CONSTITUTIONAL HARDBALL AND NATIONWIDE PRELIMINARY INJUNCTIONS

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ABSTRACT

Constitutional hardball—the breaking of norms while remaining technically within the bounds of the Constitution—has spread from the executive and legislative branches to the federal judiciary in the form of nationwide preliminary injunctions in politically sensitive cases. Preliminary injunctions evolved in the English judicial system to ensure that plaintiffs clearly in the right were not irrevocably harmed while waiting for torpid courts to rule on their case. Now, preliminary injunctions are a useful tool for delaying and disrupting the adoption of disfavored executive branch policies.

While the general problem of nationwide preliminary injunctions is well recognized, it is difficult to find satisfactory solutions. Proposals for reform have largely focused on near-total elimination of nationwide preliminary injunctions by restraining the power of district judges. Opponents of those reforms rightfully argue that because actions by the executive branch have come to dominate the policy arena, the judiciary is the only branch that can meaningfully constrain partisan executive actions. More bluntly put: the executive policies of the last several years have been so bad as to warrant constitutional hardball.

In this Article, I review the development of preliminary injunctions and judicial partisanship, dissecting exemplar preliminary injunctions from the past several years in politically sensitive cases. Careful review of the actual decisions in question reveals flaws in judicially created doctrines interpreting the four-prong preliminary injunction test that dates back to English courts of equity. These flaws have turned the preliminary injunction doctrine into a mini-trial with virtually no evidence instead of a pragmatic inquiry. Refining the preliminary injunction test is a promising, targeted reform that could preserve the

value of preliminary injunctions while reducing their use as a political tool.

INTRODUCTION

The late Justice Ruth Bader Ginsburg memorably described courts of equity as flexible institutions with a mission "to protect all rights and do justice to all concerned."[1] In her view, courts of equity, which stood in for the king in order to provide remedies that were unavailable to common law courts, like specific performance and injunctions, should follow broad principles instead of strict rules.[2] In the same case, the late Justice Antonin Scalia emphasized the need to define strict boundaries for the equitable remedies of federal courts so that the United States government would remain one of "laws, not of men."[3] Twenty-four years after that case, a quintessentially equitable power—the preliminary injunction—has evolved to run afoul of both justices' visions. The increasing partisanship of the judiciary has created a widespread public impression that ours is a government of parties rather than laws.[4] At the same time, courts have imposed nationwide preliminary injunctions at nearly every opportunity rather than engaging in the fact-intensive, case-by-case analysis appropriate for equitable remedies.

Nationwide injunctions, both permanent and preliminary, are a topic of intense legal interest.[5] By most accounts, their use has exploded over the past decade.[6] This surge correlates with an increased use of

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1. Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 342 (1999) (Ginsburg, J., concurring in part) (quoting Rubber Co. v. Goodyear, 76 U.S. 788, 807 (1870)). Note also that in this Article, I will consistently refer to English chancery courts as "equity courts" or "courts of equity" for the sake of simplicity.

2. *See id.* at 336 ("Since our earliest cases, we have valued the adaptable character of federal equitable power.").

3. *See id.* at 321 (asserting that the "expansive view of equity must be rejected").

4. *See* Andrew Romano, *Poll: Confidence in Supreme Court has Collapsed Since Conservatives Took Control*, YAHOO NEWS, May 10, 2021 (describing a recent poll of registered voters finding 74 percent of respondents said the Supreme Court was "too politicized").

5. *See, e.g.*, Press Release, William Barr, Attorney General, *Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions* (May 21, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide (describing nationwide injunctions as "inconsistent with our American legal system").

6. Determining what should count as a nationwide injunction is a thorny methodological question. The most often cited figures, released by the Trump administration in 2020, claimed there had been 12 nationwide injunctions under President Bush, 19 under Obama, and at least 55

executive action instead of legislation to achieve salient political goals and increased partisan attention to the appointment and confirmation of judges whose views align with the party in power.[7] These trends mean that executive action has become the main avenue for policy change, judicial review of agency action is usually the only way to contest a partisan executive action, and there are inevitably judges up to the challenge.

The legal debate around increased use of nationwide injunctions often boils down to comparing the relative importance of abstract and incommensurate legal principles. For example, nationwide injunctions can be important in providing complete relief to the plaintiff,[8] but ruling only on the rights of the parties before the court is also important for ensuring the appropriate remedy for each potential plaintiff.[9] Moreover, while nationwide injunctions promote nationwide uniformity in agency policy, they also allow litigants to forum shop, finding the most partisan judge to rule in their favor. No one can answer in the abstract which principle is more important, so policymakers and legal scholars simply keep repeating the respective principles that align with what they want to do—end nationwide injunctions or preserve them.

Far less abstract and more important to policymakers in the national debate is the use of nationwide injunctions as constitutional hardball, the abandonment of norms in favor of using every technically legal tool to carry out political fights. If there is always a judge willing to issue an injunction for every politically sensitive executive action, nationwide preliminary injunctions can hobble the executive branch. If one supports the executive actions in question, nationwide injunctions are a curse. If one does not support those executive actions, nationwide injunctions are a blessing. This hardball perspective is evident from

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under Trump. JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM 8 (2021). The extent to which nationwide injunctions are a new phenomenon is also hotly contested. *See, e.g.*, Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924–25 (2020) (describing nationwide injunction cases dating back to at least 1913).

7. *See, e.g.*, Susan Davis and Kelsey Snell, *Mitch McConnell On Filling the Federal Bench: This Is My Top Priority*, NAT'L PUB. RADIO, May 24, 2018 (quoting then-Senate Majority Leader Mitch McConnell describing the appointment of conservative judges as his "top priority").

8. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (noting the fairness and efficiency concerns that support granting some nationwide injunctions).

9. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 469 (2017) (asserting that injunctions should not bind nonparties).

patterns of congressional interest. Republican senators and members of Congress in 2019 (during the Trump presidency) introduced a bill restricting injunctive power to the parties in the case in question or only to the federal district in which the judge sits.[10] They have not reintroduced the bill during the Biden presidency, indicating a lack of concern about the issue when the president being hampered is a Democrat.

Preliminary injunctions present the same hardball concerns as permanent injunctions, with the added benefit (or curse) of speed. Judges do not need to hold a full trial with discovery and all available evidence before issuing a preliminary injunction,[11] allowing them to keep up with the pace of the executive branch.

Expansive solutions to the problem of nationwide injunctions seem likely to do more harm than good. Taking away the power of district courts to issue nationwide preliminary injunctions would, of course, allow the executive branch to issue and enforce its policies. But this would come at a noteworthy cost to plaintiffs seeking redress of obvious wrongs by the federal government. The executive branch could create and enforce illegal rules and regulations and have them on the books for months before a court could reach a final decision on the merits.[12] In some instances, that might be enough time to render the whole issue moot, a problem that has already arisen in at least one case.[13]

While the nationwide injunction debate rages on, targeted reform could mitigate the costs of nationwide *preliminary* injunctions without throwing away their benefits. The current pressure on the preliminary injunction standard has revealed flaws that make it easier to use preliminary injunctions for partisan ends. Targeted reform addressing those flaws could make it more difficult to issue partisan preliminary injunctions while still allowing the use of preliminary injunctions in compelling cases.

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10. The Nationwide Injunction Abuse Prevention Act, H.R. 4292, 116th Cong. (2019).

11. *See* Fed. R. Civ. P. 65(a)(1) (requiring only notice on an adverse party). The court "*may* advance the trial on the merits and consolidate it with the [preliminary injunction] hearing," but is not so required. *Id.* Rule 65(a)(2) (emphasis added).

12. *See* Bray, *supra* note 9, at 476–77 (describing an instance where EPA achieved its regulatory end despite the Supreme Court ultimately invalidating the rule).

13. *See id.* at 419 n.4 (discussing Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (Oct. 10, 2017) (mem.) (per curiam), which was eventually vacated and remanded to be dismissed as moot).

Current doctrine allows judges to issue preliminary injunctions if four conditions are met: (1) the plaintiff is likely to achieve success on the merits; (2) the plaintiff will likely suffer irreparable harm without an injunction; (3) the balance of equities and hardships among the parties tips in the plaintiff's favor; (4) the injunction is in the public's interest.[14] These factors reflect the original motivations of the English courts of equity that developed the preliminary injunction as a matter of economic and bureaucratic efficiency.[15] All involved recognized the awkwardness of intervening in a case before hearing all the evidence, but the slowness of English courts in determining the rights of the parties could render the case moot if the plaintiff's harm could not be remedied by monetary damages after the trial.[16]

In the modern American political context, problems have emerged with each of the four factors. The likelihood of success on the merits prong has come to dominate district courts' analysis, but the inquiry has changed subtly from "how likely is the plaintiff to ultimately win?" to "are the plaintiff's claims right?"[17] The former question would take into account the lack of full evidence before the end of a trial, as well as the likelihood of winning appeals that might be before appellate courts composed of judges appointed by the other party. The likelihood of convincing, for example, a Republican-appointed district court judge that a Biden administration measure violates the Administrative Procedure Act is quite different from the likelihood of a majority Democrat-appointed circuit panel agreeing. Judicial orders discussing the likelihood of success on the merits have become simulacra of final decisions, missing the crucial authority of evidence needed to render truly persuasive opinions.

The irreparable harm prong has been weakened by conflating "irreparable" with "serious." Historically, irreparable harm has meant that the plaintiff could not be compensated by monetary damages.[18] If the plaintiff could be adequately compensated with money damages after the harm, then there would be no reason to have a preliminary

14. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008).

15. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 528 (1978) (describing the English need for preliminary injunctions because of the slow speed of equity courts).

16. *Id.*

17. *See, e.g.*, Louisiana v. Biden, 543 F.Supp.3d 388, 418 (W.D. La. 2021), *vacated*, 45 F.4th 841 (2022) (discussed *infra* Part III.B).

18. *See* Leubsdorf, *supra* note 15 at 530 (describing how the jurisdictional hook for courts of equity was inadequacy of remedies in courts of law, meaning irreparable damage implied jurisdiction because courts of law could only award monetary remedies).

injunction where the court makes a virtually evidence-free guess as to culpability. Now, violations of constitutional rights are assumed to impose irreparable harm without distinction between plaintiffs.[19] While the goal of providing "complete relief" for plaintiffs is meant to guide judges in considering whether harm is irreparable, in practice it offers little constraint.[20] In short, if every damage is irreparable, then the prong is without purpose.

The balance of equities and public interest prongs are frequently considered together with little in the way of actual analysis. They appear to serve no functional role in preliminary injunction decisions.[21] Given the political sensitivity of current cases, judges are probably loath to appear to act on political grounds, but a consideration of actual facts and public good is necessary to ensure that a preliminary injunction is equitable. The balance of equities prong ensures that damage to the defendant is taken into consideration, while the public interest prong incorporates damage to the public writ large. These prongs should allow a judge to make a more nuanced distinction between truly egregious executive actions with broad consequences to the country as a whole and actions with cultural salience but not immediate costs.

Clarifying and restoring the four factors of the preliminary injunction test could go a long way in limiting the politicization of preliminary injunctions. If preliminary injunctions are seen, correctly, as equity-based expedients rather than purely legal judgments, their abuse for partisan ends becomes much more difficult to hide.

Part I of this Article tracks the historical evolution of preliminary injunctions to explain how the current four-prong test came about and how it has since been weakened. Part II discusses the increasing politicization of the judiciary. Part III describes how preliminary injunctions have been used in recent years and examines two case studies demonstrating how judges have applied the four factors in politically-charged cases. Part IV assesses the potential problem with the current system for preliminary injunctions and considers possible

19. *See, e.g.*, Statharos v. N.Y.C. Taxi & Limousine Comm'n, 198 F.3d 317, 322 (2d. Cir. 1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.").

20. *See* Bray, *supra* note 9, at 467 (explaining that because what constitutes complete relief is often indeterminate, this concept can actually act as an impetus for national injunctions rather instead of a constraint).

21. *See, e.g.*, Louisiana v. Biden, 543 F.Supp.3d 388, 418 (W.D. La. 2021), *vacated*, 45 F.4th 841 (2022) (discussed *infra* Part III.B).

solutions, ultimately recommending clarification of the four factors rather than abridging the power of district courts to impose preliminary injunctions.

I. THE EVOLUTION OF PRELIMINARY INJUNCTIONS

Understanding the history and legal theory behind preliminary injunctions can help explain how the current doctrine has strayed from its original purpose. Courts of equity in England created preliminary injunctions to mitigate the damage inflicted by a cumbersome legal system. Courts in the United States inherited the power to impose preliminary injunctions but had to evolve new doctrines for applying them to the government itself. [22] The preliminary injunction standard that has emerged from that process is economic in its logic, but court-developed interpretations based on normative considerations have rendered it vulnerable to partisan misuse.

A. Courts of Equity and Preliminary Injunctions: Legitimacy, Politics, and the Law

The history of preliminary injunctions does not tell us precisely what to do about the current debate, but breaking out of the current context helps us understand the role preliminary injunctions should play and points us to beneficial reforms. Most law students learn a basic distinction between law and equity. Courts of law determined the rights of the parties under specific causes of action and awarded monetary damages. Courts of equity had flexible power to ensure adequate relief when courts of law could not, including through remedies unavailable to courts of law—specific performance of contracts and injunctions.[23] But describing the English system in this way gives it a false patina of forethought and stability. It was developed through a haphazard sequence of action and reaction motivated by financial and political concerns. Preliminary injunctions arose as just another step in that sequence and cannot be fully understood by merely noting that they came from courts of equity.

22. For a full history of nationwide injunctions, including preliminary injunctions, see Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 925–26 (2020) (describing early nationwide preliminary injunctions against federal enforcement of statues that reached beyond the plaintiffs in the suits).

23. *See* Leubsdorf, *supra* note 15, at 528-29 (explaining that the Chancellor had the power to order "interim enforcement of a contract" and "interlocutory decree[s]").

1. Differentiating Permanent and Preliminary Nationwide Injunctions

Debate in the legal community over nationwide injunctions has generally focused on permanent injunctions, where a district court reaches a final decision and permanently enjoins the federal government from enforcing a rule or executive action. Nationwide permanent and preliminary injunctions serve different practical functions, and more importantly for present purposes, they play very different roles in constitutional hardball.

A focus on pragmatism and efficiency is the defining doctrinal feature of a preliminary injunction. Preliminary injunctions evolved to fix practical problems emerging from the differences between courts of law and equity in England several centuries ago.[24] Permanent injunctions are conceptually much simpler, so much so that they likely emerged from the very earliest forms of legal proceedings at least 3,500 years ago.[25] One can imagine a proto-judge in ancient Assyria, Egypt, or China ordering a permanent injunction with a very simple argument: if you are currently harming someone with your wrongful actions, you should stop.[26] On the other hand, a preliminary injunction, boiled down, would be something like: if you are harming someone with actions that are probably wrong, and it is relatively easy for you to stop temporarily while we figure out if you are wrong, you should do so. A permanent injunction is a way for a court to force justice upon litigants. A preliminary injunction is fundamentally a matter of efficiency, of reaching the likely better final arrangement more quickly.

