PRELIMINARY INJUNCTIONS ON A BLANK SLATE

*Samuel L. Bray**

Prior studies of the preliminary injunction have worked within the constraints of existing doctrine, including the traditional four-factor test. This Article relaxes the doctrinal constraints and offers a normative analysis of the preliminary injunction. It identifies three functions the preliminary injunction can serve: protecting the court's ultimate remedial options, previewing the court's ultimate decision, and accelerating the court's ultimate decision. These functions demand different kinds of competence from the court, and they differ in how much they are affected by error costs in the court's prediction of the merits. The option-preserving function is useful when one party can exploit the time lag of litigation to narrow the court's ultimate remedial options. The decision-previewing function is more narrowly useful—only when error costs and transactions costs are low. The decision-accelerating function is unnecessary; it can be fully served by other procedural tools. This analysis has far-reaching implications for the exercise of judicial discretion, the design of injunction tests, and the forms that interim injunctive relief should take.

* Professor of Law, University of Chicago Law School. I am grateful for comments from Rick Hasen, Bert Huang, Doug Laycock, and Paul Miller, as well as comments by Lee Fennell and Jonathan Wiener on another article that were formative for this one. And I thank Bert Huang and Lior Strahilevitz for the conversations that spurred the writing of this Article.

INTRODUCTION

Many of the most important legal disputes in the United States are presented to the federal courts on motions for a preliminary injunction.[1] Yet it is blackletter law that preliminary injunctions "do not conclusively resolve legal disputes."[2] This tension is one that the federal courts are wrestling with on a daily basis.

Existing scholarship on preliminary injunctions tends to assume a number of fixed points. These include the four-factor preliminary injunction test, the irreparable injury rule, and the existence of exactly two forms of interim injunctive relief (namely, preliminary injunctions and temporary restraining orders).[3] Scholars have sometimes criticized an isolated doctrine or two, but without proposing a larger change in the structure of the law of preliminary injunctions.[4] The existing

1 For examples drawn from challenges to executive action in just the first two months of the second Trump Administration, see *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723 (D. Md. 2025) (birthright citizenship), *appeal dismissed*, No. 25-1153, 2025 WL 2141296 (4th Cir. July 29, 2025); *Pacito v. Trump*, 768 F. Supp. 3d 1199 (W.D. Wash. 2025) (refugee program), *aff'd in part*, 169 F.4th 895 (9th Cir. 2026); *Washington v. Trump*, 768 F. Supp. 3d 1239 (W.D. Wash. 2025) (gender identity); *National Council of Nonprofits v. OMB*, 775 F. Supp. 3d 100 (D.D.C. 2025) (disbursement of federal funds); *Philadelphia Yearly Meeting of Religious Society of Friends v. Department of Homeland Security*, 767 F. Supp. 3d 293 (D. Md. 2025) (immigration enforcement at places of worship); and *New York v. Trump*, 767 F. Supp. 3d 44 (S.D.N.Y.) (access to financial information), *modified*, 784 F. Supp. 3d 619 (S.D.N.Y. 2025). On remedies issues in the first hundred days of the second Trump Administration, see generally Samuel L. Bray & James E. Pfander, *Remedies in the First Hundred Days of Trump II: A Gently Adversarial Collaboration*, 78 STAN. L. REV. ONLINE 89 (2025).

2 Lackey v. Stinnie, 145 S. Ct. 659, 667 (2025).

3 *See, e.g.*, DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 110–32 (1991); Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809 (2025); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

4 *See, e.g.*, Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001) (critiquing the doctrine that the preliminary injunction is supposed to preserve the status quo); Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty,*

scholarship thus tends to start with the current doctrine, and then make proposals for how that doctrine can be refocused or refined.[5] That is true of my own scholarship on preliminary injunctions.[6]

But what if the law of preliminary injunctions were to be rewritten on a blank slate? That question is explored in this Article, which is the first work of scholarship on the preliminary injunction that relaxes the doctrinal constraints and offers an almost wholly normative analysis.

The single critical fact about the preliminary injunction is that it precedes the court's judgment in a case. This exercise of coercive judicial power before judgment is unusual.[7] *After* finding that a defendant has breached a contract or committed a tort, judges have no compunction about awarding damages or issuing final injunctions. But a preliminary injunction occurs in a liminal space before there has been a determination that the defendant actually *is* liable.[8]

In some circumstances, the court can more fully do justice to the parties by intervening before judgment, instead of waiting for the fuller information and certainty that the litigation process is supposed to produce.[9] A judge may have sound reasons for this intervention before judgment,[10] and this Article identifies and explores three such reasons. These reasons can be considered three distinct functions that may be served by a preliminary injunction.

