a preliminary injunction.[119]

The difficult question regarding the First Amendment in the context of a preliminary injunction is how to balance irreparable harm to speech rights with likelihood of success and the public interest. This question breaks down into two closely interrelated components. First, should irreparable First Amendment injury weigh more heavily on the balancing scale than other varieties of irreparable injury? Second, does substantive First Amendment law have anything to say about how a court should weigh the public interest in granting or denying an injunction against democratic action?

117. *See* Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) ("For it has always been true that irreparable injury means injury for which a monetary reward cannot be adequate compensation and that where money damages is adequate compensation a preliminary injunction will not issue.").

118. *See* Elrod v. Burns, 427 U.S. 347, 373 (1976) (noting that the loss of First Amendment freedoms for even a minimal period of time constitutes irreparable injury); *see also* LAYCOCK, *supra* note 22, at 122 ("The right to speak or vote or worship after trial does not replace the right to speak or vote or worship pending trial, and damages for temporary loss of such rights are not even approximate compensation.").

119. This reasoning potentially extends to other types of irreparable injury as well, for example intellectual property, civil rights and liberties, and environmental law. *See* LAYCOCK, *supra* note 22, at 116 (noting that permanent injunctions are routine in these areas due to the inherent irreparability of these types of injuries); *see, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 262 (2003) (noting the injury in an equal protection case under the Fourteenth Amendment is the denial of equal treatment regardless of the ability to obtain the benefit being denied). In other words, an equal protection injury is inherently irreparable because even an award of the denied benefit will not compensate for harm resulting from the denial. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972) (noting that the inalienability rules with which the Constitution protects certain substantive rights not only protect those rights directly, but also act as a limit on state power by proscribing the government from offering compensation for infringement).

To answer the first question is also to answer the second. Unlike many other rights, First Amendment speech rights are interdependent, meaning that each person derives value not just from her own rights, but also from the analogous rights of others. The Supreme Court has long recognized that one of the central purposes of the First Amendment is to foster a "marketplace of ideas" necessary for democratic government and individual autonomy.[120] When one voice is stifled, society as a whole loses a valuable contribution to the public discourse.[121] This consequence is especially striking in *Rounds*, where any restriction on constitutionally protected speech would affect not only the physician whose speech is foreclosed, but also the patient whose access to information is limited. In addition, First Amendment doctrine recognizes the serious risk of overbroad speech restrictions that not only proscribe some constitutionally unprotected speech, but also dissuade speakers from offering protected speech for fear of prosecution.[122] For these reasons, a number of courts have recognized not only the significant weight of First Amendment injury, but also the strong public interest in protecting First Amendment rights.[123]

120. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .").

121. *See id.* at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford 1947))).

122. *See* Osborne v. Ohio, 495 U.S. 103, 115 n.12 (1990) ("In the First Amendment context, however, we have said that '[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser.'" (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965))); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867–68 (1991) ("[T]he First Amendment enjoys a special status in the constitutional scheme. Any substantial 'chilling' of constitutionally protected expression is intolerable. Third-party rights are too important to go unprotected . . . .").

123. *See* Sammartano v. First Judicial Dist. Court *ex rel.* County of Carson City, 303 F.3d 959, 974–75 (9th Cir. 2002) (balancing the government's interest in maintaining order in the courthouse against the "public interest in maintaining a free exchange of ideas" as protected by the First Amendment); Homans v. Albuquerque, 264 F.3d 1240, 1244 (10th Cir. 2001) (noting the public interest in protecting "the core First Amendment right of political expression"); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999) ("[T]he public interest favors protecting core First Amendment freedoms.").

To be clear, this Section does not advocate treating a potential First Amendment injury as requiring preliminary injunctive relief.[124] Nor is it suggesting that the First Amendment values outlined above fit perfectly into the complex and uncertain doctrinal territory of professional-speech regulation.[125] Instead, it simply seeks to highlight the substantive legal values that should have been relevant to the preliminary injunction decision in *Rounds* but for the misplaced separation of powers and federalism concerns. Because of the interrelated nature of First Amendment rights, infringement upon these rights creates injuries that are in some ways extraordinary. Although this by no means qualifies such injuries for preliminary injunctive relief as a matter of right, it should make First Amendment claims particularly good candidates for what the Court has termed an "extraordinary remedy."[126] With this in mind, Part III discusses the steps needed to move from *Winter* to a comprehensive preliminary injunction standard and emphasizes the potential benefits of doctrinal uniformity in this area.