2. Equity, Legitimacy, and Taxes

Modern legal debates about nationwide preliminary injunctions focus on litigant-level concerns such as whether plaintiffs can be made whole without them and whether they should carry preclusive effect on non-litigants. Preliminary injunctions arose, however, from an English legal system built to achieve state-level ends. They fixed an efficiency problem rather than a justice problem. Reframing nationwide preliminary injunctions as a question of systemic effectiveness rather than fairness offers a better way to address the current situation.

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24. *Id.*

25. *See* Morris Jastrow Jr., *An Assyrian Law Code*, 41 J. AMER. ORIENTAL SOC'Y 1, 6 (1921) (describing the Assyrian law code as comprising non-monetary, retributive remedies).

26. *See* Joseph Perillo, *Exchange, Contract and Law in the Stone Age*, 31 ARIZ. L. REV. 17, 23 (1989) (identifying injunctions as one of the remedies available in Stone Age society).

The evolution of preliminary injunctions began with the Norman conquest. Lack of legitimacy is always the biggest problem facing conquerors. In Hannah Arendt's famous formulation, power comes from people working together, but legitimacy stems from the initial agreement to work together.[27] Conquerors want to translate military power into cooperation from the native population so they can enjoy the spoils of tax revenue. They cannot coerce everyone with direct violence, so they need voluntary cooperation. Legitimacy is, in essence, whatever keeps people obeying political leaders whenever the people are not acting under direct violence or threat of violence.[28] A conqueror inherently has not entered into any kind of agreement to work with the conquered; he simply showed up with sufficient power to overthrow the previous leaders.[29] Conscious effort is required to build legitimacy, whether by doing good things for the conquered people to show commitment to shared principles, citing some mutually respected religious authority's permission for conquest, or some other method.[30]

To the Norman conquerors of England in the eleventh century, the quest for legitimacy drove legal reforms. The Normans had barely conquered England in the first place, narrowly prevailing at the Battle of Hastings. Although we call William the *Conqueror*, he steadfastly maintained he had taken the throne lawfully.[31] As part of a bid to build legitimacy, William maintained the existing substantive laws and local courts in England.[32] These formed the "customary" law, and they varied depending on the region.[33]

The Normans did have one desire even more primal than legitimacy—money.[34] The need for legitimacy drove the decision to

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27. *See* Hannah Arendt, ON VIOLENCE 52 (1968) (formulating the relationship between violence, legitimacy, and power).

28. *Cf.* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, PSYCH. PUB. POL'Y & L., Aug. 2013 ("[L]egitimacy involves the public recognition that the social order needs a system of laws that generate compliance and respect above and beyond individual preferences.").

29. *See* Alex Weisiger, *Victory Without Peace: Conquest, Insurgency, and War Termination*, CONFLICT MGMT. & PEACE SCI. 357, 361 (2014) (describing the inherent difficulty of replacing the incumbent political structure of a conquered enemy).

30. *Id.*

31. *See generally* George Garnett, *Coronation and Propaganda: Some Implications of the Norman Claim to the Throne of England in 1066*, TRANSACTIONS OF THE ROYAL HIST. SOC'Y (1986) (describing the importance of William's continued lawful claim to the throne).

32. *See* Theodore F.T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW, 15 (Liberty Fund ed., Little & Brown 1956) (2010) (stating that the "period of Anglo-Saxon law extended later than the Norman Conquest").

33. *Id.*

34. *See* William Craddock Bolland, THE GENERAL EYRE: LECTURES DELIVERED IN THE

maintain the existing laws and courts, but the Normans also needed their tax collectors to collect from landowners. We can imagine a simplified three-tier system: peasants generate economic surplus through agriculture, landowners (nobles) collect that surplus, and the king extracts part of the surplus from the landowners through tax collectors. In the late Middle Ages, two big problems arose with having law and tax collection separated in this system. First, the landowners had far better local knowledge than the king's tax collectors.[35] Landowners could detect tax evasion because they directly administered the peasants, including through the landowners' stewards who served as judges in local courts.[36] While Norman kings could track real estate ownership fairly well through efforts like the Domesday Book, they had much more difficulty with any other kind of taxable asset.[37] It was far harder for clever subjects to hide income from local landowners than from the king's tax collectors.[38] Local courts were slow and opaque, applying different rules haphazardly across districts.[39] Fines and legal fees were a major source of revenue for whoever administered the local courts, which in the immediate aftermath of the conquest was the nobility.[40] Particularly galling to the king was the levying of fines by the landowners for violation of royal laws.[41] The king's tax collectors, cut out of the legal system, had to push even harder

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UNIVERSITY OF LONDON AT THE REQUEST OF THE FACULTY OF LAWS 18 (1922) (quoting a contemporary legal scholar as saying, "So intimate . . . is the connexion [sic] of judicature with finance under the Norman kings that we scarcely need the comments of the historians to guide us to the conclusion that it was mainly for the sake of the profits that justice was administered at all.").

35. *See* Charles Angelucci et al., *How Merchant Towns Shaped Parliaments: From the Norman Conquest of England to the Great Reform Act* 10 (Nat'l Bureau of Econ. Rsch. Working Paper No. 23606, 2017) (explaining that sheriffs drawn from the royal court had "limited knowledge of local economic conditions and lacked the knowledge necessary to administer justice over commercial contracts").

36. *See* Bolland, *supra* note 34, at 14 (noting the taxing power of manorial courts and the fact that they were typically administered by the lord's steward).

37. *See* Plucknett, *supra* note 32, at 12 (describing the Domesday Book and its improvement of land tax administration).

38. *See* Bolland, *supra* note 34, at 17–18 (describing the difficulties facing the king's appointees when they tried to determine how many fees that should have gone to the king actually went to local lords).

39. Geoffrey C. Hazard Jr., *The Early Evolution of the Common Law Writs*, 6. AM. J. LEGAL HISTORY 114, 115 (1962).

40. *See* Bolland, *supra* note 34, at 15 (explaining that manorial courts were "depriving the King of very large profits, constantly accruing, and diverting them into the pockets of the lords").

41. *See id*. at 14-15 ("Nothing, perhaps, spurred on the advisers of our medieval kings to send out their roving commissions more than did this knowledge that many of the manorial courts…were exercising these royal powers without any right or warrant, and by such usurpation were depriving the King of very large profits…").

to collect taxes. Unsurprisingly, they became paranoid and persistent in their collections, creating a reputation for terrorizing the countryside in search of money.[42]

Kings Henry I and II instituted the common law in order to fix that cash flow problem.[43] They allowed the local courts to continue, but created the new common law system that was easier to understand and faster to act, allowing it to eventually drive local courts out of existence.[44] In the new system, the kings created a specific set of laws that applied equally anywhere in the country.[45] To make use of these common laws in a lawsuit, a plaintiff had to seek a "writ"—written instructions from the king's officials ordering the defendant to appear.[46] These writs were standardized by causes of action, meaning the suits had to fit a relatively inflexible set of circumstances in order to proceed in a common law court.[47] As this system took hold, the royal officials charged with implementing it became regularized into judges, and gradually started holding trials in fixed locations rather than simply "riding circuit" (traveling the country in fixed, repeating routes and administering justice at regular stops).[48]

3. Ossification of the Common Law

This system worked well for a few centuries, but eventually the substance of the common law and the standardized writs became unworkably rigid, leading to discontent.[49] A relief valve for this discontent involved asking the king (via his chancellor) to create new writs for new kinds of cases.[50] This happened frequently enough that

42. *See id.* at 22 ("The Eyres [tax collecting operations of the crown] were hated by all men, hated and feared.").

43. *See id.* at 18–19 (explaining that Henry I invented, and Henry II improved upon a "system of itinerant justices" that "traversed the country as itinerant justices and collectors of revenue").

44. *See* Hazard, *supra* note 39, at 118–22 (explaining the evolution of writs from a purely administrative power into a legal system).

45. *See id.* at 117 (describing the workings of the "writ" system whereby the king could impose legal decisions anywhere in the realm without regard for local or feudal courts).

46. *See id*. at 118 (explaining that one use of a writ was an order to the wrongdoer "to right the wrong or to appear before the king or his justices and show cause why he had not done so").

47. *See id.* at 121 ("The royal writs were ad hoc responses to particular types of situations.").

48. *See* Henry C. Clark, *Circuit Riding a Former National Asset*, 8 ABA J. 772 (1922) (defining and discussing "riding circuits").

49. *See* Hazard, *supra* note 39, at 121–22 ("The inference is that these attractions became dispensable as the crown strengthened its hand during the Twelfth Century, so that the relatively higher certainty of obtaining an enforceable decision was compensation for additional delay and difficulty in obtaining it.").

50. *See* U.K. Courts and Tribunals Judiciary, "History of the Judiciary in England and Wales," https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary-in-england-and-

the process was standardized and deputized to a new kind of court: the court of equity, which could hear causes of action and award remedies outside those found in common law courts.[51] Predictably, doctrines quickly emerged to guide the application of remedies, to the point that by the eighteenth century equity courts were as ossified as common law courts.[52]

4. Emergence of Preliminary Injunctions

The preliminary injunction emerged as the equity courts were ossifying. In the eighteenth century, the existence of an irreparable injury and the apparent strength of the case led equity judges to start issuing "interlocutory" injunctions before cases reached final judgment.[53] Practically speaking, preliminary injunctions were the only way to provide useful relief to parties facing imminent irreparable damage because courts of equity were so slow to reach a decision.[54]

Most importantly for the present issue, plaintiffs often sought injunctions when they had a case pending in a court of law, which created a dilemma for the equity court.[55] The plaintiff needed an order that would stop the defendant's actions until the court of law declared him to be in the right, but until the court did so, the equity court had no way of knowing the actual extent of the plaintiff's legal rights.[56] In the event of a non-meritorious claim, an injunction transferred the risk of irreparable harm from plaintiff to defendant. The equity court's solution was to decide a request for an injunction based on an estimate of the likelihood that the court of law would ultimately side with the plaintiff, as well as the public interest and the overall balance of the equities.[57]

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wales/history-of-the-judiciary/ (last visited Aug. 6, 2022) (describing the historical workings of the British judiciary).

51. *See* Leubsdorf, *supra* note 15, at 530 (describing how the jurisdictional hook for courts of equity was inadequacy of remedies in courts of law, meaning irreparable damage implied jurisdiction because courts of law could only award monetary remedies).

52. *See* U.K. Courts and Tribunals Judiciary, *supra* note 50 (explaining that courts of equity were eventually subject to the same flaws as courts of law, namely "complexity, expense, and delay").

53. *See* Leubsdorf, *supra* note 15, at 527 (narrating the development of the interlocutory appeal as a uniform standard for preliminary injunction cases).

54. *See id.* at 528 (discussing the utility of preliminary injunctions given nineteenth century courts' delay in reaching final judgment).

55. *See id.* at 530 (noting the "peculiar problems of protecting rights at law with interlocutory equitable relief").

56. *See id.*

57. Equity courts also issued preliminary injunctions in equity cases that they themselves heard. In those cases, the courts tended to focus on the likelihood of the merits more than in cases

The historical preliminary injunction power of English courts of equity was carried over into the American court system after the Revolution. In 1789, the First Congress empowered federal courts to follow English courts of equity in the "forms and modes of proceedings."[58] The Second Congress amended this slightly to allow the U.S. Supreme Court to establish rules for equity courts, a power the Supreme Court exercised when it established the Federal Equity Rules in 1822.[59] That set of rules, in turn, contained a default rule that when the rules issued by the Supreme Court do not apply, the court in question should follow the High Court of Chancery (that is, equity) in England.[60] American and English courts both worked toward establishing what ultimately became the four-factor test, with the first fairly unified standard emerging in 1867.[61] Tweaks in phrasing aside, the general substance of the four-factor test did not change markedly over the following century.[62] In 1938, Congress adopted the Federal Rules of Civil Procedure, which finally and conclusively merged procedures for law and equity.[63] Rule 65 provides basic notice requirements for preliminary injunctions, but does not limit what courts can actually consider in evaluating a motion for a preliminary injunction.[64] The Supreme Court itself subsequently established the four-factor test; its most recent authoritative recounting of the standard comes from *Winter v. Natural Resources Defense Council* in 2008.[65]

5. Lessons from History

From this history, several points emerge regarding reform of preliminary injunctions. First, courts depend on legitimacy, and

pending in courts of law, presumably because of the same concern over treading on the jurisdiction of courts of law. *See id.*

58. *See* Robert E. Bunker, *The New Federal Equity* Rules, 11 MICH. L. REV. 435–36 (1913) (discussing the statutory mechanism for the authorization of adopting rules of procedure).

59. *See id.* at 438 (explaining the evolution of Congress's delegation of court procedural rules).

60. *See id.* at 440 (detailing the further development of rules of civil procedure in the nineteenth-century U.S.).

61. *See* Leubsdorf, *supra* note 15, at 536 (describing the preliminary injunction standard presented by William Kerr).

62. *See id.* at 537 (discussing the relative lack of development of the preliminary injunction standard in the time since Kerr's formulation).

63. *See* Charles W. Joiner & Ray A. Geddes, *The Union of Law and Equity*, 55 MICH. L. REV. 1059, 1088 (1957) (proffering descriptions from contemporaneous observers on the merger of courts of law and equity).

64. Fed. R. Civ. P. 65(a).

65. *See* 555 U.S. 7, 20 (2008) (stating and applying the traditional standard for a preliminary injunction).

legitimacy depends on a mixture of efficiency and fairness. Preliminary injunctions were first and foremost an efficiency correction to fairness, allowing litigants to reach the probable correct end faster even if there was some perception of unfairness in changing legal dispositions before a court determined the rights in question.[66] Translating that notion to the modern context, preliminary injunctions should be viewed through a lens of pragmatism rather than strict rules or universal assumptions. The question should not be, for example, whether it is *fair* for a court exercising equity power to bind non-litigants, but rather whether the institution is making the overall system work more smoothly.

Second, because preliminary injunctions emerged from courts of equity, such courts had to take more than just the law into account.[67] That is how the balance of equities and weighing of public interests came to be part of the four-factor test. As this Article further discusses, modern courts have transformed the four-factor test into essentially one factor in politically sensitive cases—the likelihood of success on the merits. This speaks to a fundamental judicial discomfort with equity, perhaps because it too closely resembles the function of a lawmaker. But a preliminary injunction is, as modern courts frequently recite without deep thought, an extraordinary remedy.[68] Judges should be required to explain the equity behind this most equitable of remedies. If they do not, they are using a legal remedy cosplaying as an equitable one. A nationwide injunction in a politically sensitive case is unavoidably political, but that is precisely why a judge should be required to explain the action in terms of equity.

Third, history helps dispel one formalistic argument about nationwide injunctions: that because injunctions in English history could not be imposed against the king, American courts based on the English system should not impose injunctions against the executive branch.[69] Given how intimately connected courts of equity were to the king, it is easy to see why injunctions against the government would be awkward in the English system.[70] It would have essentially been the

66. *See* Leubsdorf, *supra* note 15, at 530 (discussing the use of equitable remedies).

67. *See id.* (noting the requirement of irreparable damage as foundational to granting a preliminary injunction).

68. *See, e.g.*, Louisiana v. Biden, 543 F. Supp. 3d 388, 412 (W.D. La. 2021) (describing preliminary injunctions as an extraordinary remedy).

69. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) ("As an agent of the King, the Chancellor had no authority to enjoin him.").