The first and primary function is *protecting the court's ultimate remedial options*. A preliminary injunction may "stop a defendant from abusing the legal process by going ahead and taking the irreversible action that will moot or radically alter the case—selling the disputed pet,

Economic Efficiency, and the Preliminary Injunction Doctrine, 58 STAN. L. REV. 381 (2005) (urging a shift toward a liability-rule conception of preliminary injunctions).

5 *See, e.g.*, Samuel L. Bray, *Preliminary Injunction Realism*, 44 REV. LITIG. 203 (2025); John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33 (2007); Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284 (2007).

6 *See, e.g.*, Bray, *supra* note 3; Bray, *supra* note 5.

7 *See, e.g.*, Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENGLAND L. REV. 173, 174 (1984) ("Interim relief . . . restricts freedom of action without a final judgment of liability."). A leading opinion on this point is *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1014–15 (10th Cir. 2004) (McConnell, J., concurring).

8 *Cf.* Lackey v. Stinnie, 145 S. Ct. 659, 667 (2025) ("[W]e have previously cautioned against 'improperly equat[ing] "likelihood of success" with "success"' and treating preliminary injunctions as 'tantamount to decisions on the underlying merits.'" (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 394 (1981) (alteration in original))).

9 *See* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 453 (5th ed. 2019).

10 *Cf.* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942) ("Procedural instruments are means for achieving the rational ends of law.").

tearing down the disputed house, exporting the disputed Vermeer."[11] Those are instances of the option-preserving function.

A second function is *previewing the court's ultimate decision*. A preliminary injunction may reveal how the judge is thinking about the case, and that revelation can prompt settlement.[12] For example, in a patent infringement suit, if the court says that the plaintiff[13] is unlikely to succeed on the merits, then the parties will often respond by settling.[14] The preliminary injunction decision has revealed the judge's thinking, thus altering the expected value of the litigation.

A third function is *accelerating the ultimate decision*. This function resembles the previous one, but the value of the decision-previewing function depends on the possibility of settlement: The court discloses information in order to change the behavior of the parties. Yet in some circumstances, the only effect of the preliminary injunction may be to accelerate the court's ultimate decision.

All three functions allow the court to intervene before judgment to protect the parties and promote a just resolution of the dispute, even though the court must act under conditions of limited time and information.[15] With the option-preserving function, the court is ensuring that it can do justice to the parties after its final resolution of the case. The court is intervening to prevent opportunistic behavior by the parties that could compromise its ability to remedy the prevailing party's harms.[16] The decision-previewing function allows the parties to negotiate a settlement that is cost-minimizing and mutually advantageous,[17]

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11 William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 170 (2023).

12 The literature on preliminary injunctions and settlement is discussed *infra* Section I.B.

13 As is conventional in scholarship on the preliminary injunction, I will refer to the moving party as the plaintiff, but occasionally the defendant moves for a preliminary injunction.

14 *See* Daphna Lewinsohn-Zamir, *Do the Right Thing: Indirect Remedies in Private Law*, 94 B.U. L. REV. 55, 73 (2014).

15 In *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), the Court rejected as "specious" any "distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties," since "[c]ourts normally exercise their jurisdiction only in order to protect the legal rights of parties." *Id.* at 175 n.23.

16 *See* Bray, *supra* note 3, at 843; *cf.* Looney v. E. Tex. R.R. Co., 247 U.S. 214, 221 (1918) ("The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice." (citations omitted)). On equity's responses to opportunism more generally, see Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

17 *See* Kathryn E. Spier, *Litigation*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 259, 269–72 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

thus allowing them to construct what each side may accept as a just outcome. The decision-acceleration function also reduces litigation costs, but it does so without the mechanism of settlement: The court is simply moving up the ultimate resolution of the case.

The relative value of the three functions depends significantly on the error costs of the merits prediction.[18] Error cost is heterogeneous across different kinds of cases and fact patterns.[19] Yet this variability in error costs does not significantly affect the option-preserving function, because its value does not depend as centrally on the merits. By contrast, the value of the decision-previewing and decision-accelerating functions depends heavily on the error costs of merits prediction. Where error costs are low, as they sometimes are, the previewing and accelerating functions rise in value.

Even though all three functions have something to offer the legal system, they differ sharply in what might be called the preliminary injunction's "wins above replacement."[20] For the option-preserving function, there will usually be no substitute for a preliminary injunction. For the decision-previewing function, there are partial substitutes, including a judge's private communication to the parties (e.g., in a settlement conference), as well as the disposition of pretrial motions (e.g., a motion to dismiss). For the decision-accelerating function, there are near-perfect substitutes,[21] which means this function of the preliminary injunction is unnecessary.

