THE LAW OF VIBES: MUCH ADO ABOUT PRELIMINARY INJUNCTIONS

INTRODUCTION

Federal courts are in the midst of a crisis of legitimacy.[1] Faith in the judiciary has plunged to historically low levels,[2] leading the Biden administration to form the Presidential Commission on the Supreme Court for the explicit purpose of considering various court reforms.[3] Though the Commission's recommendations proved meek,[4] the view that Justices and judges are little more than "politicians in robes" persists.[5] This is by no means a new phenomenon; sophisticated court watchers have made similar claims for years.[6] What is new is that, for the first time in decades, a majority of the public distrusts the federal judiciary.[7] Still, others insist that the particular processes of the judiciary differentiate it from traditional political institutions and create guardrails that ensure reasoned decision-making.[8] Some argue, for instance, that the doctrinal frameworks within which judges

1. *See, e.g.*, Ed. Bd., *The Supreme Court Isn't Listening, and It's No Secret Why*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html [https://perma.cc/J8G9-C2CM]; Zachary B. Wolf, *The Supreme Court Is Fighting over Its Own Legitimacy*, CNN POL. (Sept. 29, 2022, 6:17 PM), https://www.cnn.com/2022/09/29/politics/supreme-court-legitimacy-what-matters/index.html [https://perma.cc/8KA3-RTNY]; Kaia Hubbard, *Historically Low Public Trust, Legitimacy Questions Mar Supreme Court's Return*, U.S. NEWS & WORLD REP. (Sept. 30, 2022), https://www.usnews.com/news/the-report/articles/2022-09-30/historically-low-public-trust-legitimacy-questions-mar-supreme-courts-return [https://perma.cc/KQ9C-DE5M] ("[A] crisis of confidence or a feeling that the court is illegitimate, and that they're just packed with political actors, not judges, . . . can truly become a crisis where we would no longer have three branches of government.").

2. *See Supreme Court*, GALLUP (2023), https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/LWX9-NJLP] (asking respondents about their degree of trust in the judicial branch, and finding only 7% said they trusted the judiciary a great deal, 40% a fair amount, 31% not very much, and 22% none at all).

3. *See Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, https://www.whitehouse.gov/pcscotus/ [https://perma.cc/58QH-TKEY].

4. *See* Nina Totenberg, *Biden's Supreme Court Commission Steers Clear of Controversial Issues in Draft Report*, NPR (Dec. 6, 2021, 8:24 PM), https://www.npr.org/2021/12/06/1061959400/bidens-supreme-court-commission-releases-draft-report [https://perma.cc/S449-3U9Y]. *See generally* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/XP37-83TZ].

5. *See* Laurence H. Tribe, *Politicians in Robes*, N.Y. REV. (Mar. 10, 2022), https://www.nybooks.com/articles/2022/03/10/politicians-in-robes-justice-breyer-tribe/ [https://perma.cc/389F-E6K8].

6. *See, e.g.*, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 385 (2013) ("[F]ederal judges are not just politicians in robes, though that is part of what they are . . . .").

7. *See Supreme Court*, *supra* note 2.

8. *See, e.g.*, Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

operate insulate judicial decision-making (at least to some degree) from personal biases.[9]

Which camp has the better side of that debate may not be entirely clear, but the stakes are high. In his book defending the apolitical nature of the Supreme Court, Justice Breyer warns that society existentially depends on a belief that the law is just, even when its outcomes do not go your way.[10] But if that is right, accepting the latter camp's assertions regarding the value of judicial deliberation and doctrine, society should be on guard for places where institutional constraints fall short. One might even assume judges are acting in the best possible faith, but the worry remains—cognitive biases that affect us all may invade judicial decision-making without due care.[11] This Note argues that the contemporary law of preliminary injunctions, with its many doctrinal and theoretical tests, is particularly susceptible to the biases that undermine just decision-making and faith in the judiciary.[12]

"The preliminary injunction may be the most striking remedy wielded by contemporary courts."[13] As opposed to other pretrial remedies like summary judgment or dismissal for failure to state a claim, preliminary injunctions enforce potentially harsh penalties against parties without

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9. *See* William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178 (2023) (arguing that the public-facing official story of the law constrains judges, even when a judge may personally disagree with the decision they issue); *see also* EPSTEIN ET AL., *supra* note 6, at 54 ("[Judge] Edwards contends that realists exaggerate the degree to which judges are unable to achieve agreement through deliberation that, overriding ideological and other differences, generates an objectively correct decision."). *But see id.* at 53–63 (taking issue with Judge Edwards's position).

10. *See generally* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021).

11. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001). Like "doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists . . . [e]ven lawyers fall prey to cognitive illusions." *Id.* at 782–83 (footnote omitted).

12. For a brief introductory example of the problem, see Anna Majestro, *Preparing for and Obtaining Preliminary Injunctive Relief*, A.B.A. (June 4, 2018), https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/preliminary-injuction-relief/ [https://perma.cc/A5N7-DWRU]. The ABA's top practice tip for success in procuring a preliminary injunction is judge shopping. They say:

> Choosing the court to file your case in is vitally important when seeking preliminary injunctive relief. Consider the different courts available to you to file your case and research and evaluate whether the judges who may hear your motion (and the remainder of your case) in each court are likely to grant the relief you seek.

Id. For a savvy litigant looking for any available edge, this advice is probably reasonable. However, it is normatively suboptimal to say the least that the ABA's primary pointer for a procedural motion ostensibly separate from the merits of a claim is to strategically target a judge whose biases might predispose them to your position. *See* Stephen I. Vladeck, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html [https://perma.cc/EYM8-BXSD]. This Note argues that the standard for preliminary injunctions should aim to minimize the effect of judges' biases on the outcomes of motions for preliminary injunctions in the interest of justice. *See infra* Part II.

13. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978).

judging the sufficiency of a plaintiff's claims or the wrongfulness of a defendant's conduct.[14] The necessity of the practice is nonetheless widely accepted because of the general recognition that adjudication takes time during which a party, through no fault of their own, may experience grievous, irreparable harm.[15] Still, since the merits of the plaintiff's claims are necessarily indeterminate when courts are tasked with deciding whether or not to grant a preliminary injunction, courts consider the relative equities of both the plaintiff and defendant and the public's interest in a potential preliminary injunction in order to decide the question.[16] Deciding a motion for preliminary injunction is immensely consequential, not only considering the threat of irreparable harm during the course of litigation, but also for the ultimate disposition of a case.[17] The remedy is not limited to narrow questions, but has the potential to "block the enforcement of legislation, place a candidate on the ballot, forbid strikes, prevent mergers, or enforce [or presumably decline to enforce at an early stage] a school desegregation plan."[18] Lengthy litigation means "[t]he relief thus granted may endure for months or years."[19]

One might hope (in vain) that such a consequential procedure would be well understood or uniformly applied. As Section I.A demonstrates, courts considering motions for preliminary injunctions apply varied, contradictory standards.[20] A movant may receive a preliminary injunction in a California federal court by asserting a claim that presents a "serious question" or a "novel question of law," while that same movant would be denied relief in Missouri or Virginia unless they could make a strong showing that they are substantially likely to succeed on the merits of their claim.[21] A Missouri movant might prevail so long as the public's interest did not militate too harshly against the equity of their claim, while a Virginia movant would need to establish as an element of their motion that the public interest likely favors a preliminary injunction.[22]

This Note argues that—at a moment when federal courts are especially vulnerable to accusations of bias—preliminary injunctions are particularly problematic. Part I proceeds by describing the varied standards federal courts apply when deciding preliminary injunction questions, how they

14. *Compare* FED. R. CIV. P. 12(b)(6), *and* FED. R. CIV. P. 56, *with* FED. R. CIV. P. 65. *See also* Leubsdorf, *supra* note 13, at 525.

15. *See infra* Section I.A (describing the historical evolution toward that understanding).

16. *See infra* Section I.A; *see also* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (providing the general test for preliminary injunctions).

17. *See infra* note 63 and accompanying text.

18. *See* Leubsdorf, *supra* note 13, at 525 (footnotes omitted).

19. *Id.*

20. *See infra* Section I.A.

21. *See infra* Section I.A.