70. *See id.* (explaining why "[t]he English system of equity did not contemplate universal injunctions").

king enjoining himself. Some modern-day scholars cite this as a reason why injunctions should not apply to the U.S. federal government.[71] Courts of equity, however routinely enjoined courts of law because they were distinct actors.[72] The injunctive power extended as far as it needed to in England—there simply was no reason for a court of equity to enjoin what was effectively itself. In the American system, courts of equity, tied to courts of law, can now enjoin the executive branch because it is a distinct actor. The difference in court structure between England and the United States amply explains why injunctions look different in the American context without fundamentally undermining the legitimacy of preliminary injunctions against the government.

Finally, and perhaps most importantly, legal scholars are sometimes prone to misperceptions about both law and equity that erroneously guide judicial interpretation, and these errors affect how we see preliminary injunctions. The common law system's reliance on precedent is interpreted in some libertarian-leaning circles as an indication of an ideal, government-less decentralization.[73] If we actually wanted to take a didactic lesson from the history of law and equity, it should be that no reform will work forever. Doctrines need constant pruning in order to work efficiently. As this Article will discuss, courts have changed preliminary injunction doctrine extensively since the merger of law and equity. The pragmatic adjustment of law and equity suggests we should not be afraid to continue making changes.

B. Modern Changes to the Four Factor Test

Although the basic terms of the four-factor test have not changed markedly since 1867, American judges have created several presumptions that have altered the relative importance of the various factors, particularly in politically sensitive cases. Overall, these changes lessen the discretion of judges, but in so doing lend an unduly legal gloss to a profoundly equitable remedy. The end result is to put almost all emphasis on the likelihood of success on the merits prong, which contains the purest legal analysis. The more equitable factors are either assumed or treated in an airy, superficial manner.

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71. *See id.* (citing Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425 (2017).

72. *See* Leubsdorf, *supra* note 15, at 530 (noting one implication of the distinction between courts of equity and law in nineteenth-century Britain).

73. *See, e.g.*, Ronald Hamowy, *F.A. Hayek and the Common Law*, 23 CATO J. 241, 243 (2003) (describing libertarian theorist Friederich Hayek's affinity for the common law system).

1. The Weakening of "Irreparable" Damage

Arguably the most significant development in this vein is the assumption of irreparable damage in cases alleging constitutional violations. Courts generally regard the deprivation of constitutional rights as per se irreparable damage.[74] The theory goes that without a preliminary injunction, plaintiffs could lose their rights for a period of time that they can never get back or for which they can never be compensated.[75] In this view, preliminary injunctions are justified by the simple fact that constitutional rights are so important that the prospect of their violation always warrants action from the court before full consideration of the underlying facts. For example, in a 2012 freedom of speech case, the Ninth Circuit clarified that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and that the "harm is particularly irreparable" in the political context where there *might* be additional time pressure.[76] While the difference between "irreparable" and "particularly irreparable" harm is difficult to discern, it is striking that this analysis creates both a presumption of irreparability and a presumption of "particular" irreparability for the loss of First Amendment freedoms with essentially no consideration of facts beyond noting the political context of the case.

One can easily imagine scenarios where this rhetoric does not match reality. For example, if one sued the Trump administration claiming that its Muslim travel ban violated a U.S. citizen's right to travel, it could be the case that the actual damages are completely financial and thus not irreparable.[77] The plaintiff could not travel at a particular time, but the government could presumably pay some amount of financial compensation after final judgment in the case is rendered. It could also be the case that the plaintiff wanted to travel to visit a dying relative one last time, and the loss of that opportunity is absolutely not reparable. The facts of the case are utterly necessary to discern whether the damage is irreparable.

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74. *See, e.g.*, Statharos v. N.Y. C. Taxi & Limousine Comm'n, 198 F.3d 317, 322 (2d. Cir. 1999) (mentioning that "[b]ecause Plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary").

75. *See, e.g.*, Farris v. Seabrook, 677 F.3d 858, 868 (9th Cir. 2012) (discussing the rationale underlying per se irreparable harm in light of a constitutional violation).

76. *Id.* (quoting Thalheimer v. City of San Diego, 645 F.3d 1109, 1128 (2011)).

77. One could imagine, for example, a business traveler who missed a business opportunity because she could not travel.

Of course, having a presumption of irreparable damage in constitutional claims could still be justifiable if there were some reason to believe that assuming irreparable damage saves time and money overall. In the context of constitutional claims in politically-charged cases, that is obviously not true. These suits tend to address either vast programs of national significance like the Affordable Care Act[78] or salient emotional issues like immigration.[79] It is implausible that it would not be worth the court's time to determine whether the damage in question is irreparable.

There is, of course, no defensible universal bright line between reparable and irreparable damage. In some sense, every damage is irreparable, if only because we are all mortal and even the loss of money for a finite part of a life can irrevocably alter a person's behavior. Practically speaking, however, monetary damages are the most reparable damages because interest can always be imposed to make up for the lost time.[80] At the other end of the spectrum, the loss of a person's life means that person cannot actually enjoy compensation. Between those ends, virtually any kind of damage requires further discussion of relevant facts to establish how irreparable the damage truly is. Acknowledging the difficulty in judging irreparability does not excuse failing to try.

Although assumption of "irreparable" damage in cases alleging constitutional claims is particularly galling, some circuits have gone further, stating that "no cognizable harm results from stopping unconstitutional conduct, so 'it is always in the public interest to prevent violation of a party's constitutional rights.'"[81] Regardless of its philosophical veracity, this statement should be irrelevant for preliminary injunction purposes because it is not possible for a court weighing a preliminary injunction motion to be absolutely certain that a violation of constitutional rights is taking place. The court has not entertained full discovery, which is often crucial in establishing the actual relevant facts.[82] Unless the offending president or executive

78. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (ruling on a lawsuit from twenty-six states challenging the Affordable Care Act).

79. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (ruling on a lawsuit against the Trump administration's Proclamation No. 9645, which changed American immigration policy on eight countries).

80. DAN B. DOBBS, DOBBS LAW OF REMEDIES 302 (2nd ed. 1992).

81. Vitolo v. Guzman, 999 F.3d 353, 360 (6th Cir. 2021) (quoting Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee, 274 F.3d 377, 400 (6th Cir. 2001)).

82. *See* Bray, *supra* note 9, at 461–62 (2017) (arguing that a lack of developed facts at the district level will lead to higher courts making decisions of vast significance with a limited record).

agency openly concedes that it is violating the Constitution, the most a court can do at the preliminary injunction stage is assess the *likelihood* that the Constitution is being violated.

One can immediately see how this problem is heightened in politically-sensitive cases. Political sensitivity increases the potential personal gain for a partisan judge of imposing an injunction. The assumption of irreparable damage from constitutional harm means the judge's analysis can focus on the plaintiff's likelihood of success.

2. The Dumbing Down of Equities Balancing and the Public Interest

Another curious aspect of the caselaw regarding irreparable harm in constitutional cases is the assumption that the only remaining factor in play is the likelihood of success on the merits.[83] If a court follows the usual formulation of the preliminary injunction analysis, assuming irreparable harm to the plaintiff does not answer whether there is irreparable damage to the *defendant*. Of course, in constitutional cases, the named defendant is a local, state, or federal government official, and one can imagine glib explanations for why the officials cannot suffer irreparable damage. For example, if the government official can simply re-institute the challenged policy at a later date, how can its damages truly be irreparable? This analysis obtusely ignores that the government is acting on behalf of the people, and some amount of irreparable damage is highly likely if a government action is delayed during a trial.[84]

This is a subtle point that bears further discussion. In the theory of rule utilitarianism, a law's purpose is to force people to make choices that are generally beneficial to society writ large.[85] Even if it might be beneficial in some specific cases for people to, say, drive faster than the speed limit, society benefits from having the general rule.[86] In the

83. *See* Liberty Coins, LLC v. Goodman, 748 F.3d 682, 689–90 (6th Cir. 2014) (listing four factors to be weighed when considering a motion for a preliminary injunction, including the likelihood of success on the merits, the potential for irreparable injury to the plaintiff, whether the injunction would cause substantial harm to others, and whether an injunction would serve the public interest).

84. *See* New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

85. *See* Richard F. Bernstein, *Legal Utilitarianism*, 89 ETHICS 127, 131 (1979) ("The rule utilitarian principle says simply that a decision is right if it based on that rule whose employment would have best consequences.").

86. *Id.* at 129-30.

American system, democratically-elected legislators decide what rules would be generally beneficial for people to follow, meaning ultimately that the people decide what rules everyone should follow. Constitutional provisions are *meta* rule utilitarian—they are laws about the laws that are generally beneficial for legislators to adopt and society to follow. The benefit of the meta rule is that it stops ill-considered laws. The cost is a denial of democracy, the ordinary mechanism that allows the people to judge utility through their legislators.[87] Viewed through this lens, a preliminary injunction in a constitutional case necessarily harms the people themselves by taking away their power without a full consideration of evidence.[88] Indeed, the harm to specific U.S. citizens of a preliminary injunction can be irreversible if they would have benefited from the enjoined executive action.[89]

At the same time, not candidly assessing the government's equities can allow the government to assert vague, categorical equities that obscure whether irreparable damage from an injunction is likely. This tendency is most obvious in cases where the federal government asserts that an action is motivated by national security concerns.[90] The judiciary is often at its most deferential in those circumstances, so the government has an obvious incentive to argue that every issue poses national security risk. In response, judges could demand greater specificity, particularly given that there are legal mechanisms in place to protect classified information in litigation.[91] Rather than probe these equities carefully, courts have prioritized likelihood of success on the merits.

3. The Ambiguity of the Likelihood of Success on the Merits

This factor seems simple on its face: how likely is it that the plaintiff would win the case if a full trial were held instead of the brief presentation of arguments required for a preliminary injunction motion? That question, however, does not address what ultimate

87. *See supra* note 84.

88. *Id.*

89. *Id.* This outcome would occur whenever the end result of trial would have been different from the likely outcome predicted by the judge at the preliminary injunction stage. One would expect this to happen regularly—if it did not, then the evidentiary value of discovery is roughly zero, which seems unlikely.

90. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) ("[O]ur inquiry into matters of entry and national security is highly constrained.").

91. *See* Classified Information Procedures Act, 18 U.S.C. app. III §§ 1–16 (creating a procedure to allow the introduction of classified information in federal court proceedings through substitution or summarization).

success really means. For example, does it mean the federal trial judge would decide the case in favor of the plaintiff, or that the case would ultimately result in the plaintiff's victory on appeal?

In run-of-the-mill cases, that ambiguity does not usually matter. The trial judge likely knows the facts of the case more deeply and the appellate judges may better understand doctrinal nuances. But there is no reason to believe *a priori* that the judges will approach the issue at hand in fundamentally irreconcilable ways. The trial judge's guess of how the trial will turn out at her level is a reasonably effective proxy for how an appellate court would rule on appeal.

Politically-charged cases involving agency rulemaking depart from this arrangement. A competent trial court judge appointed by a Republican president brings different preconceptions and methods of interpretation to his task than a competent judge appointed by a Democratic president. When evaluating the "likelihood of success on the merits" of a plaintiff challenging, say, a Trump administration immigration rule, a Democratic appointee might reasonably think she will ultimately strike down the rule even after presentation of evidence.[92] She also likely understands that the circuit court of appeals will disagree, particularly if the circuit is composed mostly of Republican appointees.[93] Even if the circuit court agrees with her, there is a strong chance that the Supreme Court will not, composed as it is of six Republican appointees and three Democratic appointees.

The ambiguity of "likelihood of success on the merits" has not gone unnoticed, but the main branch of discussion has been the precise quantum of likelihood of success that courts should require, not what success really means.[94] The Supreme Court has certainly not hesitated to disagree with district and circuit courts on the likelihood of success

92. *See* East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019) (providing an example of an Obama-appointee striking down a Trump administration immigration policy).

93. *See* City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Services, 981 F. 3d 742 (9th Cir. 2020) (Republican-majority panel lifting a lower court's injunction of a Trump-era immigration policy).

94. *See* All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131–35 (9th Cir. 2011) (probing different standards for measuring the likelihood of success on the merits). Courts have variously described the requisite likelihood as a "fair question," "serious question," "substantial probability," "reasonable certainty," or "clear right." These formulations are best understood as rhetorical choices intended to nudge the outcome of a particular motion one way or the other. A judge predisposed toward granting a preliminary injunction would be more likely to use a lower quantum of probability.

on the merits, substituting its own analysis of the underlying facts and substantive law for that of the district court.[95]

II. POLITICIZATION OF THE FEDERAL JUDICIARY

The problems with preliminary injunctions discussed above are merely theoretical in a normal case because the likelihood of success on the merits prong is ordinarily a reasonable proxy for the final outcome. Yes, the economic analysis of preliminary injunctions could be led astray by assuming irreparable damages for plaintiffs with constitutional claims, but if a judge accurately assesses the likelihood of ultimate success on the merits, the overall system will still function relatively efficiently. Politically-charged cases, however, turn preliminary injunctions into useful tools for partisan judges, and the federal judiciary has been under intense evolutionary pressure in favor of partisanship for the last several decades.[96]

A. Defining and Measuring Partisanship in the Judiciary

Coming to terms with the partisanship of federal judges will help us both comprehend the current problem and understand that the problem will not get better without some kind of intervention. While the topic of partisanship in the federal judiciary truly merits its own article, we can observe some obvious trends and consider possible causes.

It bears mentioning at the outset that "partisan" in this context is meant not as a description of motivation, but of outcome. A president generally seeks an appointee who will rule as the appointing president would want.[97] That appointee might be "partisan" in the sense of unthinking conformity to a party line. The appointee also might conform more closely to the ideal of a judge, being independent, principled, and clear thinking, but if her principles and prejudices point her in the direction the president would want, she is just as "partisan."

95. *See e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (reversing a preliminary injunction after a novel legal analysis under an abuse of discretion standard).

96. *See* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1380–81 (2021) ("From 2018-2020 there was a dramatic and strongly statistically significant spike in both partisan splits [of circuit court panels] and partisan reversals of en banc decisions.").

97. The senators of the appointing president's party will have similar policy preferences. While there could in theory be sufficient difference between the president's preferences and those of the senators of his party, that situation rarely (if ever) arises in modern times.

1. Measuring Partisanship in the Federal Judiciary: Cloture Votes

It is difficult to objectively measure partisanship in judges, but there are a number of useful proxy measurements that all point in the same direction. First, consider the number of judicial nominees requiring a cloture vote in the Senate. Debate over a nominee in the Senate is theoretically unlimited, but in practice comes to a close either by unanimous consent of all senators or through a vote to end debate, called a "cloture" vote.[98] If a nominee is uncontroversial, a cloture vote may be unnecessary because no senator objects to ending debate. Senators will keep debate open, i.e., filibuster, to slow or prevent a confirmation vote from taking place.

Historically, the overwhelming majority of federal judicial nominees did not require cloture votes.[99] The table below shows the increase in the necessity of cloture votes on non-Supreme Court Article III judicial nominations over time. Note that the Trump administration in four years required about 70 percent more cloture votes on judicial nominees as the Obama administration in eight years.[100]

98. Another possibility is the nomination is withdrawn. Generally, a majority leader knows that a nomination vote will succeed in advance, but occasionally, a senator unexpectedly is absent or switches his vote. *See, e.g.*, Marianne Levine & Burgess Everett, *Tim Scott Sinks Trump Judicial Nominee*, POLITICO, Nov. 29, 2018 (describing the last-minute withdrawal of a judicial nominee when a key senator voiced concerns).