III. THE SUPREME COURT SHOULD RESOLVE THE ISSUES REMAINING AFTER *WINTER*

Although *Winter* resolved the irreparable-harm and public-interest issues,[127] it left open two equally salient doctrinal matters. First, *Winter* did not reach the issue of whether the likelihood-of-success requirement should be treated flexibly once irreparable injury is demonstrated.[128] Second, *Winter* provides no guidance as to the relative weight courts should give the public interest in democratic action vis-à-vis the public interest in protecting individual rights.[129] Although *Winter* is certainly relevant to the extent its analysis is grounded in separation of

124. If there was a time for such an approach, it was when Professor Henry P. Monaghan made a prominent call for a similar approach based on late Warren Court precedents. *See* Henry P. Monaghan, *First Amendment "Due Process*,*"* 83 HARV. L. REV. 518, 519 (1970) (identifying the Court's procedural requirements in obscenity cases and advocating their expansion to other First Amendment concerns).

125. *See* Post, *supra* note 49, at 946–47 (outlining these doctrinal uncertainties).

126. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375–76 (2008).

127. *Id.*

128. *See id.* at 381 (declining to address whether plaintiffs established a likelihood of success on the merits).

129. *See id.* at 379–80.

powers concerns,[130] it is unclear whether this analysis would alone be controlling outside the foreign affairs and national security context.[131]

Rounds highlights the importance of resolving these issues. The express split with the Ninth Circuit frames the likelihood-of-success question.[132] In *Rodde v. Bonta*, the defendant government entity argued that plaintiffs were required to show a "strong likelihood of success" because plaintiffs sought to enjoin legislative action.[133] The Ninth Circuit rejected this argument and held that plaintiffs need only "raise serious questions," the same standard that applies to enjoining private conduct.[134] *Rounds* also sets up a public interest question parallel to the one decided in *Winter*.[135]

With the above tensions in mind, Part III.A articulates a comprehensive standard that extends the *Winter* framework to remedy the flaws of *Rounds*. Part III.B argues that constitutional structure and judicial prudence buttress this call for a uniform procedural standard.

A. A UNIFORM STANDARD FOR VALUING THE LIKELIHOOD OF SUCCESS AND WEIGHING COMPETING PUBLIC INTERESTS

Nothing in *Winter* expressly forecloses the traditional flexibility with respect to the likelihood-of-success criterion.[136] Moreover, *Winter* is clear in its insistence on balancing the equities and weighing the public interest in granting or denying an injunction.[137] In light of the issues *Rounds* raises, the Court should strike while the iron is hot and expand *Winter* into a fully articulated preliminary injunction standard for the public law context.

130. *See id.* at 377 (giving "great deference" to professional military judgments on the ground that judges do not "begin the day with briefings that may describe new and serious threats to our Nation and its people" (quoting Boumediene v. Bush, 128 S. Ct. 2229, 2276–77 (2008))).

131. *See id.* (noting the public interest in national defense).

132. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 731 (8th Cir. 2008) (citing Rodde v. Bonta, 357 F.3d 988, 994 n.8 (9th Cir. 2004)).

133. Rodde, 357 F.3d at 994 n.8 (9th Cir. 2004).

134. *Id.*

135. *Rounds*, 530 F.3d at 752.

136. *See Winter*, 129 S. Ct. at 376 (declining to address whether plaintiffs had established a likelihood of success on the merits).

137. *See id.* at 377 ("These interests [in the necessity of military training] must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court.").

The new standard should maintain the irreparable harm requirement as seen in both *Winter*[138] and *Rounds*.[139] However, it should adopt a flexible approach to the likelihood-of-success issue, such as *Rodde*'s alternate test[140] or the *Dataphase* sliding scale.[141] This is not to say that legislative action does not deserve deference; indeed, such deference is fundamental to both separation of powers and, by extension, federalism.[142] However, it is equitable-restraint and standing doctrines, not the preliminary injunction doctrine, that should bear most of the weight of ensuring deference to the political branches. To the extent federalism and separation of powers concerns factor into a preliminary injunction decision, such concerns should be balanced under the flexible public-interest prong instead of distorting the likelihood-of-success requirement in a way that will often fail to minimize irreparable harm.

Winter exemplifies this approach.[143] In contrast, *Rounds* uses a heightened threshold likelihood-of-success requirement.[144] This difference is crucial. Under *Rounds* it is possible, and perhaps even likely, to deny injunctive relief without reaching the public-interest consideration.[145] This approach reduces the probability of granting an injunction that proves to be unsupported on the merits, thereby advancing the public interest in a legislative process free from unwarranted interference. However, it fails to consider any potential public interest in preliminarily enjoining government action. When the government action at issue allegedly infringes upon First Amendment rights as it did in *Rounds*, the public interest favoring an

138. *See id.* at 375 (requiring a showing that irreparable harm is "likely").