22. *See infra* Section I.A.

arrived at those standards, and the fundamental principles that underlie just procedure. Part II explains some of the potential pitfalls that may plague preliminary injunction questions, most notably a lock-in bias that may unfairly prejudice the ultimate disposition of litigants' positions when the judge deciding their case has made strong claims about their likelihood for success at the preliminary injunction stage. Part III analyzes the various tests that courts apply when considering preliminary injunction questions, as well as scholarly proposals. Ultimately, the Conclusion argues that the best way to evaluate preliminary injunctions would be a modified threshold test. Under this conception, sufficient showings of a *serious question* going to the merits of a case alongside a threat of irreparable harm would establish a presumption in favor of the movant, but that presumption could be rebutted if the balance of the equities and the public's interest outweigh the movant's claim. Such a standard would advance the fundamental interests motivating procedural mechanisms such as preliminary injunctions, minimize unfair prejudice from lock-in bias, and formalize the preliminary injunction process to more evenly and justly apply the law.

I. BACKGROUND

A. Preliminary Injunctions: Understanding the State of Affairs

Preliminary injunctions are a unique, powerful legal remedy. Generally, when a plaintiff-party has been injured by another, the legal system aims to make that plaintiff whole by ordering the other to pay money damages.[23] Where money damages cannot adequately address the plaintiff's grievance, courts may enjoin violative conduct.[24] In truly "extraordinary" cases where a party stands to suffer "irreparable harm" while litigation proceeds, a court may enter a preliminary injunction, altering the nonmovant's conduct without a showing of wrongdoing.[25] Despite theoretical reservation for extraordinary circumstances, in practice preliminary injunctions are frequent and far-reaching.[26] Built through a long tradition of equitable decision-making, courts have developed a variety of standards for preliminary injunctions. Scholars have long called for a unified standard such that, when courts set out to enjoin a party before a showing that they

23. *See* Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEGAL STUD. 29 (2015).

24. *See* Howard W. Brill, *Equitable Remedies for Common Law Torts*, 1999 ARK. L. NOTES 1; *cf.* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530 (2016) (teasing out the differences between legal and equitable remedies and the occasional inadequacy of the former).

25. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22–24 (2008).

26. *See* Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 382–83 (2005) (collecting various settings in which preliminary injunctions have issued).

acted wrongfully, the remedy would be applied evenly, with minimal disruption to the broader adjudication.[27] The various standards and proposals traditionally embrace the "widely shared view that the purposes served by preliminary injunctions are maintaining the status quo between the parties, preserving the court's ability to consider the case fully, and minimizing the harm caused by erroneous preliminary decisions."[28] Critically—and particularly to preliminary injunctions[29]—preliminary injunctions operate independently from the ultimate disposition of the dispute at issue. The point is not to judge the wrongfulness of a defendant's conduct or assign rights and entitlements to settle a dispute, but rather to "minimize errors: the error of denying an injunction to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose."[30] Any responsible standard must refuse to pick winners and losers, but instead protect the potential rights of the parties while their claims remain indeterminate.[31] The indeterminacy of the merits is the key characteristic informing the historical development of the standard and should be a nonnegotiable principle underlying the doctrine going forward.

American courts inherited preliminary injunctions, among other remedies, from the English Courts of equity.[32] Though the Judiciary Act of 1789 merged the practices of law and equity in federal court to a large extent, U.S. courts continue to apply the common law of equitable remedies inherited from state courts.[33] Formal, uniform federal rules of equity were

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27. *See, e.g.*, Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 839–40 (1989); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 517–26 (2003).

28. Brooks & Schwartz, *supra* note 26, at 389.

29. Preliminary injunctions and stays pending appeal have distinguishable theoretical purposes, but they share a legal test. *See* Nken v. Holder, 556 U.S. 418, 434 (2009).

> A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. . . . There is substantial overlap between [stay factors] and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

Id. at 428, 434 (citation omitted). Because stays and preliminary injunctions share a legal test, the biases that affect one may affect the other. *See infra* Part II. While the respective motions are certainly distinct, because of their similarities this Note treats them as interchangeable.

30. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 388 (7th Cir. 1984).

31. *Cf.* Brooks & Schwartz, *supra* note 26 (advocating for a standard which would elevate the efficient allocation of resources among the parties above all). *But see* Leubsdorf, *supra* note 13, at 543 n.101, 555 (explaining that "[e]ven in common law nuisance cases where the court must perform something like a cost-benefit analysis at trial, other considerations control at the interlocutory hearing" and that "[t]he court's function is to protect rights, not to increase the gross national product").

32. *See* Taylor Payne, *Now Is the* Winter *of Ginsburg's Dissent: Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test*, 13 TENN. J.L. & POL'Y 15, 24–25 (2018).

33. *Id.*

created in 1822, and the Supreme Court issued a subsequent set of rules of equity in 1842.[34] Those pronouncements reserved for courts the power to "make further rules and regulations, not inconsistent with the rules . . . in their discretion . . . regulated by the present practice of the High Court of Chancery in England."[35] Acting upon that authority, nineteenth century courts began to develop the strands of the standard that persist to this day.[36] Though the standards for judging preliminary injunctions varied (a phenomenon that persists), courts found agreement regarding the spirit of the remedy sufficient for William Kerr to write in his treatise on injunctions:

> The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters [in dispute] *in statu quo* until the hearing or further order . . . . [T]he Court does not in general profess to anticipate the determination of the right . . . . A man who comes to the Court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such questions can be disposed of . . . .[37]

Today, as articulated by the Supreme Court in *Winter v. Natural Resource Defense Council, Inc.*,[38] to earn a court order preserving the status quo ante, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[39] Because "a preliminary injunction is an extraordinary and drastic remedy," imposing upon a party before showing they violated the law or are culpable for any harm, it is "never awarded as of right."[40] A party seeking a preliminary injunction will file a motion under Federal Rule of Civil Procedure 65.[41]

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34. *See* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 273 (2010). *See generally* Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.), at xxxix–lxx.

35. Collins, *supra* note 34, at 274 & n.109 (first quoting Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.), at xiii, r. 32; and then quoting Rules of Practice for the Courts of Equity of the United States, 42 U.S. (3 How.), at lxix, r. 90).

36. Leubsdorf, *supra* note 13, at 532–37.

37. WILLIAM WILLIAMSON KERR & JOHN MELVIN PATERSON, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 2 (5th ed. 1914).

38. 555 U.S. 7 (2008).

39. *Id.* at 20.

40. *E.g.*, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); KERR & PATERSON, *supra* note 37, at 24.

41. FED. R. CIV. P. 65.

The parties may seek expedited discovery under Rule 26(d) upon a showing of good cause,[42] and the court hearing the motion will often conduct an abbreviated hearing on the motion (though it is not required to do so).[43] From there, the various circuit courts of appeals currently apply at least three distinct versions of the test for preliminary injunctions.[44]

The Second, Sixth, Seventh, Ninth, and D.C. Circuits judge motions for preliminary injunctions under a "sliding scale" approach, treating the four aspects of the test as factors and balancing them against one another.[45] Under this approach, a "strong showing on one factor could make up for a weaker showing on another."[46] If, for example, a plaintiff's claim presents a "serious" or "substantial" question[47] going to the merits of the case, and if the factual record supporting that claim were relatively weak but the claim implicated an overwhelming threat of irreparable harm, a court applying a sliding scale approach could defer to the threat of harm and grant the preliminary injunction.[48] The Court in *Winter* addressed a challenge under the Ninth Circuit's standard, and the Court's barebones statement of the law there listed the four aspects of the standard on equal footing and avoided mention of a sliding scale,[49] leaving some doubt regarding the ongoing vitality of this approach.[50] Though Justice Ginsburg argued in dissent that the "Court has never rejected [the sliding scale] formulation, and [she did] not believe it [did] so [in *Winter*]," others remain skeptical.[51]

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42. FED. R. CIV. P. 26(d); *see also* Majestro, *supra* note 12.

43. *See* Erik A. Christiansen, *Preliminary Injunctions: Live or Die on Powerful Evidence of Wrongdoing*, 45 LITIGATION 14, 15 (2019).

44. *See* Payne, *supra* note 32, at 46–56; *see also* Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 796–97 (2014).