99. Some caveats are necessary when engaging in this type of analysis. First, in earlier times, it is possible that Senate leadership did not force votes on nominations against which senators had privately indicated that they would filibuster. So, for example, while there were no cloture votes in the 1920s against judicial nominees, it was widely understood that Southern conservatives would have filibustered Black judicial nominees. Cloture votes are still a useful proxy for partisanship of the judiciary, however, because we do know that the nominees who became judges were more widely acceptable to both sides, suggesting that the judiciary was less partisan overall.

100. U.S. SENATE, CLOTURE MOTIONS (2022), https://www.senate.gov/legislative/cloture/clotureCounts.htm (last visited Feb. 8, 2023).

Table 1: Confirmed Judicial Nominees
Who Required Cloture Votes

Administration	*Judicial Nominees Requiring Cloture Votes*
H.W. Bush	1
Clinton	5
W. Bush	25
Obama	130
Trump	219

To be sure, there are confounding factors here. The most obvious is that both parties changed cloture rules to allow for a 50-vote threshold on judicial nominees, first temporarily from 2013 to 2014 when the Senate was controlled by the Democrats, then permanently in 2017 under Republican control.[101] When the vote-threshold was 60 for cloture, we would not expect as many cloture votes because they would have failed, and consequently the majority leader in question would not choose to hold such votes. That is one obvious reason there were fewer cloture votes under President George W. Bush than under Presidents Obama or Trump.

Despite that confounding factor, the cloture figure above is still an accurate representation of partisanship of nominees because the Senate ultimately confirmed hundreds of nominees for each of the presidents listed. Senate majority leaders ultimately did hold votes for presidential nominees without the need to overcome a filibuster because the nominees were not viewed as partisan.[102] For example, Clinton appointed hundreds of judicial nominees without cloture votes despite the fact that Republicans controlled the Senate for three-quarters of his administration.[103] He was able to do so either because,

101. *See* VALERIE HEITSHUSEN & RICHARD BETH, CONG. RSCH. SERV., RL30360, Filibusters and Cloture in the Senate 9 (2017) (summarizing and explaining changes in the Senate cloture rules).

102. This conclusion is not meant to be an endorsement of those nominees. Rather, "not viewed as partisan" here simply means that senators from the opposite party did not see net value in filibustering the nominees. They may have refrained from filibustering because they valued comity more than current senators. It is also possible voters care more about judicial nominees now than in the past, so the cost of refraining from filibustering has gone up.

103. President Clinton appointed a total of 378 Article III judges. *Judgeship Appointments by President*, ADMIN. OFF. OF THE U.S. COURTS, https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president (last visited Feb. 6, 2023).

knowing he needed 60 votes, he appointed relatively centrist nominees, or because senators did not vote monolithically against opposing party nominees like they do today. Either way, the incentive structure has clearly changed in a way that favors partisan nominees.

Another confounding factor is that the president's party does not always control the Senate. President Trump had a Republican majority for all but the last few days of his presidency, while President Clinton spent three-quarters of his presidency without a Democratic majority in the Senate. If Clinton submitted a partisan nominee during that time, the Republicans did not need to filibuster to force a cloture vote; they could simply never schedule a vote in the first place. By contrast, Majority Leader Mitch McConnell needed to hold cloture votes for the vast majority of Trump's nominees because he could only overcome Democrat filibusters if he did so.

This factor ultimately reinforces the overall conclusion of increasing partisanship. Majority leaders hold cloture votes on nominees when (a) the nominee is viewed as partisan (else, a cloture vote would be unnecessary); (b) the president's nominee is very likely to win the vote (else, the leader would not call the vote); and (c) the majority leader and the president are of the same party (else, the leader would not call the vote). The fact that cloture votes are increasing over time means the three conditions are true more often. If we assume that factor (c) is random (i.e., past presidents were roughly equally likely to have a Senate under their party's control), then the change must be due to factors (a) and (b). Factor (b) is affected by the cloture vote threshold, which only changed under President Obama, but the trend obviously started during George W. Bush's presidency. This leaves only factor (a), the perceived partisanship of the nominee, to explain the recent shift.

2. Measuring Partisanship in the Federal Judiciary: Confirmation Votes

While cloture vote data can provoke an avalanche of recriminations about which party started filibustering nominees first, we can also examine the number of "aye" votes that confirmed judges actually received in the most recent presidential administrations. Taken in conjunction with the cloture data, the inescapable conclusion is that senators are perceiving judicial nominees to be more partisan. The table below depicts the average number of confirmation votes for

judges confirmed by the Senate during the presidencies of Obama, Trump, and Biden (as of July 29, 2022):[104]

Table 2: Average "Aye" Votes for Confirmed Judicial Appointments

	Obama	Trump	Biden
District	91	77	55
Circuit	86	60	53
Supreme	66	52	53

The most obvious trend in these numbers is increasing Senate hostility to presidential nominees. Under President Obama, the average nominee for any Article III court obtained a significant measure of support from the opposing party. Under Trump, near absolute partisanship reigned for Supreme Court nominees, circuit court nominees became substantially more partisan, and district court nominees could still muster about half of the opposing party in support. Under President Biden, total partisanship has reigned at all three levels. Circuit judges are viewed as just as partisan as Supreme Court judges, and district judges only a fraction less.

Blame matters less than recognizing the incentives at work here. The increasing Senate hostility could mean that the nominees themselves are actually more partisan, which would imply the president is at fault for his choices.[105] Increased Senate opposition, however, could also result from senators feeling an increased need to signal party loyalty by opposing more of the judicial nominees of a president from the opposing party.[106] It does not particularly matter which explanation

104. One procedural note: many judicial nominees in the Obama and Trump presidencies (and a few in the Biden administration) were confirmed by voice vote, meaning no senator objected to the confirmation. Whether failure to object to a voice vote constitutes an "aye" vote is debatable. In some cases, senators doubtless accept a voice vote even if they would vote no if pressed simply because they do not care enough to vote. I have nevertheless counted voice votes as 100 "aye" votes because failing to assign some high number would ignore the general acceptability of a nominee approved by voice vote, and there is no other number that is theoretically defensible.

105. *Cf.* Charlie Savage, *Poor Vetting Sinks Trump's Nominees for Federal Judge*, N.Y. TIMES, Dec. 18, 2017 (suggesting that President Trump's judicial appointees faced increase Senate hostility because of their quality rather than an increase in Senate partisanship).

106. *See, e.g.*, Alex Isenstadt, *Trump Vows to Campaign Against 'Disloyal' Murkowski*, POLITICO, Mar. 6, 2021 (chronicling public comments and polling by Trump against Murkowski after she expressed doubts about a judicial nominee).

is correct, or if they both are, because even if the president is not to blame, the president has little incentive to nominate a moderate candidate if such nominee will encounter roughly the same level of opposition. The best option for the president is thus to nominate a partisan in order to maximize advantage from the seat in question. Similarly, if the opposition will demand a cloture vote regardless of whether the nominee is partisan, then a president should rationally nominate a partisan to appeal to his own base and potentially generate judicial rulings more favorable to his party.

The ultimate conclusion from this data must be that perceived partisanship of judicial nominees is increasing over time. I use the phrase "perceived partisanship" because to term a judicial nominee "partisan" might seem unduly pejorative. There is no objective measure of a "good" judge. Lawyers might have in mind someone relatively apolitical, diligent in reading briefs, and attentive at arguments. But that person will have beliefs and experiences that are highly suggestive of how she would rule as a judge, and such predispositions explain both appointment by the president and the level of resistance among senators of the opposing party. Justice Amy Coney Barrett, for example, was active in a religious anti-abortion group.[107] This obviously suggested she would vote to overturn *Roe v. Wade*, which she later did.[108] Senators who wanted to preserve abortion rights filibustered her nomination, which meant her nomination required a cloture vote. The same scenario played out in the confirmations of President Trump's two other Supreme Court nominations.[109] In the current political context, I doubt it is really possible for a Supreme Court nominee *not* to be "partisan" in the sense of either being personally possessed of animating partisan feelings or of having been selected for reliability in voting a certain way in certain cases.[110]

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107. Adam Liptak, *Amy Coney Barrett, Trump's Supreme Court Pick, Signed Anti-Abortion Ad*, N.Y. TIMES, Oct. 1, 2020.

108. Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. at 1. (U.S. June 24, 2022).

109. U.S. Senate, Roll Call Vote 115th Cong.- 1st Session, (2017) https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00110.htm (Nomination PN55); U.S. Senate, Roll Call Vote 115th Cong.- 2nd Session (2018) https://www.senate.gov/legislative/LIS/roll_call_votes/vote1152/vote_115_2_00222.htm (Nomination PN2259).

110. Appointing relatively non-partisan justices was easier in the past when parties had less distinct ideologies. With less ideological homogeneity, the president's incentives on appointment revolved less around how the judge would rule on known issues and more on regional or personal politics.

B. Causes of Increasing Judicial Partisanship

The phenomenon of judicial partisanship is entirely predictable given one salient fact: the parties have become much more ideologically cohesive and polarized.[111] There are far fewer liberal Republicans and conservative Democrats than in previous decades.[112] Political polarization has measurably increased in recent decades, a phenomenon with many possible explanations beyond the scope of this discussion.[113] Polarization has made it more difficult to pass legislation, meaning that a larger share of national political undertakings is achieved through executive action or rulemaking.[114] The judiciary has become the most important way to check that sort of executive-driven action. Increased polarization has led parties to increasingly value the partisan potential of judicial appointments,[115] resulting in the increased measures of partisanship in the judiciary discussed above.

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111. We can objectively measure ideological cohesion, meaning that it is not essential for us to explain *why* ideological cohesion is increasing. *See, e.g.*, Drew DeSilver, *The Polarization in Today's Congress has Roots that Go Back Decades*, PEW RESEARCH CENTER, Mar. 10, 2022 (performing statistical analysis on partisan extremism within Congress over time). However, it is worth a brief aside to speculate on possible causes. I believe two factors explain the increase in ideological cohesion. First, the internet has lowered the cost of transmitting information, allowing for national Darwinian competition among sources of news and entertainment. Because people are ultimately motivated by similar factors—sex appeal, moral outrage, etc.—the winners of that Darwinian competition drive out more nuanced options across the country. Voters become increasingly homogeneous across geographic lines, so representatives from different parts of the country cluster together around roughly the same issues and vote together.

Second, the increasing wealth of the country allows more people to vote based on factors other than the naked politics of national spending. Note that many of the most defining issues of modern presidential contests are either completely divorced from finance (e.g., abortion, crime) or their financial aspect is largely outweighed by non-financial considerations (e.g., immigration, which is often viewed as a question of national identity or racism rather than the short- and long-term economic consequences.) This means it is more difficult to trade votes on national issues for local favors. Of course, that still happens—the famous "Cornhusker Kickback" allowed the passage of the Affordable Care Act in 2010. *See* Steve Jordon, *The Story of Nelson and the 'Cornhusker Kickback'*, AP, Jul. 22, 2017 (summarizing a rider in a draft of the ACA that resulted in the federal government covering Nebraska's share of costs). However, it is now exceedingly rare that the decisive vote on an issue of national importance can be obtained in that way.

112. *See* Lee Drutman, *Why Bipartisanship in the Senate is Dying*, FIVETHIRTYEIGHT, Sept. 27, 2021 (pointing to increased geographic separation as a cause of increased political volatility).

113. *See* Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER, Dec. 27, 2021 (describing a classical psychology experiment in which various explanations for polarization were tested).

114. For example, restrictions on immigration were a key part of the presidential campaigns of Donald Trump, but there was never any serious consideration of legislation to change the immigration system. Instead, the Trump administration issued many rules attempting to restrict legal and illegal immigration. The Obama administration similarly pursued its immigration and climate change agenda through rulemakings after it decided that legislative efforts would be unavailing.

115. *See, e.g.*, Press Release, Mitch McConnell, In Less Than Three Years, President Trump

The national polarization trend affects all three players in the judicial appointments process: the president, the Senate, and the judge.

1. The President's Incentives

With increased polarization, the president must manage a much narrower but more passionate base of support.[116] That base follows nominations intently and has clear desires for judicial nominees, namely that they have specific views on issues likely to come before the court.[117] There is little latitude for heterodox nominations. Given those circumstances, the game theory of nominations is clear. Nominating ideologues solidifies the president's hold on his base.[118] Nominating some heterodox brilliant scholar brings only risk of upsetting the base, and little prospect of enticing defections from the other party.

A more subtle factor is also at work here. With legislation at a low ebb, the appointment of partisan judges can become a relatively more important claim to significance. While it is impossible to truly know the mind of a president, legacy certainly seems to be the focus of many.[119] Certainly, the Trump administration and leading Republicans in the Senate spoke frequently and openly about the importance of creating a right-leaning judiciary.[120] Prominent commentators argued that putting up with Trump's unfitness for office was worth it *just* for the chance to influence the political makeup of the judiciary.[121]

Has Appointed and the Republican Senate Has Confirmed 50 Circuit Judges, More Than Any President's First Full Term Since 1980, (Dec. 11, 2019), https://www.republicanleader.senate.gov/newsroom/press-releases/50-circuit-judges (enthusiastically quoting various press publications' descriptions of the Republican Senate quickly filling the federal judiciary with young conservative judges).

116. *See* Daniel J. Galvin, *Party Domination and Base Mobilization: Donald Trump and Republican Party Building in a Polarized Era*, FORUM, Sept. 29, 2020 (describing President Trump's "base mobilization" focused strategy for elections).

117. *See* Brian Bennett & Tessa Berenson, *Trump Allies Weigh Which Supreme Court Pick Would Help Him Win The Election*, TIME, Sept. 23, 2020 ("'If Trump wants to fire up his base, they've definitely heard of Amy Barrett,' says a person familiar with the selection process [for nominating a replacement for Justice Ginsburg].").

118. *Id.*

119. Most recently, see Jonathan Martin & Maggie Haberman, *How Kristi Noem, Mt. Rushmore and Trump Fueled Speculation About Pence's Job*, N.Y. TIMES, Aug. 8, 2020 (describing President Trump's effort to get the governor of South Dakota to add him to Mt. Rushmore). While other presidents have been less transparent in their effort to shape the views of posterity, every recent president has written at least one memoir of his time in office.

120. *See, e.g.*, Burgess Everett & Elana Schor, *McConnell's Laser Focus on Transforming the Judiciary*, POLITICO, Oct. 17, 2018 (noting Senator Mitch McConnell's statement that federal judicial appointments "are the way you have the longest lasting impact on the country").

121. *See* Dan McLaughlin, *I Was 'Never Trump' in 2016. I'm Still a Conservative. Here's How I'm Voting*, NATIONAL REVIEW, Nov. 2, 2020 (describing the importance of voting for Trump because of judicial appointments).