139. *See Rounds*, 530 F.3d at 732 n.5 (noting that irreparable harm is a threshold requirement).

140. *See* Rodde v. Bonta, 357 F.3d 988, 994 (9th Cir. 2004).

141. *See* Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1991).

142. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) (noting that acts of Congress enjoy a presumption of constitutionality).

143. *See Winter*, 129 S. Ct. at 378 (balancing national security interests with other public interest factors).

144. *See Rounds*, 530 F.3d at 733 ("By re-emphasizing this more rigorous standard for demonstrating a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis.").

145. *See id.* at 732 n.5 (noting that likelihood of success will now be treated as a second threshold requirement that must be met before the remaining equitable factors can be considered).

injunction is substantial.[146] Although this public interest may sometimes be outweighed by a competing public interest,[147] it is too substantial to be ignored.

Winter requires courts to consider the public interest in granting or denying a preliminary injunction.[148] However, *Winter* had no occasion to consider precisely what the public-interest consideration should look like in a case like *Rounds* where irreparable harm to a constitutional right caused by a statute is alleged. As *Rounds* notes, the obvious counterweight to a plaintiff's irreparable constitutional injury is that the state would face substantial harm to its lawmaking and law enforcement powers if the court issues an injunction.[149] In balancing these competing concerns, a court should remember the fundamental purpose of preliminary equitable relief—minimizing irreparable harm.

Where third-party interest in avoiding irreparable harm is clearly established, as it is in the First Amendment context, it makes sense to create a rebuttable presumption that the public interest in avoiding infringement trumps the public interest in democratic efficiency unless the state demonstrates otherwise. The moving party will be protected unless the state establishes, on the basis of legislative purpose and findings, that a delay will be particularly harmful to the public interest. This harm will be protected unless the legislature, which in theory has more information than the court, establishes that delay will be particularly harmful on the facts of the case.[150] This addresses

146. *See, e.g.*, Sammartano v. First Judicial Dist. Court *ex rel.* County of Carson City, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."); *see also* Homans v. Albuquerque, 264 F.3d 1240, 1244 (10th Cir. 2001) (noting the public interest in protecting political expression); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999) ("[T]he public interest favors protecting core First Amendment freedoms.").

147. For example, the public interest in national security articulated in *Winter* would probably outweigh the public interest in avoiding First Amendment infringement. *See* Hale v. Dep't of Energy, 806 F.2d 910, 918 (9th Cir. 1986) (holding that government restrictions on demonstrations outside a nuclear testing site did not give rise to a First Amendment claim, but suggesting that if they did, the public interest in nuclear testing site security would outweigh the public interest in a First Amendment claim).

148. *See Winter*, 129 S. Ct. at 378 (disapproving of the district court's failure to adequately consider public interests).

149. *See Rounds*, 530 F.3d at 732.

150. *See Winter*, 129 S. Ct. at 377 (vacating an injunction based on "declarations from some of the Navy's most senior officers" that the injunction was

the potential objection based on institutional competence; that is, that legislatures, not courts, are best suited to define the public interest.

Admittedly, this framework will permit injunctions in certain cases where the moving party appears unlikely to prevail on the merits. There are two responses to this objection. First, to the extent that democratic accountability provides a check on the legislature against imposing potentially irreparable constitutional harm via statute, such situations will be rare. Moreover, the framework proposed here will reinforce this safeguard against legislative overreaching.[151] Second, in these rare situations, the judiciary's constitutional obligation to guard against irreparable constitutional harm trumps concerns about intervening in favor of the eventual losing party. Such intervention should not be thought of as being mistaken. Instead, it should be seen as merely erring on the side of caution with respect to avoiding constitutional harms until a judgment on the merits can be reached.

B. A UNIFORM STANDARD PROMOTES FEDERALISM AND JUDICIAL QUALITY

In addition to resolving the flaws of *Rounds*, a uniform standard would benefit practitioners, the state legislative

interfering with critical training, thereby harming the public interest in national security).