45. Payne, *supra* note 32, at 50.

46. Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011).

47. Following the Supreme Court's treatment of the Ninth Circuit's sliding scale approach in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), some uncertainty existed regarding the ongoing validity of a serious questions test. However, in *Munaf v. Geren*, 553 U.S. 674 (2008), the Court heard a challenge which applied the D.C. Circuit's serious questions standard and failed to comment on the standard. At least one commentor has considered the various inferences that can be drawn from *Munaf*:

> [*Munaf*] implie[d] the acceptability of a more lenient version of the success-on-the-merits factor—in other words, the movant can demonstrate either a likelihood of success on the merits or serious questions going to the merits. It is possible, however, that the Supreme Court simply declined to rule on the validity of the D.C. Circuit's serious-questions test because it did not need to do so to decide the case.

Rachel A. Weisshaar, Note, *Hazy Shades of* Winter*: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1030 (2012).

48. *See, e.g.*, All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131–35 (9th Cir. 2010) (discussing courts' uncertainty regarding the ongoing validity of the sliding scale approach post-*Winter* before ultimately upholding the sliding scale approach).

49. *See Winter*, 555 U.S. at 20.

50. *See* Weisshaar, *supra* note 47, at 1049.

51. *Id.* at 1028 (quoting *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting)).

Following *Winter*, "[t]he most natural reading" of the Court's preliminary injunction precedent "is that it requires a sequential test, with likely success on the merits constituting one of the four required elements."[52] Indeed, in the wake of *Winter*, the Fourth Circuit overruled its previously held sliding scale approach and adopted a sequential test.[53] Under this approach, (1) a likelihood of success on the merits; (2) threat of irreparable harm; (3) a balance of equities in favor of the movant; and (4) the public's interest in a preliminary injunction are considered four *elements* of the motion, standing on equal footing and each requiring a strong showing for success. Consider, for a moment, whether this test for a preliminary injunction accords with the purpose of the remedy to maintain the status quo ante—though the public's interest has long been a factor militating in favor of a preliminary injunction given its equitable origins, it is not difficult to imagine a party who may suffer grievous harm during the course of litigation absent a preliminary injunction, though their claim is personal and bears little on the public's interest. Under the sequential test, that movant would be out of luck. Without establishing a strong showing of the public's interest in their personal preliminary injunction, the status quo ante would be disrupted, and the process of litigation itself would perpetuate grievous harm.[54] Yet, despite the supposed clarity of *Winter*, a third protagonist to this drama has emerged.

Judging a motion for stay pending appeal, the Court in *Nken v. Holder*[55] reiterated the *Winter* standard and emphasized that the likelihood of success on the merits and the threat of irreparable harm elements are the most

52. *Id.* at 1049. Note, "[t]he Ninth Circuit in *Alliance* acknowledges that *Winter* requires a showing of each of the four elements, but argues that it may substitute 'serious questions' for 'likely success on the merits,' so long as the movant also shows that the balance of the hardships tips sharply in his favor." *Id.* (footnote omitted); *see Cottrell*, 622 F.3d at 1135. Though some doubt persists regarding the serious questions interpretation of likelihood of success on the merits, subsequent treatment by the Court may imply its permissibility. *See Winter*, 555 U.S. at 24.

53. *See* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated*, 559 U.S. 1089 (2010).

54. *See* Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014). In this study, the authors found that circuit courts of appeals "denied stays of removal [i.e., approved deportation] in about half of the appeals that were ultimately granted, an alarming type of error that could result in people being errantly deported to countries where they risk persecution or torture." *Id.* at 337. This systematic injustice arises, at least in part, because "[t]he government may deport an immigrant appealing a deportation order in federal court even before the court rules on the case, unless the court issues a stay of removal." *Id.* Though this study analyzed stays pending appeals, as previously noted, the standard for stays pending appeal and for preliminary injunctions is functionally the same. For the purpose of the hypothetical described in the text accompanying this footnote, an immigrant facing deportation to a hostile nation surely faces a serious threat of irreparable harm, but the public may not have a strong interest in that individual's particular case. Under a faithful application of the sequential test, such an immigrant would likely be denied relief. The inadequacy of the sequential test is explored further, *infra* Section III.C.

55. 556 U.S. 418 (2009).

important aspects of the test.[56] The Court stated that "[i]t is not enough that the chance of success on the merits be 'better than negligible,'" and that a standard relying on a mere "possibility" of success would be too lenient.[57] Some have argued that the ongoing use of a pure sliding scale approach is even more dubious post-*Nken*—if the threat of irreparable harm and a party's likelihood of success on the merits are the most important factors, a "serious question" or a "novel question of law" may be insufficient.[58] The most straightforward application of *Nken* is reflected by a type of threshold test called the gateway factor approach applied by the First, Third, and Eighth Circuits.[59] Under this approach, a court will first consider whether the moving party has established certain "gateway factors" which, if met, will create a presumption in favor of granting the preliminary injunction.[60] After finding that the movant has established sufficient likelihood of success on the merits and threat of irreparable harm, the court will then consider the balance of the equities and the public's interest as countervailing factors which may weigh against granting the preliminary injunction.[61] Circuits applying this approach argue that it adheres to the traditional flexibility of the remedy's equitable roots—allowing the court discretion to weigh the evidence in each individual case rather than applying a formulaic trot through four elements—while faithfully applying the Supreme Court's precedent.[62]

Through this morass, this Note considers the best standard by which to evaluate preliminary injunctions, paying special attention to the potential that the likelihood of success on the merits prong of the test may unfairly bias movants' claims. Though preliminary injunctions are meant to maintain the status quo ante and avoid affecting the ultimate merits of a claim, in practice courts and commentators recognize that a motion for a preliminary injunction can be dispositive of the ultimate merits of the case. The Ninth Circuit has noted, for example, that at least in certain contexts, the disposition of a motion for a preliminary injunction "may even, as a practical matter, determine the outcome of a case."[63] Accepting the

56. *Id.* at 434.

57. *Id.* (quoting and rejecting Sofinet v. Immigr. & Naturalization Serv., 188 F.3d 703, 707 (7th Cir. 1999)).

58. *See* Weisshaar, *supra* note 47, at 1052–54.

59. *See* Payne, *supra* note 32, at 54–56.

60. *See, e.g.*, Reilly v. City of Harrisburg, 858 F.3d 173, 177–78 (3d Cir. 2017) (analyzing the first two factors as a threshold question under *Nken*, then balancing the latter two factors against one another).

61. *Id.*

62. *See supra* notes 45–48 and accompanying text.

63. Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1099 (9th Cir. 2016). It is worth noting, however, that not all judges agree with this perspective. *Cf.* Hamilton Watch Co. v. Benrus Watch

prevailing assumption that preliminary (as opposed to permanent) injunctions are meant to impose temporary burdens on parties while the ultimate merits of a claim remain to be decided, an optimal standard by which to judge motions for preliminary injunctions should strive to minimize the practical likelihood that the disposition of the motion would decide the disposition of a claim as a whole. Failure to abide by such a standard would be not just historically unprecedented, but substantively unjust—to decide necessarily indeterminate claims without an adequate factual record would radically flout traditional legal principles and endorse a system of "judgment and execution before trial."[64]

B. The Dual Principles of Civil Procedure: Truth-Seeking and Efficiency

The Federal Rules of Civil Procedure were crafted in the early twentieth century to affect a "'liberal ethos' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery."[65] In the view of the Rules' drafters, the gold standard in dispute resolution was a trial, preferably one before a jury.[66] Litigation would begin with a relatively scant pleading to put a defendant on notice of the charges against them,[67] followed by a robust discovery stage to reveal all the relevant facts,[68] and finally an adversarial trial would test the merits of each party's claims to discover the truth of the matter at hand. In response to the expanding volume, costs, complexity, and duration of litigation, procedure has veered away from the original conception in many important respects.[69] *Twombly*[70]

Co., 206 F.2d 738, 742 (2d Cir. 1953) ("[A] preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness."); *see also* Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1362 (2020).