Another presidential incentive that has changed in recent years is the ease of picking ideologically-motivated judicial nominees. For starters, presidents can outsource the task to ideological legal groups like the Federalist Society or the American Constitutional Society.[122] Those organizations, in turn, can find suitable candidates from among their members, people whose ideological proclivities have been known to members of those societies for decades. Moreover, thanks to the internet, the nominees themselves will likely have a discoverable paper trail going back to their high school or college days. The fact that finding partisan nominees is easier means there is less likelihood of embarrassment when a supposedly ideologically-aligned nominee turns out to be more of an asset for the opposition, *à la* David Souter.[123]

2. Incentives in the Senate

Increasing polarization makes the incentives facing individual senators crystal clear. Although the president is generally not likely to face a serious challenge in a primary election, senators do not have that luxury. If they deviate from party orthodoxy, they can and will lose their seats.[124] The relatively tiny percentage of true swing voters are the least informed and least likely to be motivated by a nomination vote.[125]

On a more personal level, polarization has incentivized the degradation of Senate norms, which inevitably means there is less comity between senators. There may be no reliable way to objectively measure such a thing, but it is difficult to recall senators who have received more public scorn from other senators than Ted Cruz, Josh Hawley, and Ron Johnson.[126] Less comity means less personal sense of

122. The Trump administration reportedly largely outsourced judicial nominee selection to the Federalist Society. *See* Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX, Sept. 29, 2020 (noting Donald Trump's statement before his election in 2016 that he would pick "great judges, conservative, all picked by the Federalist Society").

123. *See* Jeff Greenfield, *The Justice Who Built the Trump Court,* POLITICO MAGAZINE, July 9, 2018 (describing the present impact of Justice Souter's ideological shift from conservative to liberal).

124. The most recent Republican examples are Senators Jeff Flake and Bob Corker. No Democratic senator has been so obviously forced to retire to avoid a primary challenge, but it is not at all uncommon to see calls for primary challenges to sitting Democratic senators known for deviating from their party in key votes. Obvious examples include Senators Kyrsten Sinema and Joe Manchin.

125. *See* ASHLEY KIRZINGER ET AL., DATA NOTE: A LOOK AT SWING VOTERS LEADING UP TO THE 2020 ELECTION (Kaiser Family Foundation 2019) (describing polling results showing that swing voters in the then-upcoming 2020 presidential election expressed the most interest in issues other than judicial appointments).

126. *See, e.g.*, Tessa Stuart, *A Compendium of People Who Hate Ted Cruz's Guts*, ROLLING STONE, Apr. 29, 2016 (collecting statements from other politicians expressing dislike of Ted

duty to negotiate in good faith or vote for qualified nominees not belonging to one's party.

The political payoff to appointing partisan judges is arguably higher now than in the past because the relative importance of non-legislative forms of lawmaking has increased as legislation itself becomes increasingly difficult. Major campaigns do enough polling and turn out their bases so effectively that every presidential election is close.[127] As a result, it is exceedingly difficult to put together a legislative majority large enough to surpass the sixty-seat requirement to overcome a Senate filibuster. The biggest presidential election landslide of the twenty-first century was a 7-point win for Barack Obama in 2008, which produced a 60-seat Senate Democratic majority for about six months.[128] That supermajority did not even last long enough to pass the Affordable Care Act in its final form—the Democrats ultimately had to use the reconciliation process to make needed amendments, requiring only 50 votes.[129] Slim legislative majorities have meant navigating the constraining rules of reconciliation.[130] Though the parties are becoming more cohesive, they are not yet monolithic, and the defection of merely one or two senators is sufficient to doom efforts at reconciliation.

A partisan judicial nominee is one of the very few things that is now easier to get through the Senate. After Democrats temporarily reduced the votes required for cloture on non-Supreme Court judicial nominations in 2013, Republicans made the change permanent in 2017 and applied the change to Supreme Court nominees as well.[131] They also reduced the time required for post-cloture debate for district judge nominations, allowing Republicans in the Senate to confirm more of

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Cruz).

127. *See* Daniel J. Galvin, *Party Domination and Base Mobilization: Donald Trump and Republican Party Building in a Polarized Era*, FORUM, Sept. 29, 2020 (describing President Trump's "base mobilization" focused strategy for elections).

128. *See* Stuart Rothenberg, *Supermajority Within Reach for Senate Democrats*, ROLL CALL, Nov. 28, 2012 (describing the Democratic supermajority in the Senate from April 2009 to February 2010).

129. *See* Sheryl Stolberg, Jeff Zeleny & Carl Hulse, *Health Vote Caps a Journey Back From the Brink,* N.Y. TIMES, Mar. 20, 2010 (detailing Congressional maneuvering around the passage of the ACA).

130. *See generally* BILL HENIFF JR., CONG. RSCH. SERV., RL30862, The Budget Reconciliation Process: The Senate's "Byrd Rule" (2022) (describing the method by which budget reconciliation can be used to force legal changes that could not otherwise have been passed in a divided Congress).

131. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES, Apr. 6, 2017.

President Trump's district-level judicial nominees.[132] Senators also used to effectively veto nominations for judges from their states, an informal policy that only recently became routinely ignored by the party in power.[133]

3. Incentives for Judges

The incentives facing judges on the level of their own career trajectories tilt in favor of acting in a more partisan way. Partisan rulings have little downside for the judge who issues them. Federal judges appointed under Article III of the Constitution enjoy lifetime tenure, and have historically only faced impeachment for truly egregious instances of corruption, not partisan judicial rulings.[134] Cultivating a reputation for partisanship can build a judge's social standing within the networks he cares about.[135] By one account, 90 percent of President Trump's appellate court appointees were members of the Federalist Society.[136] Partisan rulings can credibly signal to presidents that the judge in question will be unlikely to rule in ways unhelpful to the president's party if promoted to a higher court. Now that a minority party in the Senate cannot filibuster federal judicial nominations, would-be nominees have little reason to worry about perceptions that they are too partisan.

C. Constitutional Hardball in the Judiciary

With the increasing partisanship of the judiciary established, we can examine how that partisanship has manifested itself. In 2004, Professor Mark Tushnet coined the term "constitutional hardball" to describe a

132. Sarah Binder, *The Republican Senate Went Nuclear Again to Speed Up Confirming Conservative Judges*, WASH. POST, Apr. 6, 2019.

133. While the precise power of one senator in the "blue slip" process has varied over time, the Senate has only very rarely approved a nominee without the support of both home-state senators before 2017. *See* Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS, (Dec. 30, 2013) (tracking the historical respect for blue-slips, as well as how the timeline for judicial nominees has become a point of contention); Press Release, Sen. Dianne Feinstein, Explaining the Senate's Blue Slip Process (Nov. 29, 2017) https://www.judiciary.senate.gov/press/dem/releases/explaining-the-senates-blue-slip-process (claiming that Republican senators showed a greater disregard for the blue-slip process than Democratic senators)..

134. *See, e.g.*, H.R REP. NO. 111-427, at 1–5 (2010) (describing outright financial corruption by Judge G. Thomas Porteous).

135. *See* David Montgomery, *Conquerors of the Courts*, WASH. POST, Jan. 2, 2019 (describing the attendance of four Supreme Court justices at the Federalist Society's annual convention).

136. Philip Allen Lacovara, *Still the Wrong Way to Pick Judges*, THE HILL, Sept. 18, 2022.

seemingly new situation where legislative and executive actions violate norms while remaining technically within the bounds of law.[137]

I note at the outset that "constitutional hardball" seems like a pejorative way of describing the violation of norms. One could also describe constitutional hardball as the abandoning of pretense in favor of principle. Any partisan advantage sacrificed on the altar of norms comes at the expense of one's party, at least in the short run. Consider that in early U.S. history, there was a norm in Congress not to discuss the immorality of slavery.[138] From the modern vantage point, a senator who upheld that norm was far worse morally than a senator who, say, acted in ways considered outlandish at the time to delay and stymie pro-slavery forces.

With that caveat stated, constitutional hardball comes with obvious dangers. To the extent violating norms increases the power of part of the government, it increases the stakes of elections, as well as the sense of outrage that can be whipped up among partisans, leading to an increase in attempts to seize power like the January 6th insurrection.[139] Norms can also mitigate flaws in a constitutional system, and once the norms are discarded, it might not be possible to fix the flaws in any ordinary way.[140]

In the judicial context, constitutional hardball means using every power at the judiciary's disposal to stymie the opposition's executive, legislative, and judicial initiatives. Obviously, nationwide injunctions are only one of many possible manifestations of judicial constitutional hardball. Not respecting *stare decisis* is another,[141] as is issuing a decision in a moot case.[142]

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137. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

138. Daniel Wirls, *The Only Mode of Avoiding Everlasting Debate*, 27 J. EARLY REPUBLIC 115, 118 (2007).

139. *See* Alan Feuer et. al, *Jan. 6: The Story So Far,* N.Y. TIMES (last accessed Jan. 21, 2023), https://www.nytimes.com/interactive/2022/us/politics/jan-6-timeline.html (collecting months of newspaper articles summarizing and analyzing the events of Jan. 6, 2021).

140. One could argue that the now seemingly automatic use of the filibuster has revealed a damaging flaw in the constitutional system that is now practically impossible to fix. When there was a norm against routine use of the filibuster, the filibuster's existence did not seem like such a glaring obstacle.

141. *See* Dobbs v. Jackson Women's Health Org., 597 U.S._,142 S. Ct. 2228, 2354. (2022) (Breyer, J., dissenting) (noting that this decision marks a dramatic departure from the then-prevailing *stare decisis* analysis).

142. *See* West Virginia v. Env't Protection Agency, 597 U.S._(2022), 142 S. Ct. 2587, 2607 (declining to dismiss a claim against the 2015 Clean Power Plan rule despite its never having gone into effect).

If nationwide preliminary injunctions in politically sensitive cases are part of constitutional hardball, we should be curious about why they have only recently proliferated.[143] A starting point must be examining the political era that began with the Trump presidency in 2017. Without assigning blame, it is clear the Trump presidency was marked by a total-war mentality where political actors used every power at their disposal to push their preferred policies, norms be damned.[144] Congress, the executive branch, and the courts were all pushing and being pushed to the legal limits of their powers. While partisans can quibble about whether the norm-breaking started in the Clinton presidency, the Bush presidency, or the Obama presidency, it seems clear that the Trump presidency saw a rapid increase in norm-breaking that has bled into the Biden administration.[145] Nationwide injunctions marked the spread of the total war mentality to the judiciary.

Just as it is difficult to assign original blame for constitutional hardball between the political parties, so too might we argue about when the judiciary started playing constitutional hardball. A Republican might say it began with the many Trump administration

143. To be clear, there may have been examples of nationwide preliminary injunctions as early as 1913, but it seems inarguable that the frequency of their use has increased. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020) (tracking the historical usage of preliminary injunctions by federal courts).

144. To name a few examples: use of emergency presidential authorities under non-emergency conditions, functional elimination of the filibuster for all executive branch nominations, trying to persuade the vice president to refuse to seat electors after the election, appointing circuit judges in their mid-thirties to maximize their time on the bench, and agency decisionmaking so egregiously pretextual that the Supreme Court had to create a new doctrine to address it. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (criticizing an agency justification for a policy as "more of a distraction" in "unusual circumstances").

145. While individual instances of norm-breaking can be more or less justifiable, it is fundamentally pointless to try to assign original blame for norm-breaking. For example, Republicans "nuked" the filibuster for circuit court nominees, meaning they used a bare majority to effectively rewrite the Senate rules to allow 50 votes to end a filibuster rather than 60 votes. Republicans justified this change in two ways: (1) Democratic opposition to Trump's presidential nominees was unprecedentedly strident and consistent, and (2) the Democrats had temporarily "nuked" the filibuster for judicial nominees during the Obama administration. Democrats in turn objected that Trump's nominees were unprecedentedly bad and partisan, and justified their temporary elimination of the filibuster on the grounds that Republican obstruction of Obama nominees was unprecedented. Republicans justified their obstruction in the Obama era on the grounds that the Democratic Congress had passed the Affordable Care Act through reconciliation, an unprecedented abuse of what was supposed to be a limited budgetary tool. Democrats claimed that Republicans acted in bad faith in refusing to negotiate on healthcare reform. Note that we have already gone back more than a decade in this narrative, and dedicated partisans could go back several more, citing real or supposed norm violations like the Clarence Thomas confirmation hearings and Iran Contra, all in an effort to deflect original blame for the current state of norm violations.

rules and executive actions frozen by nationwide injunctions.[146] A more philosophically inclined Republican might observe that substantive due process itself is to blame because the doctrine gave the judiciary much broader power to impose its own views on, say, the constitutionality of abortion.[147] A Democrat in turn can point to the activist conservative Supreme Court that disrupted decades or even centuries of constitutional understanding by finding an individual right to bear arms in the Second Amendment,[148] striking down campaign finance laws,[149] or, most recently, overturning *Roe v. Wade*.[150]

III. POLITICALLY-CHARGED CASES AND PRELIMINARY INJUNCTIONS

Now that we have examined the increasing politicization of the judiciary and the nature of preliminary injunctions, we can understand how the two concepts have recently mixed into a controversial brew. Preliminary injunctions are a way for the historically plodding judiciary to act at the speed of the executive branch. Politicization of the judiciary has provided an impetus for judges to hinder executive policy. The obvious tool available to a partisan judge to hinder executive policy is the preliminary injunction.

The most immediate benefit of preliminary injunctions in politically sensitive cases is their delay and disruption of the executive branch's plans.[151] Delay raises the possibility that one's own party can retake the White House and withdraw the executive action in question.[152] Disruption in some cases can lead to at least some watering down of

146. *See* Kimberly Strawbridge Robinson, *Justice Department Targets Nationwide Injunctions Trump Blasted*, BLOOMBERG LAW, Jun. 3, 2019 (chronicling efforts by the Trump Administration DOJ to minimize preliminary injunctions by targeting district judges and attempting to force the issue up to the Supreme Court).

147. For an example of that argument (by no means the only one), see generally Robert Bork, THE TEMPTING OF AMERICA 60 (1990) ("[*Skinner v. Oklahoma*] was the beginning of what came to be known as 'substantive equal protection,' an extraordinarily deceptive and therefore powerful means by which judges can embed their notions of public policy in the Constitution without appearing to do so." Bork uses the term 'substantive equal protection' to criticize what he sees as a conflation of the two doctrines.).

148. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

149. *See* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

150. *See, e.g.*, Jonathan Chait, *Democrats Must Reform the Supreme Court to Save It*, N.Y. MAG., Jun. 30, 2022 (proposing dramatic means to alter the structure of the Supreme Court, including court packing and term limits).

151. *See New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (holding that when a court enjoins a state from effectuating its statutes, the state suffers an irreparable injury).

152. *See e.g., infra*, notes 176–177 and accompanying text.

the executive action, as will be seen in the discussion below of President Trump's Muslim travel ban.

Viewed through the prism of political game theory, preliminary injunctions achieve worthwhile ends even if the judge in question thinks a stay of the injunction or overturning of his decision on appeal is the likeliest outcome. Issuing a preliminary injunction puts the onus of action on judges of the other party. The public at large hears only that a judge has declared a regulatory action illegal. Believing the judges' frequent protestations of their apolitical nature, some members of the public might decide that the action in question was improper, putting pressure on the other party to rescind the action. Imposing an injunction inflicts a cost on judges of the other party sitting on the circuit courts of appeal, or justices of the other party sitting on the Supreme Court. A 5-4 or 6-3 split along political lines overturning the injunction reinforces the political nature of the court.[153] The accumulated damage to the court's non-partisan reputation could spur public support for changing the judiciary or, equally appealingly to a partisan trial judge, encourage justices of the other party to temper their rulings in controversial cases.[154]

We can better understand how preliminary injunctions function in politically sensitive cases by examining a few recent cases. In so doing, we can better understand the costs and benefits of the current doctrine. We can also see where the current doctrine is manifestly failing in the sense that the decisions contain barely any analysis beyond whether the district judge believes the plaintiff will win the case.