151. Professors Brooks and Schwartz note in the context of private law preliminary injunctions that injured parties can generally recover damages if an opposing party infringes on their rights, but the opposing party can rarely recover the costs of avoiding the infringement. Brooks & Schwartz, *supra* note 72, at 393. The purpose of preliminary injunctions is therefore to align incentives to eliminate this "systematic bias toward infringement." *Id.* This systematic infringement bias applies to defending states as well. Even if the state raises a successful defense on the merits, it will not be compensated for the burden of delay. *See* Fischer, *supra* note 32, at 1689–90 (noting that in the public law litigation context, "bonds are either dispensed with or set at such low amounts so as to provide no meaningful protection" to the defendant); *see also* John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 35 (2007) (arguing that it would be unfair to make the availability of injunctions in public lawsuits depend on plaintiffs' ability to post bond as they might be required to do in the private law context). At least in part, it is this scenario of misaligned incentives that encouraged the South Dakota legislature to craft legislation that tests the boundaries of constitutionality. *See* Post, *supra* note 49, at 943 ("Plainly this informed consent statute pushes the constitutional envelope in numerous directions . . . ."). The presumption that the public interest in avoiding First Amendment injury outweighs the public interest in democratic efficiency mitigates any potential state bias toward infringement.

process, and the federal judicial system. Uniformity has obvious benefits to practitioners who litigate in multiple circuits.[152] Less obviously, but arguably more importantly, uniformity strengthens the marketplaces of ideas that are the state legislatures and lower federal courts. Consider the incentives different procedural rules create for litigants. If statutes are entitled to greater deference in one circuit than in another, we should expect that, *ceteris paribus*, statutes will be challenged more frequently in the less deferential jurisdiction.

This frequency differential has two important implications. First, the laws in more deferential jurisdictions become shielded from challenges to some degree.[153] This gives states in some circuits more leeway to act as "laboratories of democracy" than states in other circuits.[154] Second, federal courts can shape doctrine only by acting on cases in front of them.[155] If a particularly deferential circuit is less likely to have statutory challenges filed in its courts, it will have correspondingly less opportunity to shape the substantive issues being challenged.[156]

This becomes particularly important when we remember that the *Rounds* standard applies to federal as well as state statutes.[157] Again, all other things being equal, we should expect parties challenging federal statutes to do so where they are most likely to receive both preliminary relief and a favorable judgment on the merits. In addition to the direct effect on the deferential court, this dynamic may also have an adverse

152. *See* Denlow, *supra* note 1, at 532–33 (noting the difficulty of counseling clients in the absence of a consistent, uniform standard).

153. "Shielded" in this sense refers simply to the fact that they will be challenged less frequently. *See Winter*, 129 S. Ct. at 381 (noting that plaintiffs considered the preliminary injunction to be "the whole ball game"). It does not imply that particular preliminary injunction standards will affect the outcomes on the merits of cases actually brought.

154. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

155. *See* U.S. CONST. art. III, § 2 (case-or-controversy requirement).

156. *See* Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419, 429–30 (2003) (arguing that over time, plaintiffs' self-interested choices of liberal forums create a systemic bias toward expansion of available remedies because conservative forums have relatively less opportunity to build remedy-contracting case law).

157. *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 733 n.6 (8th Cir. 2008).

effect on the Supreme Court's jurisprudence to the extent that it reduces the frequency of circuit splits that sharpen the presentation of issues to the Court and skews the circuit court precedential stock from which it can draw in favor of a particular circuit.[158] For these reasons, uniformity among procedural standards can play an important role in ensuring the vitality of both the state legislative and lower federal judicial marketplaces.

CONCLUSION

Rounds introduced a new standard for preliminarily enjoining state statutes that requires a threshold showing of likelihood of success on the merits. In doing so, it replaced a flexible consideration of traditional equitable factors with a standard that seeks to minimize erroneous guesses as to the eventual merits, but does so at the expense of minimizing irreparable harm. This added a circuit split to an already confusing area of law, a split that potentially skews the balance between states as laboratories of democracy and lower courts as laboratories of judicial decision-making. The Supreme Court should seek an opportunity to develop a comprehensive standard for preliminary injunctions in the public law context. It should reject the Eighth Circuit's rigid standard that distorts traditional equitable principles with federalism and separation of powers principles that are more appropriately safeguarded under other doctrines. In its place, the Court should enshrine a flexible standard that preserves traditional equitable principles in order to minimize the potential for irreparable constitutional harm.

158. *See* SUP. CT. R. 10(a) (noting that a circuit split is a potentially compelling reason to grant a writ of certiorari); United States v. Mendoza, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose APA review of the question in another circuit would squelch the circuit disagreements that can lead to Supreme Court review.").