64. Wittlin, *supra* note 63, at 1362 (quoting Herman v. Dixon, 141 A.2d 576, 577 (Pa. 1958)); *cf.* Brooks & Schwartz, *supra* note 26, at 403–09 (advocating various efficiency rationales for awarding preliminary injunctions); *see also infra* Section III.E.

65. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

66. Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 591 (2011); *see also* AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES CLEVELAND, OHIO JULY 21, 22, 23, 1938, at 240 (William W. Dawson ed., 1938).

67. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (embracing a notice pleading regime).

68. *See* STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 455–56 (10th ed. 2019) (detailing a shift from a traditional limited discovery regime to the modern practice where "state courts and the federal system have adopted broad civil discovery rules that permit a lawyer to uncover, in advance of trial, enormous amounts of information lying solely in the possession of her adversary").

69. *See* Miller, *supra* note 66, at 588–91.

70. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

and *Iqbal*[71] transformed the opening foray of litigation such that it can no longer be fairly described as notice pleading. The Court has similarly transformed the law of summary judgments and expert witnesses, giving judges a more prominent pretrial gatekeeping role.[72] Taken together, these changes evince a tectonic departure from the litigation model originally conceived by the Rules, but to what effect?

The primary purpose of the adjudicatory process is to find truth.[73] The truth-seeking function of adjudication gives life to positive law, it tests the desirability of positive law against concrete applications, and it reinforces faith in government institutions.[74] Unfortunately, adjudicatory processes are inherently flawed. Imperfect perception of events as they happen, loss of memory, and inability to recount a clear narrative of past events all taint the best-faith attempts to reconstruct the past, to say nothing of biases or more devious motivations.[75] Just imagining simple interpersonal disputes, it is not difficult for any of us to recall moments where two perfectly capable sides swear by diametrically opposed versions of the same story. Lest we descend into legal nihilism just yet, a successful adjudicatory process need not necessarily reconstruct the truth of matters perfectly so long as the formal legal truth is close enough to rightly settle disputes.[76] Evidence law and civil

71. Ashcroft v. Iqbal, 556 U.S. 662 (2009). Together with *Twombly*, this case represented a sea change for the traditional pleading standards. No longer were bare allegations which put the opposing party on notice of the claims against them sufficient. The *Twombly-Iqbal* cases shifted the doctrine such that claims must allege sufficient factual allegations to present a plausible (rather than conceivable) claim. *See Twombly*, 550 U.S. at 555–56; *Iqbal*, 556 U.S. at 677–80; *see also* Monette Davis, *Applying Twombly/Iqbal on Removal*, A.B.A. (Apr. 30, 2020), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/applying-twombly-iqbal-on-removal/ [https://perma.cc/YS8Q-XX7N]. This shift grants courts a significant filtering function in the litigation process. Through motions to dismiss, courts can manage their dockets and discourage vexatious litigation. *See* FED. R. CIV. P. 12(b)(6). This shift is not without its costs, however. Meritorious claimants may be denied relief through a heightened pleading standard where they rely on discovery to build their claims. *See* Miller, *supra* note 66, at 592. The tension between filtering out suspect claims without denying meritorious relief also pervades motions for preliminary relief. *See infra* Part III.

72. Miller, *supra* note 66, at 592–93.

73. *See* Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases*, 18 LAW & PHIL. 497, 497 (1999); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 621 (1991) ("Our results indicate that public views about the fairness of Supreme Court decisionmaking procedures have an indirect effect on acceptance through their influence on public views about the Court's legitimacy and support the suggestion of a number of studies that the legitimacy of both local and national legal institutions, and the willingness to accept their decisions, are influenced by views about the fairness of their decisionmaking procedures.").

74. Summers, *supra* note 73, at 497–98.

75. *See* GEORGE FISHER, EVIDENCE 374–80 (3d ed. 2013).

76. EDMUND MORRIS MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 128 (1956) ("[T]he trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants. Still it must never be forgotten that its prime objective is to have that basis as close an approximation to the truth as is practicable.").

procedure concern themselves with how legal systems can practicably get as near absolute truth as possible in resolving disputes. For example, the need for speedy resolution of disputes and for the finality of the decisions made by the adjudicatory process impose constraints on absolute truth-seeking.[77] The wisdom of the various compromises struck between truth-seeking and competing values is beyond the scope of this Note, but it is enough to say that in the ultimate disposition of a dispute's merits, the value of truth-seeking is inherent in the dictate that the Rules be "construed . . . by the court and the parties to secure the just . . . determination of every action and proceeding."[78]

For much of American legal history, trials were thought to be the best truth-seeking method. Through representative selection[79] and secret deliberations, juries of a "competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank" were thought to be "the best investigators of truth, and the surest guardians of public justice."[80] For better or worse, the jury trial is no longer the dominant mode of truth-seeking dispute resolution.[81] Whether yielding to the increasing costs of litigation[82] or perception that juries are no longer accurate truth-seekers,[83] trials are seemingly on the way out. About one percent of all civil cases filed in federal court are resolved by trial.[84] Criminal cases go to trial more often than their civil counterparts, but not by much.[85] In light of these trends, commentors argue that the civil trial is "approaching extinction."[86]

Importantly, moving away from jury trials does not necessarily imply a similar move away from the truth-seeking function of litigation.[87] Take, for an example of pretrial dispute resolution, summary judgment. Rule 56 provides that "[t]he court shall grant summary judgment if the movant

77. *See, e.g.*, Summers, *supra* note 73, at 504.

78. FED. R. CIV. P. 1.

79. Query just how representative a jury of one's peers tends to be. *See* Edward N. Beiser, *Are Juries Representative?*, 57 JUDICATURE 194 (1973).

80. 3 WILLIAM BLACKSTONE, COMMENTARIES *380.

81. *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone*, 101 JUDICATURE 26, 27 (2017).

82. Miller, *supra* note 66, at 591.

83. Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 295 (1995) ("Several courts in the late 1970s and early 1980s held that jury verdicts in complex civil cases are so unlikely to be accurate that to submit such cases to juries violates the Due Process Clause of the United States Constitution.").

84. Smith & MacQueen, *supra* note 81, at 28.

85. *Id.*

86. MARC GALANTER & ANGELA FROZENA, POUND CIV. JUST. INST., THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS 23 (2011); *see* Robert P. Burns, *What Will We Lose if the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575, 578 (2011).

87. Though changes in procedure detailed above do not necessarily imply a less effective truth-seeking adjudicatory process, some scholars conclude (and mourn) that the system has in fact deteriorated. *See* Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 742 (2018).

shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[88] Despite much handwringing by critics of the motion, it is certainly theoretically possible that, where the only dispute between parties is over the proper application of the law to mutually agreed upon facts, legal experts (judges) are better suited to ascertain the correct disposition than laypeople (juries).[89] If the factfinding aspect of truth-seeking traditionally filled by juries has been settled by the parties in advance of trial, the legal conclusions aspect of truth-seeking may be more accurately executed through the deliberate drafting of an opinion on a motion for summary judgment than it might be at trial. Similar exercises might lead one to similarly believe that pretrial disposition by motion to dismiss, settlement, or alternative dispute resolution are effective applications of the truth-seeking norm of the adjudicatory process. Trial may still be the gold standard for truth-seeking adjudication, but it is not necessarily so. Policymakers crafting standards and incentives for dispute resolution are tasked with considering the ideal truth-seeking processes.

Balanced alongside the truth-seeking norm, those policymakers—and the judges interpreting those policies—must consider ways in which procedure can be speedier and less expensive for the parties.[90] Courts may be especially interested in speedy adjudication to clear their dockets and lighten their workloads.[91] Taken together, speedy and inexpensive resolution of cases is often characterized under the umbrella of efficiency. In the classic view of Judge Richard Posner, for example:

> The purpose of legal procedure is conceived to be the minimization of the sum of two types of costs: "error costs" (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it), and the "direct costs" (such as lawyers', judges', and litigants' time) of operating the legal dispute-resolution machinery. Within this framework the rules and other features of the procedural system can be analyzed as efforts to maximize efficiency.[92]

Under this formulation, the minimization of "error costs" might best be understood as part of the truth-seeking norm of procedure. If the primary

88. FED. R. CIV. P. 56(a).

89. *Compare* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003), *with* Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561 (2012).