The specific case studies below help illustrate these general points. In each, the judge is achieving specific policy wins for his side, regardless of the ultimate disposition of the case. Whether the injunctions in question are good for the country writ large requires a more holistic analysis, which this Article will undertake in Part IV.

A. Case Study 1: Trump's Muslim Travel Ban

The first examples are two preliminary injunctions relating to President Trump's Muslim travel ban. Trump campaigned in 2016 on a

153. Lydia Wheeler & Madison Alder, *Republicans Find Home Court for Biden Suits in Western Louisiana,* BLOOMBERG LAW, Dec. 20, 2022.

154. Conservatives frequently allege that liberals attempt to intimidate justices into softening their rulings. *See, e.g.*, Thomas Jipping, *Democrats Claim to Restore the Confidence in the Supreme Court That They Are Destroying*, NAT'L REV, Apr. 28, 2022 (mentioning outcry among Democrats at Justice Thomas and Ginni Thomas).

pledge to end all Muslim travel into the United States "until our representatives can figure out what's going on."[155] He referred to this pledge multiple times as the "Muslim travel ban."[156] On January 27, 2017, the eighth day of his presidency, Trump issued an executive order directing the Department of Homeland Security to ban entry into the United States by nationals of seven Muslim countries for 90 days.[157] That order applied equally to nationals of those countries who had been granted a U.S. visa or green card, resulting in hundreds of travelers being detained at airports.[158]

Over the next several days, federal district judges issued temporary restraining orders (TROs) delaying application of parts of the ban to particular classes of individuals. A TRO is essentially an emergency version of preliminary injunctions. The requirements for a TRO are similar to that of a preliminary injunction, stressing that immediate and irreparable damage will be inflicted on the plaintiff by the defendant's action.[159] For example, in the early morning hours of January 29, a district judge in Massachusetts issued a TRO prohibiting application of the ban to people who would otherwise be legally allowed to enter the United States (for example, visa holders, or permanent residents).[160]

1. Preliminary Injunction Against the Second Travel Ban

The Trump administration, unwilling to await litigation of these cases past the preliminary injunction stage, issued a new order on March 6.[161] The new order omitted one of the original countries (Iraq) and exempted people with visas or green cards.[162] Federal district judges again issued TROs, halting implementation of the order. A district judge in Maryland also issued a preliminary injunction against the second travel ban.[163]

155. David J. Bier, *A Dozen Times Trump Equated His Travel Ban With a Muslim Ban*, CATO (Aug. 14, 2017), https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban.

156. *Id.*

157. Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

158. Aaron Blake, *Trump's Travel Ban is Causing Chaos—and Putting His Unflinching Nationalism to the Test*, WASH. POST, Jan. 29, 2017.

159. Fed. R. Civ. P.. 65(b).

160. Tootkaboni v. Trump, No. 17-CV-10154, 2017 WL 386550, at *1 (D. Mass. Jan. 29, 2017).

161. Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order 13,780, 82 Fed. Reg. 13209, (Mar. 6, 2017).

162. *Id.*

163. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 566 (D. Md. 2017).

In the Maryland case, Judge Theodore Chuang held that the plaintiffs had a high likelihood of success on the merits on their Establishment Clause claim against the travel ban.[164] The court order included no discussion whatsoever of what evidence might be developed in a full trial, only a straightforward analysis explaining why Judge Chuang felt the second order violated the Establishment Clause.[165] As discussed earlier,[166] infringement of First Amendment interests necessarily implies irreparable damage, so Judge Chuang's holding regarding the Establishment Clause automatically implied irreparable damage.[167] The balance of the equities and public interest prongs were addressed in two paragraphs asserting the importance of the Establishment Clause and the lack of any national security interest in the case.[168] In short, all of the actual analysis came from the likelihood of success prong, and that prong amounted to an opinion on why the plaintiffs were correct.

2. Preliminary Injunction Against the Third Travel Ban

Notwithstanding the preliminary injunction, the second order expired following a "review" by the federal government.[169] The administration then issued a third version of the order, this time adding North Korea and Venezuela.[170]

Judge James Robart of the district of Washington issued a nationwide preliminary injunction on this version on statutory grounds rather than the Establishment Clause.[171] Judge Robart's analysis of likelihood of success also revolved solely around his own views of the statutory question at hand, not what the ultimate disposition of the case was likely to be.[172] He found, consistent with Sixth Circuit precedent, that "separation from family members" is an irreparable injury.[173] His opinion covered public interest and balancing of the equities in the

164. *Id.* at 564.

165. *See generally id.* (concluding that because the second order violated the Establishment Clause, the plaintiffs showed irreparable harm).

166. *See* discussion *infra* Part I.B.1 (asserting that courts generally regard the deprivation of constitutional rights as per se irreparable damage).

167. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 564 (D. Md. 2017).

168. *Id.* at 564–65.

169. Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public–Safety Threats, 82 Fed. Reg. 45161, 45172 (Sept. 27, 2017) (to be codified at 82 C.F.R. pts. 45161).

170. *Id.*

171. Doe v. Trump, 288 F. Supp. 3d 1045, 1062–63 (W.D. Wash. 2017).

172. *Id.* at 1076–77.

173. *Id.* at 1082.

same analysis, finding that the government's national security concerns were spurious, and that there was a compelling interest in "uniting families and supporting humanitarian efforts in refugee resettlement."[174]

The Supreme Court ultimately stayed the preliminary injunction in *Trump v. Hawaii* in June 2018.[175] The third order was augmented by a fourth order, and both remained in effect until the end of Trump's presidency.[176] Staying the injunctions did not actually end the cases, however, and litigation continued in cases around the country. The whole matter was only substantively concluded by President Biden taking office and ending the ban through executive action.[177]

3. Were the Preliminary Injunctions Justified?

It is not easy to assess whether the current standard for preliminary injunctions "worked" in this instance. From a constitutional hardball view, the preliminary injunctions achieved some substantive successes. Actual implementation of the Muslim ban was delayed from January 27, 2017 to the Supreme Court's decision on June 26, 2018. The Trump administration also had to alter the substance of the ban several times. Some of those changes seemed obviously pretextual, like adding North Korea and Venezuela to reduce the perception that the ban was targeting Muslims. But other changes, like creating clear exemptions for legal permanent U.S. residents, obviously reduced the confusion and harm of the bans.

From a strictly utilitarian perspective, the injunctions' net effect is unclear. Certainly, the injunctions allowed some people to travel from the countries in question to the United States between January 27, 2017 and June 26, 2018 who would not have been able to otherwise. The addition of Venezuela to the no travel list, seemingly the result of the administration's obvious efforts to evade the injunctions, added to the net harm of the bans. Of course, the injunctions also led to substantive improvements that reduced the harm of the orders, as discussed above.

When considering the injunctions as a way to efficiently allocate resources during a trial, they were a waste. Recall that the purpose of an injunction is to prevent damage to the plaintiff while litigation is

174. *Id.* at 1084.
175. 138 S. Ct. 2392 (2018).
176. *See* Exec. Order No. 13815, 82 Fed. Reg. 50055 (Oct. 24, 2017).
177. Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021).

ongoing in a case the plaintiff is likely to win.[178] The Supreme Court ultimately stayed the injunctions, so the United States suffered the delayed implementation of the bans.[179] The damages of plaintiffs who could not travel to the United States were ultimately not cognizable, and therefore irrelevant to the economic logic of injunctions.

From a narrowly literal legal perspective, we do not know whether the district courts were right or wrong because they never reached a final judgment on the merits, and, as far as my research indicates, no appellate court ever ruled on a final judgment in any of the suits against the travel bans. The courts were wrong in the sense that the Supreme Court disagreed with them about the likelihood of success on the merits. It should be noted, of course, that none of the district courts actually *estimated* the likelihood of success on the merits. They merely explained their view of whether the plaintiff's rights had been violated. Observers understood that resolution of the preliminary injunction question really resolved whether the ban would happen, and in that sense, the Supreme Court ruling might as well have been a final judgment.[180]

While the policy reckoning of whether the injunctions "worked" remains obscure, it is easier to see that the likelihood of success on the merits prong served little practical function. The judges treated the prong as asking what they thought the outcome *should* be rather than what it likely *would* be with full evidence.

Finally, we should note that the other three prongs of the preliminary injunction analysis were essentially useless in the context of this politically sensitive issue. The irreparability of harm was assumed, and the actual factual circumstances of the plaintiffs barely influenced the analysis.

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178. *See supra* note 14 and accompanying text. Among other things, preliminary injunctions require a showing that the plaintiff is likely to win on the merits and will suffer irreparable harm absent the injunction. *Id.*

179. Of course, this harm suffered by the United States was entirely abstract. None of the people able to travel because of the injunctions ultimately committed a terrorist act, the prevention of which was the ostensible purpose of the ban. If we look to the seemingly obvious actual purpose of the bans, the prevention of Muslims from entering the United States, then the injunctions undermined that objective for a period of time. People opposed to Muslim immigration could be said to have "suffered" from that undermining, but such harms are not cognizable. The very notion of frustrated discrimination as a "harm" is, frankly, reprehensible.

180. *See, e.g.*, Brent Kendall & Jess Bravin, *Supreme Court Upholds Trump Travel Ban*, WALL ST. J. (Jun. 26, 2018) (describing the outcome as the Supreme Court "affirm[ing] President Donald Trump's power to block citizens of several Muslim-majority nations from entering the U.S.").

The courts examined the balancing of equities and consideration of the public interest even less than the irreparability prong. One would imagine a court ruling on a quintessential equity question to be the ideal venue for candid and thoughtful consideration of those factors, but both judges cited conclusory precedent to avoid any detailed analysis. Perhaps the judges, conscious of the political sensitivity of the controversy, felt they should hew closer to law than equity in order to increase the likelihood of being upheld on appeal. After all, a Republican appointee's view of equity and public interest is likely to differ tremendously from that of a Democratic appointee. The Supreme Court did not reach the balance of equities or public interest questions because it found there was low likelihood of success on the merits.

B. Case Study 2: Biden Pause on Oil and Gas Leases

The previous example came at the beginning of the explosion of nationwide preliminary injunctions during the Trump administration. This next example concerns the Biden presidency, and shows that Republican-appointed judges do not hesitate to employ nationwide preliminary injunctions when a Democrat occupies the White House.

Four years to the day after President Trump issued the first version of his Muslim travel ban, President Biden issued an executive order directing the Secretary of the Interior to "pause new oil and natural gas leases on public lands or in offshore waters" pending a review of "climate and other impacts" associated with oil and gas development in those areas.[181] Several Republican-leaning states immediately sued, alleging that the federal government is statutorily mandated to continue selling leases.[182]

1. Likelihood of Success on the Merits

Judge Terry Doughty of the U.S. District Court for the Western District of Louisiana issued a preliminary injunction requiring the Interior Department to continue issuing oil and gas leases.[183] Judge Doughty's analysis of the likelihood of success on the merits confined itself to his view of the substantive legal question, declaring that the

181. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

182. As this Article is less concerned with the substance of the case than the justification of the preliminary injunction, I omit detailed discussion of whether the court accurately described the relevant claims.

183. Louisiana v. Biden, 543 F. Supp. 3d 388, 395 (W.D. La. 2021).

pause had violated several provisions of the Administrative Procedure Act.[184]

We can see here that the likelihood of success prong is inherently lacking in authority despite its relative prominence. In this case and many other challenges to agency action (including the travel ban cases), there is an allegation that the relevant agency is acting on pretextual grounds. Here, the plaintiffs suspected that the Biden administration is calling the suspension of oil and gas leases a "pause" pretextually, with the true objective of curtailing oil and gas production in the long run to fight climate change.[185] The Biden administration claimed that the pause was just that, a temporary pause to evaluate the effect of the leases on climate change.[186] To a non-political, non-legal, practical observer, whether the allegation of pretext is true is the only relevant issue in deciding who is in the right. A preliminary injunction motion inherently comes before any discovery can be had that would change initial impressions about the pretext issue,[187] so a judge considering the likelihood of success prong must decide this central question with only the evidence known without discovery.

2. Irreparable Damage

The court found irreparable damage in the fact that the plaintiff states claimed they would suffer the downstream economic consequences of fewer oil and gas leases. These consequences include reduced royalties, loss of jobs in the oil and gas industries, and higher gas prices.[188] The plaintiffs argued that they could not recover monetary damages later because of sovereign immunity, which generally precludes monetary recovery in cases against the federal government unless explicitly authorized by Congress.[189]

Whether this sort of damage should qualify as irreparable is debatable, but the Republican-appointed judge did not appear to

184. *Id.* 413-417.

185. *See id.* at 407 (presenting Plaintiff's argument that "the Pause itself is a final agency action, as is each cancellation and postponement").

186. *See id.* at 406 (explaining that the Government claimed that the pause was not final agency action).

187. *See* Susan Guerette, *Five Tips for Requesting Expedited Discovery When Moving for an Injunction*, AMERICAN BAR ASSOCIATION (Dec. 23, 2019), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2019/five-tips-requesting-expedited-discovery/ (suggesting that in the event of a preliminary injunction it is best practice to move for expedited early discovery).

188. Louisiana v. Biden, 543 F. Supp. 3d 388, 417 (W.D. La. 2021).

189. *Id.* at 417–18.

consider the matter carefully, spending just three paragraphs on the issue. [190] The irreparable damage analysis hinges on the fact that the plaintiff states would be barred from collecting monetary damages from the federal government by sovereign immunity.[191] Thus, even if the states win their suit on the merits, they cannot collect the funds that they would have accrued while the pause was ongoing. But that does not in and of itself mean their damages are irreparable. Instead, it means Congress has chosen not to recognize their entirely reparable damages. Indeed, the historical solution to sovereign immunity was for Congress to grant funds to the aggrieved party.[192] We are left with an ambiguity: whether "irreparable damage" means literally damage incapable of compensation or also damage requiring additional legal action to compensate.