18 On error costs and interim injunctions, see LAYCOCK, *supra* note 3, at 111 ("Acting without a full presentation from either side and without time for reflection, the court is more likely to err."); and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.4, at 522 (3d ed. 1986) ("The problem for the judge asked to grant a preliminary injunction is that he is being asked to rule in a hurry, on the basis of incomplete information. The risk of an error is high.").

19 *See infra* notes 102–05 and accompanying text (explaining that error costs at the preliminary injunction stage are more likely to be low when (1) factual development is less necessary, (2) the legal questions are not novel, (3) the legal questions do not need to be factually situated, (4) judicial variance is low, or (5) the court is applying a rule instead of a standard).

20 *Cf. Wins Above Replacement (WAR)*, MLB, https://www.mlb.com/glossary/advanced-stats/wins-above-replacement [https://perma.cc/6JHQ-2W2G] (last visited Nov. 9, 2025) (defining "Wins Above Replacement" as a measure of "how many more wins" a Major League Baseball player is worth to his team "than a replacement-level player at his same position").

21 These include the consolidation of the preliminary injunction hearing with the trial or with summary judgment. *See* FED. R. CIV. P. 65(a)(2); Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 206 (3d Cir. 2024) (Bibas, J.) (listing several substitutes for a preliminary injunction that accelerates the decision on the merits); Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 757–58,757 n.59 (2012).

This analysis has three sets of implications. The first is guidance for judges in how to use preliminary injunctions to preserve their ultimate remedial options. This guidance can be summarized as (1) deemphasize the merits; (2) recognize the importance of learning throughout litigation and the need to design preliminary injunctions to enhance that learning; and (3) avoid a zero-tolerance mindset toward preventing interim harm to the parties.

Another set of implications is about the design of tests for preliminary injunctions. In particular, the normative considerations for granting a preliminary injunction depend on which function(s) it is serving. To preserve the court's ultimate remedial options, what the court needs to know most of all is irreparable injury and the balance of equities (also called the balance of hardships or balance of convenience). The merits matter, but not independently—they matter because they affect the probability of the various irreparable harms. In sharp contrast, for the previewing and accelerating functions, the merits are all that matters. A preliminary injunction inquiry designed for these functions might look *only* to the merits, and the merits inquiry should align in every way possible with the ultimate determination of the merits, including burdens of proof and persuasion.[22]

The implications of this Article could be even more radical: reshaping the forms of interim injunctive relief to match the functions. At present, there are two forms: temporary restraining orders, which can be ex parte, require less evidence, and have a shorter duration; and preliminary injunctions, which are not ex parte and can last until judgment. These two forms are not aligned with the different functions. In practice, temporary restraining orders tend to be option-preserving. Theoretically, however, both the temporary restraining order and the preliminary injunction can do justice to the parties by serving all three functions: preserving options, previewing decisions, and accelerating decisions.

This Article therefore offers a thought experiment: What would be gained and lost if instead of two forms distinguished by stages within

22 Similarly, if one has in view only the previewing and accelerating functions, standing and mootness doctrines should be identical for preliminary injunctions and final injunctions. Any divergence would cloud the signal provided by the preliminary injunction. But for the option-preserving function, standing and mootness should be different for the preliminary injunction than for a final remedy. Mootness, for example, should be about whether the preliminary order is no longer needed to preserve the court's ultimate remedial options, not about whether the case or the final remedies would be moot. *Cf.* Brown v. Yost, 122 F.4th 597, 601–03 (6th Cir. 2024) (en banc) (per curiam) (explaining that the plaintiff's request for preliminary injunction was moot even though the underlying case was not). And the posting of a satisfactory no-injunction bond by the defendant could moot the request for preliminary injunction. I am grateful to Evan Caminker for this point. On no-injunction bonds, see *infra* note 33 and accompanying text.

the progress of litigation, there were two forms distinguished by the functions they served? One form could protect the court's ultimate remedial options, subsuming the current temporary restraining order and preliminary injunction. The other form could preview the merits.[23] This form could serve the previewing function even better if it were not an injunction, since a court previewing its decision does not need the additional capacities and limitations of equity.[24] But form does not always follow function, and for reasons discussed below such a radical reform would not be a panacea. Even so, the thought experiment underscores the contingency and limited coherence of the current doctrine.