90. *See* FED. R. CIV. P. 1.

91. *See* Miller, *supra* note 89, at 1016 (arguing that federal courts will, and in some cases are directed to, wield various Rules "to promote the efficient and speedy resolution of cases").

92. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399–400 (1973).

purpose of adjudicatory processes is to find the truth of a matter, failure to do so will generate social costs.[93] Broadly speaking, inaccurate decisions undermine the strength and reliability of positive law as well as societal confidence in institutional competence.[94] On the other hand, excessive direct costs impede fair processes just as readily as error costs. Put most simply, if a litigant cannot afford to maintain their action, recovery is foreclosed just as thoroughly as it might be by an unfavorable disposition.[95] Whether framed in terms of truth-seeking and efficiency or error costs and direct costs, a balance between the two factors is interwoven throughout the Rules—if adjudication can be handled faster and with less expense, the Rules must be construed to do so, as long as such a construal *also* advances justice.[96]

This Section is not a comment on the arc of the Federal Rules or the relative value of either the truth-seeking norm or the efficiency norm standing alone (or in tension with one another). Rather, it is only important here to recognize that *both* norms persist, and any reasonable argument regarding procedural mechanisms must be broad enough to encompass the pair. The efficiency norm is ascendant,[97] and for good reason. In the world of complex, mass, and multidistrict litigation, going the way of *Jarndyce v. Jarndyce* is an unfortunately real danger.[98] Wary of spurious and endless

93. *See* Miller, *supra* note 66, at 591–99 ("Despite this vacuum of knowledge, when you read the Court's opinions in *Twombly* and *Iqbal*, the Justices in the majority in both cases seems [sic] pre-occupied with a concern about the litigation burdens on corporations and governmental officials and little else. Shouldn't we care about the litigation burdens on plaintiffs? Shouldn't we care that possible antitrust and civil rights violations are not being renumerated or deterred or that people are being improperly detained by government action? Shouldn't we care about cases being dismissed prematurely despite obvious information asymmetry or not being brought because of pleading barriers? Shouldn't we care about adjudicating cases on their merits?").

94. *Cf. id.*

95. *See id.* (giving voice to some of the efficiency and spurious litigation concerns which motivated a shift away from pure merits adjudication).

96. *See* FED. R. CIV. P. 1.

97. *See, e.g.*, *supra* notes 70–71 and accompanying text.

98. *See* CHARLES DICKENS, BLEAK HOUSE 4–5 (Charles Scribner's Sons 1924) (1853) ("Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit.").

Dickens's novel satirizes litigation as endless and destructive. American courts have pointed to this portrayal to convey adjudication gone wrong. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 468 (2011). As Dickens would have it, the case ends absurdly when the estate in dispute ran out of money to pay the lawyers maintaining the suit. A silly example, it is still no wonder that courts see fit to reference it when litigation spans decades and consumers are scooped up into class actions of which they have no knowledge. *See, e.g.*, Debbie Elliott & Greg Allen, *A 3-Decade-Long Water Dispute Heads to the*

litigation, the Supreme Court has embraced constructions of the Rules which enhance the speedy and inexpensive resolution of claims.[99] Still, while some may argue that developments in procedure may have advanced the efficiency norm at the expense of the truth-seeking norm,[100] those developments have not gone so far as to promote efficiency to the *exclusion* of truth-seeking.[101] Nor could they without running afoul of the Rules. Because, while procedure should be speedy and inexpensive, it must always be just.[102]

Applying the dual procedural norms explored in this Section, Part III of this Note analyzes various proposed (and current doctrinal) formulations of the standard for judging a motion for a preliminary injunction. At their best, preliminary injunction standards all seek to "minimize errors: the error of denying an injunction to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose."[103] Part III explores the ways in which courts uphold (but just as often stray from) that virtue.

II. COGNITIVE BIASES[104]

Legal realists,[105] critical theorists,[106] and law-and-economics scholars[107] have variously asserted that judges' various biases influence their decision-

Supreme Court, NPR (Jan. 7, 2020, 6:07 AM), https://www.npr.org/2020/01/07/790136973/a-3-decade-long-water-dispute-heads-to-the-supreme-court [https://perma.cc/Y949-D3JB]; Francie Swidler, *Have a MacBook? You May Be Owed Up to $395 as Part of a $50M Class-Action Settlement*, NBC CHI. (Jan. 6, 2023, 12:39 PM), https://www.nbcchicago.com/news/local/have-a-macbook-you-may-be-owed-up-to-395-from-apple-as-part-of-a-50m-class-action-settlement/3037649/ [https://perma.cc/NF64-CHWS].

99. Smith & MacQueen, *supra* note 81, at 33; *see also* FED. R. CIV. P. 1 (directing the Rules to be "construed . . . by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

100. *Cf.* Miller, *supra* note 66, at 599 (arguing that interpretations of the Rules which have elevated efficiency above justice "have lost [their] moorings").

101. *See, e.g.*, Brooks & Schwartz, *supra* note 26.

102. FED. R. CIV. P. 1.

103. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 388 (7th Cir. 1984).

104. Scholars have noted many types of cognitive biases that impact judicial decision-making. *See generally, e.g.*, Guthrie et al., *supra* note 11. This Note focuses on *overconfidence* and *lock-in effect* in particular, as those phenomena bear most concretely on the likelihood of success on the merits prong of the preliminary injunctions test.

105. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1973); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 846 (1935); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

106. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 45–48 (1987).

107. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 862–64 (1990); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1385–88 (1998); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197, 1198 (1990).

making. At the end of the day, judges are human, and "[p]sychologists have learned that human beings rely on mental shortcuts, which psychologists often refer to as 'heuristics,' to make complex decisions."[108] If decisions surrounding preliminary injunctions are "based on the judge's hunches," and to the extent they are called to make strong judgments regarding the likelihood of success on the merits without facts to support those opinions, "then the way in which the judge gets his hunches is key to the judicial process. Whatever produces the judge's hunches makes the law."[109]

A. Overconfidence

Though judges may not suffer from all cognitive biases to the same degree as the general public,[110] researchers have found that they are particularly susceptible to egocentric biases—those that lead individuals to overestimate their own strengths.[111] For example, "judges . . . exhibit[] a strong egocentric bias concerning the likelihood that they [will] be overturned on appeal."[112] It makes some degree of intuitive sense that judges, as professionals who have reached the peak of an already prestigious profession, would be confident in their professional abilities. And overconfidence is certainly not all bad, as "society surely prefers its judges to be resolute and self-assured rather than timid and insecure."[113] Indeed, "the justice system may ultimately be better off" as a whole because of judges' overconfidence,[114] but this phenomenon may also be cause for concern in the specific context of preliminary injunctions.

In each of the various tests for preliminary injunctions—both practical and theoretical—the first aspect of a movant's claim to be analyzed is always the likelihood that they will succeed on the merits of their claim.[115] At risk of belaboring the point, this determination comes before a complete factual record has been developed, and is merely one of many considerations that weigh into a procedure whose entire purpose is to freeze the interests of the parties in time and prevent one party or the other from being irreparably harmed (and alternatively unjustly enriched) by the litigation itself.[116] But judges hear these claims all the time! And they are justified in feeling that they are experts in the field, uniquely qualified to

108. Guthrie et al., *supra* note 11, at 780.
109. JEROME FRANK, LAW AND THE MODERN MIND 104 (1930).
110. Guthrie et al., *supra* note 11, at 780–83.
111. *Id.* at 811–12, 814–16.
112. *Id.* at 814.
113. *Id.* at 815.
114. *Id.* at 816.
115. *See supra* Section I.A (describing the various preliminary injunction tests of the Supreme Court and the courts of appeals).
116. *See supra* note 37 and accompanying text.

make such determinations. When they engage with a party's complaint and briefs of preliminary injunctions, they may intuit what they believe to be the likely outcome of the case. While their confidence is justified by competence, egocentric biases lead us to believe that initial determinations of likelihood of success will be systematically *overconfident*.[117] Rather than recognizing that a movant's claim is sufficiently strong to merit continued proceedings, overconfident judges would be liable to significantly overstate (or understate) the movant's ultimate likelihood of success.[118]

Preliminary injunctions are extraordinary, powerful remedies, and we may be concerned that overconfident clairvoyance regarding the merits of a case is not the optimal way to grant such injunctions. Still, the procedural posture demands some imperfect decision-making.[119] Efficient disposition of motions for preliminary injunctions benefits the respective parties, courts' dockets, and faith in the judiciary more generally.[120] Standing alone, the costs and benefits of *overconfidence* might be a wash, but the costs of *overconfidence* are unacceptably exacerbated by *lock-in bias*.