3. Balance of Equities and the Public's Interest

The court's discussion of the balance of the equities and the public's interest was so cursory as to be obtuse. As in the travel ban cases, the judge here did not separate the two factors, merely noting, "These two factors overlap considerably."[193] Judge Doughty observed that "[b]oth sides argue equity and public interest favor their side," as if there had ever been a preliminary injunction motion where one side conceded that the world writ large would be better off if it lost.[194] The analysis did not mention anything about climate change, an essential element to understand when weighing the equities of the pause. Ultimately, the judge identified two equities: (1) the money that the states in question would, at least temporarily, not receive from the leases absent an injunction, and (2) that "the public interest is served when the law is followed."[195]

4. Was the Preliminary Injunction Justified?

Despite the infirmities evident in the court's application of the preliminary injunction test, one might ask whether the outcome was still warranted. The Biden administration appealed the ruling, and the

190. *See id*. at 417.
191. *Id.*
192. *See* Kevin Lewis, CONG. RSCH. SERV., R45732, The Federal Tort Claims Act (FTCA):A Legal Overview (2019) (describing how tort victims historically could only obtain compensation from the federal government by persuading Congress to pass a private bill awarding them money).
193. *Louisiana*, 543 F. Supp. 3d at 418.
194. *Id.*
195. *Id.*

circuit court stayed the injunction on the grounds that the district court was insufficiently specific about what it had preliminarily enjoined.[196] From a utilitarian perspective, the actual outcome of this case has been somewhat overtaken by events. The Biden administration has started issuing more oil and gas leases in the wake of the Russian invasion of Ukraine, presumably mitigating whatever economic effects would have been suffered by the plaintiff states because of the leasing pause.[197]

Whatever the utilitarian analysis, this case underscores the general lack of judicial engagement with the weakness of the irreparable damage, balance of equities, and public interest prongs. The likelihood of success on the merits analysis took up 2,253 words.[198] The other three prongs occupied a mere 755.[199]

IV. ASSESSING THE PROBLEM AND PROPOSED SOLUTIONS

This Article has established that federal judges have been using preliminary injunctions in politically sensitive cases while arguably misusing the four-factor test. The question now is whether that is actually a problem and if so, what should be done to remedy it. First, this Part will consider the evidence on whether this trend is even a problem in the first place. Concluding that it is, we must determine realistic goals for reform and solutions that at least make progress toward those goals. Finally, this Part will consider the current debate over nationwide injunctions generally and assess proposed reforms.

A. Is There Truly a Problem with Nationwide Preliminary Injunctions?

There is a widespread assumption, particularly in the legal world, that something unprecedented must be bad.[200] It is difficult to talk about nationwide preliminary injunctions without using loaded

196. *See generally* State of Louisiana v. Biden, 45 F.4th 841 (5th Cir. 2022).

197. *See* Nicholas Kusnetz, *Biden Plan Could Allow New Offshore Drilling in Gulf of Mexico*, TEXAS TRIBUNE (Jul. 2, 2022), https://www.texastribune.org/2022/07/02/biden-gulf-drilling-leasing-oil/ (explaining the impact of both the pandemic lockdown and the Russian invasion of Ukraine on energy prices).

198. *See Louisiana*, 543 F. Supp. 3d at 413–17 (analyzing the "Likelihood of Success on the Merits" in 2,253 words)

199. *See id.* at 417–18 (analyzing "Irreparable Injury" and "The Balance of Equities and the Public's Interest" in only 755 words).

200. *See* Matthew Tokson, *Judicial Resistance and Legal Change,* 82 U.CHI. L. REV. 901, 903 (2015) (positing that judges can "develop biases in favor of laws that they have repeatedly applied and justified in the past" and "may develop preferences for familiar doctrines and an aversion to any departure from a long-standing status quo").

language (for example, terms like "partisan"). But fully understanding the actual costs and benefits of the current system are a necessary step in determining what, if anything, should be done.

1. Is the Rise of Nationwide Preliminary Injunctions Temporary?

Professor Amanda Frost is among the foremost defenders of the recent trend of nationwide injunctions, noting, "The need for such injunctions is particularly great in an era when major policy choices are increasingly made through unilateral executive action affecting millions."[201] This is, perhaps, polite phrasing. Some scholars clearly believe that the surge in nationwide preliminary injunctions was a temporary, healthy reaction to the Trump administration,[202] which seemed to be playing constitutional hardball everywhere from declaring national emergencies to undermining the presidential election itself. In this view, the judiciary pulled the emergency alarm and, now that the emergency is over, things can go back to normal. If that view is accurate, then there may be no reason to make any changes.

Although there are certainly arguments that the Trump administration caused a rise in nationwide injunctions through its ambitious use of executive power, it is difficult to see how or why nationwide injunctions will now decrease. The clear dynamic, seen in the endless cascade of norm violations in Congress over the past twenty years, is that one side uses perceived norm violations to justify not only reciprocation of the original norm violation, but new violations.[203] This dynamic is evident in the judiciary, where Republican judges and justices have missed few opportunities to enjoin Biden administration rules.[204] Although there are certainly partisans who disagree, the broad

201. Frost, *supra* note 8, at 1069.

202. *See e.g.* Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 53 (2017) (arguing that preliminary injunctions are justified "when a nationwide policy threatens many people with the same harm," as in the case of the Trump travel ban).

203. See discussion of which party started breaking norms in Congress, *supra* footnote 145 (discussing a reduction in time required for post-cloture debate, which allowed Senate Republicans to confirm more district judges).

204. For a partial list, see Mark Joseph Stern, *Conservative Judges Keep Doing This Thing They Say They Hate*, SLATE (Jun. 16, 2021). Since publication of that article, judges have also, to name just a few instances, preliminarily enjoined the Biden administration's update of a social cost of carbon estimate, Nichola Groom, *U.S. Judge Blocks Biden Measure for Calculating Climate Risks*, REUTERS (Feb. 11, 2022); its ending of Title 42 expulsion of foreign nationals at the border, Rafael Bernal and Harper Neidig, *Judge Blocks Biden from Rolling Back Title 42*, THE HILL (May 20, 2022); and LGBTQ protections, James Satterfield, *Tennessee Federal Judge Blocks Biden Administration LGBTQ protections*, TENNESSEE LOOKOUT (Jul. 17, 2022).

consensus reflected in polling is that the Biden administration is not particularly extreme or unusual in the way the Trump administration was.[205] The natural conclusion is that the constitutional hardball adopted by the judiciary in the Trump administration is here to stay, regardless of the party holding the executive branch.

2. What Problems Arise from Nationwide Preliminary Injunctions in Politically Sensitive Cases?

The problems identified by legal scholars with nationwide injunctions generally apply to nationwide preliminary injunctions as well. Even if we assume that the Trump administration was particularly prone to unconstitutionality, the power to impose nationwide preliminary injunctions renders the policy of the entire country vulnerable to the most partisan district court judge, virtually ensuring that any major rule or executive action will face delay.[206] Professor Samuel Bray, perhaps the most prominent academic critic of nationwide injunctions, observed that plaintiffs can thus "shop 'til the statute drops."[207] The strength of this point is somewhat undermined by the fact that plaintiffs can already choose their forum when they decide where to file suit.[208] It is also true, however, that preliminary injunctions allow multiple tries in relatively short succession, something more difficult when a party must wait for final judgment on the merits.

Preliminary injunctions also inherently increase the Supreme Court's "shadow docket," where major legal issues are effectively resolved by short decisions about whether to stay a district court injunction.[209] Such decisions often come with either a short,

205. *See Joe Biden honesty*, YouGovAmerica, https://today.yougov.com/topics/politics/trackers/joe-biden-honesty; *Donald Trump honesty*, YouGovAmerica, https://today.yougov.com/topics/politics/trackers/donald-trump-honest (last visited Feb. 1, 2023) (displaying polling results dating back several years for the same question regarding both presidents, "Do you think [Trump or Biden] is honest and trustworthy, or not?").

206. *See* Attorney General William P. Barr, Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019) (transcript available at https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide) ("No official in the United States government can exercise that kind of nationwide power, with the sole exception of the President.").

207. *The Role and Impact of Nationwide Injunctions by District Courts: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 115th Cong. 6 (2017) (statement of Professor Samuel L. Bray).

208. *See* Frost, *supra* note 8, at 1069 (asserting that forum shopping exists outside of nationwide injunctions. Moreover, Frost suggests that litigants are reasonable in searching for favorable judges and many would consider this forum shopping "a feature of the American judicial system.").

209. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L.

unsatisfying explanation or no explanation whatsoever.[210] The extent to which shadow docket decisions create controlling precedent is hotly debated.[211] Perhaps the single most important function of the Supreme Court is to resolve circuit court splits through controlling precedent, so the uncertain status of shadow docket rulings is very concerning indeed.

Deciding contentious issues through preliminary injunctions also removes one of the most important functions of trials: establishing facts. As discussed in the Muslim travel ban case above, key factual questions are left unanswered if the parties cannot engage in discovery. In that case, as in most challenges to executive actions, the true motive of the agency or executive in question is of supreme relevance in establishing legality. That motive would be far better established with months of discovery. Instead, judges (and justices) must make weak arguments about motives that appear transparently political.[212]

Perhaps most importantly, and least explicitly discussed by critics of nationwide injunctions, constitutional hardball begets constitutional hardball. Nationwide preliminary injunctions have succeeded in delaying policies that parties out of power find reprehensible, whether the Muslim travel ban or President Biden's pause of oil and gas leases.[213] Stymying the political power of the executive branch, however, threatens the overall stability of the federal system. This is a darker version of the familiar argument about the importance of honoring the democratic will. Unelected judges effectively repealing the actions of the elected president does not *just* offend abstract, highfalutin principles of democracy. At some point, completely

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REV. 123, 153–55 (2019) (discussing the impact of nationwide injunctions on the shadow docket debate).

210. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (providing a brief opinion on why a failure to grant an injunction was erroneous).

211. *See* Judge Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effect of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/ (pondering the potential impact of shadow dockets on lower courts. Despite case law and academic literature on the issue, there is very little agreement on how to weigh the precedential force of shadow docket decisions).

212. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018) (implying that President Trump's statements about wanting a Muslim ban were not relevant and then concluding that, "[i]t cannot be said that it is impossible to discern a relationship to legitimate state interests or that the policy is inexplicable by anything but animus.") (internal citations omitted).

213. *See* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEORGE MASON L. REV. 29, 30 (2019) (discussing the role of nationwide injunctions to "stop, alter, or condition" government policies).

unknowable in advance, citizens stop tolerating their government's lack of responsiveness to their concerns. That tendency manifests in a variety of ways—all bad. People who do not believe their government is responsive to their needs could refuse to defend it, as happened recently in Afghanistan.[214] More extreme citizens turn to violence, whether organized rebellion or lone-wolf acts of assassination. The fact that it is impossible to know when people reach this point of dissatisfaction means that every injunction against a president's rule could do permanent damage.

Decreasing faith in the impartiality of the judiciary also comes with a corresponding increase in the importance of national elections. Republicans frequently argued that conservatives had to vote for Trump regardless of any other policy or personal flaw simply because any Republican would appoint conservative judges.[215] Extremists use that sense of importance to justify flatly illegal actions like the January 6th insurrection—anything to put their preferred candidate into a position to appoint judges.

3. Are There Countervailing Benefits?

As should be evident from the discussion of constitutional hardball, one can also argue that nationwide preliminary injunctions, especially in politically sensitive cases, might have a salutary effect. Many are familiar with the cliché description of the Senate as the saucer that cools the intemperate heat of the House of Representatives.[216] Perhaps the judiciary is evolving into the saucer that cools executive actions, a sort of Senate to the president's House.

Nationwide injunctions are sometimes necessary to provide complete relief. Professor Frost provides the example of a school desegregation case, where allowing just one plaintiff of color to enter a segregated school would not alleviate the plaintiff's injury.[217] In the

214. *See* Tom Bowman & Monika Evstatieva, *The Afghan Army Collapsed in Days. Here Are the Reasons Why*, NPR (Aug. 20, 2021), https://www.npr.org/2021/08/20/1029451594/the-afghan-army-collapsed-in-days-here-are-the-reasons-why (explaining how a lack of faith in their government led to the collapse of the Afghan National Army).

215. *See, e.g.*, John Gaski, *Why 'Never Trump' Republicans Will Doom Our Nation*, DES MOINES REGISTER, Oct. 27, 2016, https://www.desmoinesregister.com/story/opinion/columnists/2016/10/27/why-never-trump-republicans-doom-our-nation/92847594/ (expressing concern that, if elected, Hillary Clinton will appoint sufficient justices to "establish liberal dominance").

216. The general concept is often attributed to George Washington. United States Senate, *Senate Created*, https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm.

217. Frost, *supra* note 8, at 1090–91.

Muslim travel ban case, among the claims of harm from the state of Hawaii was the contention that preventing foreign students and faculty from traveling to the University of Hawaii would weaken the school.[218] More broadly, any time a plaintiff's claims of irreparable harm stem from the effect of an action on other people, she will need some broad form of relief applying to those people in order to obtain complete relief.

This Article has already discussed the constitutional hardball argument for nationwide preliminary injunctions. Even Professor Bray, the famous opponent of such injunctions, notes that agencies can and have used the slow speed of courts to effectuate policy ends through illegal orders.[219] His solution to that problem is legislative—Congress could enact a requirement delaying regulations long enough for challenges to be brought.[220] That is theoretically true, but until such legislation is signed into law, courts will need the power to impose preliminary injunctions to deter that kind of agency behavior. Practically speaking, there is almost no chance of such legislation being signed into law because the party with the president in the White House will not want to delay its regulations. The longer the delay, the more likely the other party will take the presidency back and withdraw the proposed regulation.

4. The Balance of Costs and Benefits

We should note that as a policy matter, the importance of the constitutional hardball pros and cons depends entirely on context. If presidents are generally not stretching their legal authorities to implement rules and executive orders, then the ability of district courts to impose nationwide injunctions will mostly result in weakening the public's faith in the judicial system. If presidents are stretching their legal authorities, then people will likely not be as offended by judicial

218. *See* Hawaii v. Trump, 859 F.3d 741, 764-65 (9th Cir. 2017) (describing the alleged injury that the state of Hawaii would sustain because of the travel ban. The state of Hawaii argued that students and faculty would be unable to attend the University of Hawaii and would, therefore, be unable to "pay tuition or contribute to a diverse student body.").

219. *See* Bray, *supra* note 9, at 477–78 (suggesting that agencies sometimes do not mind losing individual cases because the litigated policy becomes "irreversible"). He then notes that Congress could also simply "push agencies toward making policy not primarily through rules but through adjudications, in accord with what seems to have been the design of the Administrative Procedure Act." Any solution predicated on a congressionally-led complete reworking of how agencies have functioned for roughly 75 years is, to put it mildly, unlikely.

220. *Id.*

attempts to restrain executive power, and the benefit to the country writ large is greater.

Synthesizing the various arguments above, nationwide preliminary injunctions are necessary to contain executive overreach, but without more intelligible limiting factors, they will likely cause more harm than good in the long run. What is needed then is a way to make them less partisan and probably less frequent without completely confiscating them from the district courts' arsenal. We should be seeking the *potential* for faster resolution of cases to deter executive constitutional hardball without that deterrent actually being used in every case. We can get that by creating a preliminary injunction standard that is clearer and less prone to abuse.

B. The Implausibility of Legislative Solutions

Three key conditions drive the growth in nationwide preliminary injunctions: (1) federal rulemaking is the primary avenue for policy progress for both parties; (2) most district court judges are appointed in a partisan manner; and (3) the current doctrine around preliminary injunctions allows for frequent use without due consideration of the relevant factors. This Article has focused on changing condition (3), but we should discuss why changing conditions (1) and (2) would require implausibly far-reaching changes to remedy.

1. Legislation Remains More Difficult Than Rulemaking

What would it take for legislation to regain its primacy of place over executive rulemaking in setting national policy? The logical answer is that it would have to be easier to pass legislation than to issue a rule.[221] Right now, issuing a major rule that survives judicial review is fairly difficult for Democrats, and somewhat less difficult for Republicans because of the Republican-appointee majority on the Supreme Court. The conservative justices of the Supreme Court have also created the "major questions" doctrine, whereby the executive agencies cannot issue rules on major policy questions unless Congress explicitly and specifically grants them authority instead of granting the authority broadly.[222] This will doubtlessly make rulemaking on major issues more

221. *See* discussion *infra* note 223.