The preliminary injunction is an important procedural tool, but it is currently forced to serve multiple functions that are in tension with one another. Recognizing this tension allows progress on a number of important questions about the preliminary injunction. Clearly distinguishing the three functions allows a court to be much more self-conscious about what function a preliminary injunction is serving and also to recognize the limits of that function. And this approach will encourage courts to account for the relevant interests more carefully and to adopt a dynamic and learning-focused approach to the use of interim injunctive relief. These advances could not be more timely: They are urgently needed as the preliminary injunction and related measures like the temporary restraining order are taking center stage in the work of the federal courts.

I. A FUNCTIONAL ANALYSIS OF PRELIMINARY INJUNCTIONS

The preliminary injunction enables a court to do justice to the parties by intervening provisionally before judgment. The court's intervention can serve one or more of three distinct functions: preserving options, previewing decisions, and accelerating decisions. This Part analyzes these three functions, each of which offers a reason for the court to take the unusual step of intervening prior to judgment to restructure the rights and duties of the parties.

A. *Preserving Options*

The first function a preliminary injunction can serve is preserving the ultimate remedial options of the court.[25] That is, a preliminary injunction can prevent one or both parties from acting in a way that

23 *See* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 167.

24 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 593 (2016) (analyzing managerial powers but also limiting principles for equitable remedies).

25 *See* Bray, *supra* note 3, at 853.

undermines the efficacy of options the court may need at the remedial stage. Whether a court should grant a preliminary injunction to preserve its options will depend primarily on three variables: the costs of inaction, the costs of action, and the prospect of learning about those costs over time.[26] These are not, however, the only considerations. The discussion below recognizes other complexities, as well as the need for heuristics to aid judicial decisionmaking.

1. Costs of Inaction

For the option-preserving function, the first variable is what will happen without the preliminary injunction. That variable involves a series of predictions. There are multiple contingencies, including the activities that each party may begin or continue,[27] how the parties' choices will interact, and the possible consequences from each party's activity and the interaction of their choices. The choices of third parties may be relevant, as well as the consequences for third parties. On each of these points there may be substantial uncertainty as the court predicts what will happen if it does nothing—that is, if it does not grant a preliminary injunction and allows the litigation process to continue to move towards judgment.

In assessing the costs of inaction, there are three primary considerations.

First, what is the remedial option that may be impaired through the court's inaction? For example, if the plaintiff is suing the defendant for a final injunction prohibiting the disclosure of a trade secret, and the court does not prohibit the disclosure now with a preliminary injunction, it may be too late to do so later.[28] In that case, the ultimate remedial option to be preserved is the option of granting a final injunction that prohibits the disclosure of the not-yet-disclosed trade secret.

Second, how valuable is that remedial option? In measuring that value, a place to start is with the costs to the plaintiff. What is relevant is not all costs to the plaintiff, but only those that would not be

26 The costs of inaction and of action largely track factors in current doctrine: the irreparable injury, the balance of equities, and the public interest factors. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES §§ 55–56 (A.L.I., Tentative Draft No. 4, 2025). Current practice does not, however, emphasize learning. *See infra* Section I.A.3.

27 One factor in the parties' choices is their reading of the signal sent by the court's resolution of the application for a preliminary injunction. *See* Miller, *supra* note 23, at 168.

28 The horse-out-of-the-barn quality of confidential information has long been a concern that motivates a court to give an interim injunction, thus preserving the court's option of giving an effective final injunction. An example is *Gee v. Pritchard* (1818) 36 Eng. Rep. 670; 2 Swans. 403, discussed in Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699, 714–15 (2022).

remediable if the plaintiff were to prevail on the merits. These "costs" include lost benefits.[29] In doctrinal terms, this is irreparable injury.[30] But there may be other costs from the loss of the remedial option, including costs to the court itself and to third parties. For example, if the case goes through the entire litigation process, yet at the end the available remedies are underpowered or nonexistent, that failure can undermine confidence in the law and induce excessive precautions or excessive reliance on self-help.

I would limit the relevant social costs to those that are not going to be remedied by a successful decision on the merits for the plaintiff. That is a traditional limit for the preliminary injunction (doctrinally expressed in the irreparable injury rule).[31] It is true that the preliminary injunction analysis could include all social costs, including ones that can ultimately be remedied after trial.[32] Nevertheless, considering only harms not reparable by a final judgment is supported by two points. One is that the court can have more confidence about its prediction of these harms, because they are nearer in time, usually occurring or at least beginning prior to judgment. The other point is that only irreparable costs are relevant for this function of preserving the court's remedial options at trial. For the other functions discussed below, all social costs are relevant.