B. Lock-In Bias

For the purpose of this Note, lock-in bias describes "systemic bias in the judicial application of the preliminary injunction standard" arising in circumstances "where a decision maker reaches an initial decision on an issue, which leads to some allocation of resources, and then revisits that decision later."[121] The prototypical example would be a case in which a plaintiff's motion for a preliminary injunction is denied for an insufficient showing on the likelihood of success on the merits—presumably the plaintiff suffers irreparable harm in the interim—and the same judge who previously found the likelihood of success on the merits wanting is called to make a final judgment of the ultimate merits of the case with a fuller factual record.[122]

> Under those circumstances, the irreparable harm that follows the denial of a preliminary injunction represents the irretrievable commitment of resources that leads to lock-in, and the second look at the merits by the judge creates conditions where strong internal and

117. *See* Marouf et al., *supra* note 54, at 397–98.

118. For one recent example of such overstatement, see *Yeshiva University v. Yu Pride Alliance*, 143 S. Ct. 1, 2–3 (2022) (Alito, J., dissenting), where Justice Alito wrote that Yeshiva would likely win its case. Justice Alito's assertion came without full factfinding, briefing, or oral arguments—the normal legal guardrails that ensure reasoned decision-making.

119. *See supra* note 37 and accompanying text.

120. *See supra* Part I.

121. *See* Lynch, *supra* note 44, at 783.

122. *See id.* at 803–04.

> external self-justification motives can be expected to influence the outcome of the case on the merits. Although judges certainly can and have changed their minds on the merits after denying a preliminary injunction, the lock-in effect can be expected to systematically bias outcomes so that cases in which a preliminary injunction was denied will be less likely to succeed on the merits as compared to situations where no preliminary injunction was sought.[123]

Though a stay pending appeal presents a slightly different factual circumstance, considering the factual similarities and the virtually identical legal standards governing stays pending appeals and preliminary injunctions, a 2014 study conducted by Professors Marouf, Kagan, and Gill gives life to the lock-in problem.[124] In *Nken v. Holder*,[125] Jean Marc Nken challenged a deportation order by an Immigration Judge, claiming that "he had been persecuted in the past for participation in protests against the Cameroonian Government," the country to which he was being deported into, and that he "would be subject to further persecution if he return[ed] to Cameroon."[126] The Court remanded Mr. Nken's case to the Ninth Circuit for reconsideration under the familiar four-part standard governing preliminary injunctions and stays pending appeals, and at the same time, Justice Kennedy concurred to note the lack of empirical understanding of "the number of stays granted [and] the correlation between stays granted and ultimate success on the merits."[127] Professors Marouf, Kagan, and Gill responded to Justice Kennedy's call for an empirical study through a study of 1,646 cases hearing immigration appeals.[128] They found that "circuit courts denied stays of removal in about half of the appeals that were ultimately granted, an alarming type of error that could result in people being errantly deported to countries where they risk persecution or torture."[129]

Suppose the government deported Mr. Nken following the Court's denial of his motion to stay deportation pending his appeal of the Immigration Judge's decision, and that the same panel of judges who denied Mr. Nken's appeal was tasked with evaluating the merits of his case. Those judges' decision regarding his stay motion led not only to the trauma of deportation, but to potential political persecution. That Mr. Nken suffered irreparable harm as a direct result of the court's opinion would give the judges "strong

123. *Id.* at 804.
124. *See* Marouf et al., *supra* note 54.
125. 556 U.S. 418 (2009).
126. *Id.* at 422.
127. *Id.* at 437 (Kennedy, J., concurring).
128. Marouf et al., *supra* note 54, at 337.
129. *Id.*

internal and external self-justification motives" for believing that their opinion was correct.[130] If they were right, their hands were tied by the law and they acted justifiably, but if they were wrong, Mr. Nken would have suffered grievous, unjustified harm by way of that error.[131] Though our hypothetical judges may still reverse in such a case, it is not difficult to see how intrinsic discomfort with the possibility that one's actions harmed another—publicly, at that—would systematically bias our judges against movants like Mr. Nken.

In some ways a preliminary injunction movant may be better situated than a movant for a stay pending appeal, but in others much worse. To stay with the immigration hypothetical, a movant for a stay pending appeal would be fighting a deportation order that would come at the end of their hearing on the merits, while a movant for a preliminary injunction might not yet face such stark consequences.[132] On the other hand, a denied movant for a stay pending appeal experiences the benefit of procedural justice in a way that a denied movant for a preliminary injunction might not.[133] Where the former has reason to believe their claims were given voice, the latter experiences ongoing harm without the chance to develop a factual record to their claims.[134] Regardless, if one accepts the broad body of social science literature supporting the *lock-in* phenomenon, both are liable to experience unfair prejudice where the judge of their ultimate merits claim is the same person who decided their claim for equitable relief.

Together, *overconfidence* and *lock-in* present significant cause for concern for any preliminary injunction standard that leans too heavily on merits determinations. Judges will systematically overestimate their ability to correctly ascertain the likelihood of success on the merits, and once they do, they will systematically stick to their initial opinion in the face of evidence to the contrary. That is not to say that judges will not deviate from

130. *See* Lynch, *supra* note 44, at 804.

131. Consider too that these hypothetical judges' errors could be due, in some part, to "a heuristic bias known as overconfidence . . . 'overestimating [their] ability to predict outcomes.'" Marouf et al., *supra* note 54, at 397 (quoting Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1172 (2003)). This would be unsurprising, as "[s]tudies have shown that judges overestimate their abilities to assess the credibility of a witness, avoid bias, and facilitate settlements. Judges also underestimate their rates of reversal, disproportionately believing they have lower rates of reversal than their peers." *Id.* (footnote omitted).

132. "Might" is doing a lot of work in this sentence. *See, e.g.*, Steph Solis, *ICE Continues to Deport Criminal Suspects in the Middle of Their Cases, Supreme Judicial Court Says*, MASSLIVE (Feb. 21, 2020, 3:17 PM), https://www.masslive.com/politics/2020/02/ice-continues-to-deport-criminal-suspects-in-the-middle-of-their-cases-supreme-judicial-court-says.html [https://perma.cc/NZU3-W8ZN] (reporting that the Massachusetts Supreme Judicial Court sent a letter to ICE indicating that it had identified "13 cases where Superior Court defendants had been deported in the middle of their court proceedings").

133. *See Procedural Justice*, YALE L. SCH., https://law.yale.edu/justice-collaboratory/procedural-justice [https://perma.cc/5N5R-AFBQ].

134. *Id.*

their earlier opinions; we know they do at times.[135] Instead, *lock-in* leads one to believe that, absent evidence to the contrary, whatever the measured error rate is in a given proceeding (about 50% in motions for stay pending removal, for example), the actual error rate is some degree higher.

III. DISCUSSION

The optimal standard for evaluating a preliminary injunction would (i) efficiently dispose of the motions[136] while (ii) upholding the status quo ante[137] (iii) without unfairly prejudicing the ultimate disposition of the merits,[138] impeding their accuracy.[139] This Part analyzes the standards which federal courts apply in considering motions for preliminary injunctions, as well as theoretical proposals, against those considerations. It then argues that the best version of the test would be a modified threshold test with a less stringent requirement for likelihood of success on the merits.

A. Threshold Test

The gateway factor approach applied by the First, Third, and Eighth Circuits filters out non-meritorious claims and sets the threat of irreparable harm front and center, analyzing the likelihood of success and irreparable harm aspects of the test as elements.[140] It adheres to historical, flexible equity tradition by then balancing fairness considerations such as the balance of the equities and the public's interest in a preliminary injunction before granting the motion.[141] But by requiring a significant showing that a party will be successful on the merits of their claim, the currently applied gateway factor approach invites cognitive biases to affect the ultimate resolution of claims.