222. *See* West Virginia v. EPA, 142 S.Ct. 2587, 2609–16 (2022) (invoking the major questions doctrine. Under the doctrine, administrative agencies must present "clear congressional authorization" to claim authority over policy questions of "economic and political significance").

difficult generally, but probably more so for Democrats than Republicans.[223]

Major legislation that would address a problem of national importance is even more difficult, however, and will likely remain so. The obvious reason for that is the filibuster in the Senate. The slightly less obvious reason is the efficiency of political parties and the extent of polarization. Neither party is likely to have a filibuster-proof majority because both parties are skilled at rallying their base and attracting swing voters who are annoyed by whoever is currently in office.[224] One party could attempt to use budget reconciliation to amend preliminary injunction practices with a bare majority of the Senate. The Byrd Rule, however, prohibits inclusion of policy measures unrelated to revenue in a reconciliation bill, making it at best highly uncertain what kind of reform measures could be passed.[225]

2. Removing Partisanship from the Courts

The more powerful and central the courts have become to politics, the less likely it is that the two parties would agree to fundamentally restructure them. Many, perhaps most, current district and circuit court judges were partisan appointments, and unless they are to be impeached under some de-partisanization plan, they will continue to serve their partisan role for decades to come.[226] Democrats, currently losing the judicial politics game because of a 6-3 deficit on the Supreme Court, frequently discuss restructuring the Supreme Court. That initiative, however, is widely understood to be a non-viable strategy. Once one party does so in a way that reduces partisan advantage, the other party will restore the advantage once it is in power.[227] The fact

223. For example, President Trump's "Muslim travel ban" was based on a vague statutory grant of power, but evidently banning travel for Muslims was not a sufficiently major question for the doctrine to apply. This selective application of the doctrine suggests that meeting the requirements of the major questions doctrine will be less difficult for Republican administrations, at least until the composition of the Supreme Court changes.

224. Niall McCarthy, *Historically, The President's Party Performs Poorly In The Midterms [Infographic]*, Forbes (Oct. 9, 2018), https://www.forbes.com/sites/niallmccarthy/2018/10/09/historically-the-presidents-party-performs-poorly-in-the-midterms-infographic/?sh=51aced616732 (illustrating that the president's party generally performs poorly during the midterm elections. In particular, since 1946, the president's party lost an average of 25 seats during midterm election).

225. Bill Heniff Jr., CONG. RSCH. SERV., RL30862, The Budget Reconciliation Process: The Senate's "Byrd Rule" (2022).

226. I reiterate that these judges are not illegitimate because they are partisan, or that they do not independently merit appointment. Rather, the presidents who appointed them did so to ensure partisan views were represented in rulings.

227. For an articulation of the potential political pitfalls of court-packing, see Rich Lowry,

that the filibuster would likely have to be suspended or eliminated in order to change the Supreme Court would make it even easier for the other party to make its own changes.

In theory, the Republican Party could unilaterally announce it would no longer appoint partisan nominees to lower courts, secure in the knowledge that its 6-3 majority on the Supreme Court means it would still occupy the high ground on the legal battlefield. Though perhaps strategically savvy, that plan would not be in the interests of any current legislator, who could be defeated in a primary for failing to push for maximum partisan advantage. It also seems implausible, in the wake of the Supreme Court overturning of *Roe*, to expect Democrats to unilaterally embrace less-partisan nominees.

C. Plausible Doctrinal Improvements

The doctrinal weaknesses evident in recent judicial rulings on nationwide preliminary injunctions suggest that we have not exhausted avenues for incremental, marginal improvements to the preliminary injunction standard. Those improvements could be dictated by the Supreme Court rather than being dependent on unlikely congressional intervention. Best of all, partisans would not have a particular reason to oppose any of the adjustments described below because partisans can still argue that disfavored policies violate the reformed factors. If partisan judges do abuse the reformed factors, however, they will have to do so through more obviously partisan and objectionable means than simply overemphasizing the likelihood of success on the merit standard. The reputational harm to judges from displaying open partisanship might reduce their incentive to issue partisan nationwide preliminary injunctions in marginal cases.

1. Pruning Rhetoric from the Irreparable Damage Prong

As the case studies make clear, modern courts in politically sensitive cases have essentially reinterpreted "irreparable" to simply mean "significant." In the travel ban cases, violation of either the Constitution or temporary separation of families were considered irreparable without any further consideration of the plaintiffs'

No, the Democrats Won't Pack the Court, POLITICO, (Sep. 23, 2020), https://www.politico.com/news/magazine/2020/09/23/court-packing-is-a-fantasy-420828 (anticipating prior to the 2020 election that the future President Biden would not waste political capital on court-packing and stating that "of course, when Republicans hold the presidency and Congress again, they'd add their own seats or subtract the Democratic ones").

circumstances.[228] In the oil and gas leases case, the temporary absence of lease royalties combined with sovereign immunity constituted irreparable damage.[229]

The simplest solution to this problem is requiring a factual determination of irreparability, not a legally assumed determination. Another variant of this idea is to require judges to find that the overwhelming majority of litigants to whom a nationwide injunction would apply would have a similar likelihood of success. Practically speaking, that would mean making a factual inquiry into the harm claimed by the plaintiffs, as well as a consideration of their representativeness of non-parties. This would have the added benefit of ameliorating one of the biggest objections to nationwide injunctions based on legal principle—the view that courts fundamentally do not and should not bind nonparties except through class-based suits.[230]

This change would not mean that constitutional claims could not satisfy the irreparable damage prong. It would merely reestablish the need to make an equitable, factual determination regarding irreparability instead of a technical, legal one.

2. Honest Accounting of Governmental Interests in the Balance of Equities

The balance of the equities prong serves a clear purpose in litigation between private parties. There is no point in putting a preliminary injunction in place to protect the irreparable damage done to the plaintiff if the injunction will do even more damage to the defendant. Although such an injunction might still be justified on utilitarian grounds if the plaintiff were certain to win, mere likelihood

228. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 564 (D. Md. 2017); Doe v. Trump, 288 F. Supp. 3d 1045, 1082 (W.D. Wash. 2017).

229. Louisiana v. Biden, 543 F. Supp. 3d 388, 417–18 (W.D. La. 2021).

230. *See* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 69–72 (2019) (asserting that injunctions impose "different and more daunting constraints" and therefore should not bind nonparties unless used as a class action remedy). The judicial discomfort with binding non-parties outside the class context is articulated in *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940), a case involving the litigation of a racially restrictive housing covenant and a Black homebuyer who was absent from previous class action litigation on the issue. Today, the legality of pursuing a claim on a class-wide basis in federal court is constrained by certain safeguards to protect the rights of non-parties. These safeguards require 1) sufficient numerosity of the class members, 2) commonality of the questions in the litigation to all class members, 3) typicality of the representative parties' claims to that of the class members, and 4) adequate representation by the named parties. *See* Fed. R. Civ. P. 23(a).

of success would not be sufficient to compensate for a dramatic difference in potential irreparable damage.

To make the balance of equities prong meaningful, judges should have to engage in an actual analysis of specific equities of the parties, including the federal government. This would have been a useful exercise in the Muslim travel ban case because it would have forced the federal government to offer a more coherent explanation of its national security interests.[231] If the Trump administration could offer a specific justification, it would have made the Supreme Court's ultimate decision to stay the injunction appear much less political.[232] Similarly, if the administration could *not* offer a specific justification, then the decision to impose the preliminary injunction would appear less political. In either case, the public's trust in an impartial judiciary would be strengthened.

3. Candid Assessment of Public Interests

Every informed observer already assumes that issues of public policy lurk behind judicial decisions regarding preliminary injunctions. That is why the first question when such an injunction arises in a political case is which president appointed the judge in question. The way to increase public trust in judges is not to pretend that politics do not exist and that the legal question is so cut and dry as to warrant an extraordinary remedy. Instead, judges should promote transparency by openly assessing the public interest in a preliminary injunction.

If larger interests or principles are at stake, they should be discussed openly. This issue was particularly acute in the case of President Biden's oil and gas lease pause. Even if the judge accepted the states' argument that their loss in royalties would be irreparable, that equity should have been weighed against the equity of the federal government and the rest of the country in mitigating climate change. Although a judge is not an expert in climate change, the litigants could absolutely explain the two sides' equities in detail, allowing for an informed discussion by the

231. In the actual case, the Department of Homeland Security offered a 17-page memo explaining the travel ban in terms of the trustworthiness of the security processes in the countries in question, but not why it was now necessary when it had not been before. That explanation would have been particularly helpful in avoiding the sense that the explanation was pretextual. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) (addressing the dissent's doubts about the 17-page DHS report).

232. This is a point also made by the dissent. *See id.* at 2446 (Sotomayor, J., dissenting) (asserting that the Court's decision allows for policy "that a reasonable observer would view as motivated by animus against Muslims").

judge. That discussion could plausibly come out in favor of the plaintiff states, or it could not; but either way, there would be a greater appearance that the judge had actually considered the equitable factors at play.

4. Clarifying the Likelihood of Success on the Merits Standard

As currently interpreted, the likelihood of success on the merits standard invites a district court judge to issue, before trial, what is effectively a decision on the main legal questions. This allows partisan judges to cloak their preferences in the guise of equity decisions rather than legal decisions. It is not at all efficient for the parties for the judge to issue a preliminary injunction that will likely be overturned by either the circuit court or Supreme Court.

Here it is important to remember the pragmatic nature of the preliminary injunction. The likelihood of success on the merits standard should be a measure of actual likelihood of success, taking into account not only the judge's views, but the views of other judges likely to make rulings on the merits of the case. In the case of English courts of equity, the other judges would include those sitting on courts of law. In the case of the current American system, the other judges would include those constituting multiple layers of appellate review.

Of course, it would be politically awkward for a district judge to write an opinion expressing his view that the circuit court or Supreme Court would likely get the decision wrong, making the likelihood of success prong the most difficult to reform. We must change the standard to incorporate some measure of awareness of how other judges will rule without explicit reference to the fact that such disagreement is likely to stem from political differences. Ultimately, that might not be possible, which is why reforming the other prongs is necessary.

Although difficult to pin down precisely, we can imagine reframing the likelihood of success on the merits standard as requiring a heightened level of certainty from the judge. Instead of a litigant being merely "likely" to win on the merits, for example, perhaps a judge must find that the litigant's likelihood of winning is not contingent on an ambiguous question of law or fact.[233] So, for example, a district judge

233. This would function similarly to a proposal from Professor Alan M. Trammell in which agencies would only suffer nationwide injunctions if they acted in bad faith. Presumably, instances of acting in bad faith would correspond to instances of acting where there are not ambiguous questions of law or fact. *See* Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 104 (2019) (concluding that nationwide injunctions should be allowed when the

might still be warranted in issuing a nationwide injunction against a facially discriminatory policy like the first version of the Muslim travel ban.[234] But in the third iteration of the travel ban,[235] the judge might find that the factual question of what motivated the bans could affect the outcome of the case, meaning that full trial is warranted before issuing an injunction.

CONCLUSION

Politics are so antithetical to the American ideal of the judiciary that we have developed an allergy to anything that even smells like personal opinion in a judicial opinion. At the same time, the federal judiciary has never seemed more political.[236] One might suspect judges are aware of the growing suspicion of partisanship and are doing their best to superficially conceal their views. As judges and justices grow more partisan, judicial opinions have taken on a more technocratic air, becoming longer, with more citations.[237] The *form* of judging has become less opinionated in appearance while the *substance* has never seemed more based on prior partisan leanings. Perhaps this is the explanation for Justice Kagan's oft-quoted remark: "We're all textualists now."[238] Whether we all are textualists, and what textualism means, matters less than maintaining an appearance of impartiality, the ostensible purpose of textualism.

This judicial posturing is an attempt to maintain a sense of legitimacy, but the judiciary is fundamentally mistaken in its understanding of how legitimacy works. The history of English courts of equity helps us better understand this point. English courts of both law and equity ultimately derived their legitimacy from their

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government acts in bad faith, especially when the law is clear and settled).

234. *See supra* notes 155–158 and accompanying text.

235. *See supra* notes 169–170 and accompanying text.

236. *See* Andrew Romano, *Poll: Confidence in Supreme Court has Collapsed Since Conservatives Took Control*, YAHOO NEWS (May 10, 2021), https://news.yahoo.com/poll-confidence-in-supreme-court-has-collapsed-since-conservatives-took-control-122402500.html (describing a recent poll finding 74 percent of respondents said the Supreme Court was "too politicized").

237. *See* Meg Penrose, *Enough Said: A Proposal for Shortening Supreme Court Opinions*, 18 SCRIBES J. LEGAL WRITING 49, 52 (2019) (noting, among other data points, that 5 of the 11 longest Supreme Court opinions in history come from the Roberts court).

238. *See* Daniel Hemel, *The Problem with that Big Gay Rights Decision? It's Not Really about Gay Rights*, WASH. POST (Jun. 17, 2020), https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights/ (quoting Justice Kagan at a 2015 lecture at Harvard Law School honoring Antonin Scalia).

connection to the king, whose legitimacy in turn stemmed from a lawful claim to the throne.[239] Those courts did not hear claims against the king, but they did hear controversial claims. The English judicial system has lasted as long as it has because these courts, imperfect as they were and still are, satisfy the public's need for justice. Courts of equity, despite their broader purview, issued reasoned decisions that won public trust.

In the United States, the legitimacy of judges is more complicated. Ultimately, the legitimacy of the federal judiciary is derived from the Constitution and Congress, whose legitimacy in turn is derived from a sense of democratic legitimacy. Current public opinion regarding the legitimacy of federal judges, however, seems to stem from their superlative impartiality and lack of personal agency in their decisionmaking. It is no coincidence that the current Chief Justice's most memorable turn of phrase was his description of his job as calling "balls and strikes."[240] This is much closer to describing an English court of law than a court of equity, but the two are merged in the United States.

A truthful accounting of the judge's responsibilities includes equity, which is not calling balls and strikes. To further the baseball analogy, a preliminary injunction is like deciding when a team deserves a break from the ordinary rules (something an umpire decidedly should not do). Doing something like that in a way the public will respect requires candor and nuanced explanation. That is precisely why preliminary injunctions are an *extraordinary* remedy. If judges do not feel they can offer an explanation based on public interest and balancing thorny equities, they should not offer the remedy in the first place.

It is not possible for a judge to be truly impartial. What is possible is credible commitment to serving public interest—not fulfilling partisan policy aims. If a judge thinks that the latter is the best way to do the former, she should not be appointed. Reforming nationwide preliminary injunctions to make the reasoning behind them more transparent will make it easier to tell when such a judge has made it through the appointments process. Whether that will ultimately make

239. Obviously, there are also religious aspects to the legitimacy arguments of English kings, but to a medieval legal mind, lawfulness and religious propriety were, if not synonymous, very closely intertwined.

240. *Chief Justice Roberts Statement – Nomination Process*, U.S. COURTS (2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (last visited Feb. 1, 2023). It is also noteworthy that the non-partisan website of the United States Courts endorses such a mechanistic view of judges.

it easier for voters to hold presidents and senators accountable for appointing partisan judges remains to be seen, but it would surely be a promising first step.