B. Sliding Scale Test

The sliding scale approach applied by the Second, Sixth, Seventh, Ninth and D.C. Circuits minimizes the potential cognitive biases judges may experience throughout the life of a claim, and it lives up to the flexible equitable tradition of preliminary injunctions.[142] Like the other tests used in practice, if the court intuits a movant is likely to succeed on the merits, their

135. *See* Lynch, *supra* note 44, at 804.
136. *See supra* Part I.
137. *See supra* Part I.
138. *See supra* Part II.
139. *See supra* Part I.
140. *See supra* notes 59–62 and accompanying text.
141. *See supra* notes 59–62 and accompanying text.
142. *See supra* notes 45–51 and accompanying text.

claim can succeed (contingent on the other three factors). But uniquely, the sliding scale approach allows preliminary injunctions to issue if the movant demonstrates merely a "serious question" or "novel question."[143] This permissive approach to evaluating the merits respects the preliminary nature of the question and faithfully adheres to the equitable tradition behind freezing the status quo. If judges are careful not to overstate a movant's chances as "likely to win,"[144] but rather as some variant of "sufficiently likely to succeed on the merits to proceed," the sliding scale approach could go a long way toward avoiding *lock-in bias*.[145] Some have argued that this alone is enough to unify the divergent standards under a mandatory sliding scale approach.[146]

Though the permissive merits prong of the sliding scale approach would work to minimize cognitive biases in subsequent hearings, adopting a uniform sliding scale approach would impose significant direct costs on federal courts and litigants. The primary value of the likelihood of success on the merits prong of the preliminary injunction tests is not based in historical equity practice, but rather in modern concern for efficiency.[147] Like evolutions in pretrial and trial practice, the incorporation of some degree of merits analysis in the preliminary injunctions test serves a filtering function, weeding out entirely spurious claims.[148] The Supreme Court's insistence that *both* the threat of irreparable harm *and* the likelihood of success on the merits are the most important factors in evaluating preliminary injunction questions leads to the inevitable conclusion that more attention needs to be paid to the merits than deciding whether the question is "novel."[149] Insufficiently meritorious claims impose direct costs on other litigants in the form of attorneys' fees (and potentially erroneous injunctions), and they bloat courts' dockets. The sliding scale approach is not the least fair option, but it remains suboptimal.

143. *See supra* notes 45–51 and accompanying text.

144. *See, e.g.*, Yeshiva Univ. v. Yu Pride All., 143 S. Ct. 1, 3 (2022) (Alito, J., dissenting).

145. *See supra* notes 121–23 and accompanying text. The less that judges commit to a strong position on a question, the fewer internal and external pressures they face to adhere to that initial position on rehearing. Stated slightly differently, if judges are free from the embarrassment of noting an improper preliminary injunction decision (and the presumable irreparable harm that would result from such error), they will be less systematically *locked-in* to incorrect positions.

146. *See* Payne, *supra* note 32; *cf.* Weisshaar, *supra* note 47, at 1033–34 (noting the Fourth Circuit's move away from the sliding scale approach, finding that it is no longer consistent with the Supreme Court's precedent post-*Winter* and *Nken*).

147. *See, e.g.*, Brooks & Schwartz, *supra* note 26, at 382 (positing a shift away from balancing equities and public interest considerations in determining preliminary injunctions).

148. *See supra* notes 65–86 and accompanying text.

149. *See supra* note 47 and accompanying text.

C. Sequential Test

Of the versions of the preliminary injunction test used in practice, the sequential test is the worst. While it does have a certain simplicity—analyzing four distinct elements, one after the other—the sequential test presents the highest risk of prejudicing the ultimate merits determinations, and may not even significantly decrease costs for courts or litigants. By considering the likelihood of success on the merits first, in isolation, as a required element rather than a factor to be balanced, the sequential test maximizes a judge's investment in their position on the question. If they were to deny a motion for a preliminary injunction for insufficient likelihood of success on the merits (in this case, the court would not even need to proceed to consider any of the other factors; to do so would be little more than an advisory opinion) and subsequently consider the merits, a judge would be faced with significant internal and external pressures to reaffirm their earlier assessment and avoid the unsettling conclusion that the lack of a preliminary injunction led to unjustified irreparable harm. At the same time, if parties are concerned that the disposition of a motion for preliminary injunction may decide the entire case,[150] they will be incentivized to pour more resources into fights over the likelihood of success on the merits than they otherwise might. Preliminary hearings and briefs may be protracted resulting in higher billable hours for litigants and more crowded dockets for courts. What good there is to say about the simplicity of the sequential test is overshadowed by its consequences.

D. A Plan Without Merit(s)

In the wake of *Nken v. Holder*,[151] scholars renewed criticisms of the various preliminary injunction standards.[152] At least one scholar has argued that courts should avoid *any* consideration of the merits of a claim in deciding a motion for equitable relief.[153] They argue that consideration of the merits is ahistorical and—a point with which this Note agrees—leads to unacceptable *lock-in bias*.[154] It is unclear whether the history of equitable remedies supports consideration of the merits on its own terms—the English Courts which served as models for the American equity tradition had mixed

150. *See* Weisshaar, *supra* note 47, at 1012 ("This supposedly temporary form of relief is often, in practical terms, dispositive of the case because the preliminary injunction remains in effect unless and until a subsequent decision vacates it.").

151. 556 U.S. 418 (2009).

152. *See, e.g.*, Lynch, *supra* note 44.

153. *See* Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319, 1329 (2016).

154. *Id.* at 1329–46.

records of considering the merits in their decision-making, and by the mid-nineteenth century a version of the modern likelihood of success on the merits prong had already been integrated into the widely used tests.[155] More to the point, an entirely merits-less test would be out of touch with modern U.S. procedural practice.

Preliminary injunctions granted to claimants with *no likelihood of success on the merits* would bestow a windfall and unjustly punish an innocent nonmovant. Spurious claims would clog courts' dockets, slowing down the adjudication for those who may not even be parties to the litigation at issue.[156] Threat of irreparable harm, the balance of the equities, and the public's interest in the litigation, standing alone, are insufficient to manage these efficiency concerns.[157] While overzealous merits predominance may bias the ultimate disposition of a claim,[158] the direct costs imposed by a merits-less test would be just as erroneous.[159] In a litigious society,[160] the lack of a meaningful constraint on motions for preliminary injunctions would surely, unacceptably incentivize vexatious litigation.

E. Merits Predominance—Avoiding Dual Legal Standards Through "Option Value"

A recent essay in this Journal argued courts should consider *only* a movant's likelihood of success on the merits mitigated by the "option value"—a restrictive understanding of irreparable harm which would "estimate what percentage of the [preliminary injunction]'s effects will accrue between now and when the final decision will be issued."[161] Under the author's proposal, courts would prophesy the ultimate disposition of the case, briefly pause to consider whether granting the remedy would impede the court's ability to get the question right in the future, and deny the motion so long as the correct legal conclusion could theoretically be reached.[162] While irreparable harm (repackaged as "option value") would be enough to stay the execution of a defendant on death row or merger trials,[163] the vast

155. *See id.* at 1334–35; KERR & PATTERSON, *supra* note 37, at 6.

156. *See supra* notes 90–93 and accompanying text.

157. *Cf.* Lens, *supra* note 153, at 1346–48.

158. *Id.* at 1342–46; *see infra* Section III.E; *see also supra* note 92 and accompanying text.

159. *But see supra* note 92 and accompanying text. The clarity of Judge Posner's "error cost" description is particularly useful in understanding this exchange. While inaccuracy—the systematic (though not ubiquitous) result of biased decision-making—is certainly an "error cost" to be avoided, so too are the direct costs imposed by vexatious litigation and groundless injunctions.

160. *See* Miller, *supra* note 89.

161. Eric Brooks, *Rethinking Preliminary Remedies*, 101 WASH. U. L. REV. 327, 350–51 (2023).

162. *Id.*

163. *Id.* at 356. Note that the "option value" standard might not even improve the speedy and efficient resolution of claims. The author seems to suggest that for certain classes of claims, such as

majority of preliminary injunction motions would devolve into "hard judgement calls."[164] This radical departure is purportedly warranted because (1) ultimate merits decisions are uncertain, so the merits-uncertainty at preliminary stages does not compel equitable considerations, and (2) allowing dual legal standards to govern different procedural postures "allows courts to replace the substantive law with their own freelance efficiency analysis."[165]

This Note shares the author's concern that the current standards for preliminary injunctions are unacceptably subjective and allow judges' biases to infect the disposition of cases.[166] Still, the author's move to a merits-predominant approach is predicated upon flawed premises. Apples and oranges are both sugary fruits, but an apple a day may be healthy while an orange a day may not be. It is certainly true that the merits of a case are somewhat indeterminate at both the preliminary and ultimate procedural postures of a case, but the respective procedural postures and the legal guardrails surrounding them are aimed at different ends. Significant attention is paid to managing the uncertainty in the ultimate merits of a case.[167] The Federal Rules of Evidence,[168] Civil Procedure,[169] and Appellate Procedure[170] can all largely be understood as societal judgments regarding the socially acceptable level of indeterminacy in the ultimate disposition of cases given countervailing efficiency considerations.[171] Some degree of indeterminacy is a necessary result of the balance struck between efficiency and accuracy.[172] Preliminary injunctions, on the other hand, are not geared to *manage* indeterminacy, but rather to *avoid it altogether*. Motions for

death row cases and mergers, a preliminary injunction may be granted as of right. *Id.* This stands contrary to Supreme Court precedent, and would undermine the merits prong's filtering efficiency function. *See* Munaf v. Geren, 553 U.S. 674, 690 (2008) (citing Yakus v. United States, 321 U.S. 414, 440 (1944)).

164. Brooks, *supra* note 161, at 356.

165. *Id.* at 327, 331–38. Though ultimately disclaiming their approach, *Rethinking Preliminary Remedies* seems to build off of another article proposing a radical restructuring of the standard governing preliminary injunctions. *See* Brooks & Schwartz, *supra* note 26, at 382 (positing a shift away from balancing equities and public interest considerations in determining preliminary injunctions). That article, and to a lesser degree the "option value" proposal discussed above, would elevate efficiency concerns at the preliminary stages above the accuracy of the ultimate merits disposition. *Compare* Brooks, *supra* note 161, at 354–56, *with* Brooks & Schwartz, *supra* note 26. To the extent that is true, both proposals are at odds with the fundamental design of procedural mechanisms more generally. *See supra* Part I. While efficiency is critical for courts, judges, and litigants alike, it cannot be pursued to the exclusion of accuracy in law.

166. *Compare supra* Part II, *with* Brooks, *supra* note 161, at 357 ("[W]hether a remedy causes net benefit or net harm will be purely in the beholder's eye. Should there be a casino? Should tribal rights trump the whales? Where should Yogi live? Good luck getting a consensus on any of these.").

167. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 96–101 (1974).

168. *See* FED. R. EVID. 102.

169. *See* FED. R. CIV. P. 1.

170. *See* FED. R. APP. P. 1.

171. *See supra* Part I.

172. *See supra* Part I.

preliminary injunctions punt questions of ultimate legal liability to another day, aiming to maintain the status quo ante in the fairest way possible.[173]

Uncertainty seems to be a somewhat awkward proxy for the larger concern that the equitable standards for judging preliminary injunctions inject too steep a degree of subjectivity in courts' analyses.[174] Again, stated so generally, this Note shares concern for the biases that may unfairly prejudice reasoned decision-making. It could be that the public's interest in the resolution of a claim is an improper consideration, but that would be a critique of equity generally rather than preliminary remedies specifically.[175] Even so, excising the public interest factor from the four-part test would be a far narrower suggestion than an "option value" proposal which would call upon judges to make strong, unfounded predictive merits determinations checked only by a theoretical exercise in the potential to unwind incorrect outcomes.

Aiming to reduce subjectivity, the "option value" proposal would do just the opposite. A standard which predominantly relies on merits determinations at a preliminary stage would walk headfirst into the *overconfidence bias* explored in Part II.[176] A judge deciding (and parties relying on that decision) between competing claims regarding the public's economic interest or the balance of harms between the parties will at least have the benefit of concrete facts upon which to found that decision. Excepting particularly law-dependent cases,[177] judges' *overconfidence* regarding their ability to predict the ultimate factual merits of a claim—or the potential "option value" risks—will create systematic errors in deciding motions for preliminary injunctions.[178] And once a judge articulates a position on the ultimate merits, they will be systematically *locked-in* on that position, unlikely to correct their errors. Out of the frying pan that might be "freelance efficiency analysis" based on briefed data,[179] preliminary injunction litigants would be thrown into a fact-free merits-predominant fire.

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173. *See supra* Part I.

174. *See* Brooks, *supra* note 161, at 340–44.

175. *See id.* at 344–47.

176. *See supra* Part II.

177. *See, e.g.*, NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted in part*, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023); NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022), *cert. granted in part*, Moody v. Netchoice, LLC, No. 22-277, 2023 WL 6319654 (U.S. Sept. 29, 2023). First Amendment prior restraint cases could serve as an example of this phenomenon. Because the prohibition of prior restraint laws is approaching absolute, the facts at issue in any particular case are, in large part, irrelevant. In such a case, a judge may be confident regarding the ultimate merits determination without being *overconfident* because subsequent fact-determinations will not likely sway the outcome of the case.

178. *See supra* note 131 and accompanying text.

179. *See* Brooks, *supra* note 161, at 327, 341.

By the author's own account, a merits-predominant "option value" approach would require courts "to make hard judgment calls," and in so doing, "[their] reasoning will be less elegant."[180] Instead of escaping subjectivity, such an approach would intolerably exacerbate the degree to which individuals' biases infect the ultimate accuracy of claims.

CONCLUSION: GOLDILOCKS'S PRELIMINARY INJUNCTION

As discussed above, the optimal standard for preliminary injunctions would be one which freezes the status quo ante in time, protecting movants from irreparable harm;[181] one which minimizes the cognitive biases that flow from prior predictions about the merits of a claim to prejudice subsequent dispositions of that same claim;[182] and one which filters out spurious claims, preventing unmeritorious windfalls and protecting courts' dockets.[183] The tests currently used by federal courts fare variously well by these standards, but all fall short when considering systematic biases.[184] Similarly, recently proposed theoretical approaches fail to respect one or more of the values underlying preliminary injunctions.[185]

Threading this needle need not require rethinking the standard entirely, but merely tweaking the best of the existing standards. The gateway factor approach applied by the First, Third, and Eighth Circuits filters out non-meritorious claims and sets the threat of irreparable harm front and center, analyzing the likelihood of success and irreparable harm aspects of the test as elements.[186] It adheres to historical, flexible equity tradition by then balancing fairness considerations such as the balance of the equities and the public's interest in a preliminary injunction before granting the motion.[187] But by requiring a significant showing that a party will be successful on the merits of their claim, the currently applied gateway factor approach invites cognitive biases to affect the ultimate resolution of claims. To avoid this bias, courts should not disregard a peek at the merits altogether (throwing out the prong's filtering function),[188] but instead tweak the merits element to endorse a "serious question" or "novel question" standard.[189] Ideally, courts cognizant of potential biases would carefully draft opinions,

180. *Id.* at 356.
181. *See supra* Section I.A.
182. *See supra* Part II.
183. *See supra* Section I.B; *supra* Section III.D (describing the insufficiency of a merits-less test).
184. *See supra* Sections III.A, III.B, III.C.
185. *See supra* Sections III.D, III.E.
186. *See supra* notes 59–62 and accompanying text.
187. *See supra* notes 59–62 and accompanying text.
188. *See supra* notes 59–62 and accompanying text; *cf.* Lens, *supra* note 153.
189. *See supra* note 47 and accompanying text.

commenting on the sufficiency of the allegations rather than whether a party will or won't win in the end.[190]

At its best, the law erects guardrails which exclude extraneous biases and promote reasoned decision-making. At the historical valley for the perceived success of federal courts in that goal, reforming the standard for preliminary injunctions would be a step in the right direction.

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190. *See* Lynch, *supra* note 44, at 796–97.

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