One more wrinkle: The defendant could post a satisfactory "no-injunction bond," which would be available to cover any harms to the plaintiff.[33] A no-injunction bond could reduce to zero the irreparable injuries the plaintiff would suffer without a preliminary injunction. That, in turn, could render the preliminary injunction moot.[34]

Third, how likely is the court to need the remedial option in question? This does require a prediction of the merits. The more likely the plaintiff is to prevail, the more likely the court is to need a remedial

29 *See* Omri Ben-Shahar, *Against Irreparable Benefits*, 116 YALE L. J. POCKET PART 381, 383–84 (2007).

30 *See* LAYCOCK & HASEN, *supra* note 9, at 457; Bray, *supra* note 3, at 823–24.

31 *See* LAYCOCK, *supra* note 3, at 110–32; Bray, *supra* note 3, at 813.

32 *See* Ofer Grosskopf & Barak Medina, Repairing (the Doctrine of) Irreparable Harm 2 (Feb. 8, 2008) (unpublished manuscript) (available on SSRN), https://ssrn.com/abstract=1091730 [https://perma.cc/KCU7-KTH7].

33 *See* ZECHARIAH CHAFEE, JR., CASES ON EQUITABLE RELIEF AGAINST TORTS 205 n.2 (1924) (collecting cases); Bray, *supra* note 3, at 862–63 (describing use of no-injunction bonds); Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1057 & n.18 (1965) ("In some situations, courts have required the defendant to post bond in lieu of the preliminary order requested by the plaintiff."); Hazeltine Corp. v. Atwater Kent Mfg. Co., 34 F.2d 50, 51 (E.D. Pa. 1929) ("The defendant has submitted itself to any order the court may make to secure through a bond to the plaintiff the payment of any damages or sum which the plaintiff may have the right to recover. . . . Having made its appeal for equitable relief, [the plaintiff] must accept the doctrine that he who asks equity must do equity.").

34 *See supra* note 22.

option, since it will kick in *only* if the plaintiff prevails. The plaintiff's likelihood of success is not an on-off switch, but a point or range on a spectrum of probabilities.[35] Yet even though in theory this prediction is a point on a spectrum, the error costs involved in finding that point are high.[36] As discussed below, at this preliminary stage the court lacks a fully developed record and understanding of the case, and judges are likely to overweight their priors.[37]

Note that the court may need to predict more than the merits in order to determine the probability that it will need a certain remedial option. The court may also need to predict its ultimate remedial choice—that is, predict which final remedy the court would likely select after judgment. Consider, for example, a plaintiff who sues for breach of contract and seeks a preliminary injunction that would preserve the court's ultimate remedial option of specific performance. The probability that the court will need that ultimate remedial option depends on *both* the probability the plaintiff will prevail on the merits *and* the probability that the court will award specific performance rather than expectation damages, reliance damages, or restitution damages.[38]

Taken together, these considerations—the identification of the ultimate remedial option that could be lost or impaired through judicial inaction, the valuation of the option in terms of irreparable social costs, and the probability that the court will need the remedial option—represent the expected value of the cost of inaction, that is, the cost of not granting a preliminary injunction.[39] The court is of course preserving its remedial option for the benefit of the parties. Seen from the plaintiff's perspective, the costs of inaction can be summarized, in

35 In doctrinal terms, what I am describing has more affinity with the sliding scale, though in the normative analysis the probability is linear, and in the doctrinal analysis it is chunky: Different standards require the court to determine that there is "no serious question," "a serious question on the merits but not a likelihood of success," "a likelihood of success on the merits," "a clear likelihood of success on the merits," and so on. For further discussion of the sliding scale, see Bray, *supra* note 5.

36 *See* POSNER, *supra* note 18, § 21.4, at 522.

37 *See infra* Section I.A.4.

38 For the classic distinction between the expectation, reliance, and restitution interests, see L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1–2), 46 YALE L.J. 52, 54, 373, 379, 389 (1936–1937). For notes on the current status of this distinction, see SAMUEL L. BRAY & EMILY SHERWIN, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 159–60 (4th ed. 2024).

39 In the different variations of the preliminary injunction test used by federal courts, the costs of inaction are considered under the rubrics of likelihood of success on the merits, irreparable injury, and the public interest. *See* Bray, *supra* note 5, at 222.

the words of the *Restatement (Third) of Torts: Remedies*, as "the nature, magnitude, and likelihood of any harm."[40]

2. Costs of Action

The next key variable is the costs of action, that is, the costs from granting a preliminary injunction. There are two primary considerations.

First, how costly is preserving the remedial option? That is, what social costs would be caused by an option-preserving preliminary injunction?

As with the costs of inaction, we are not concerned with all social costs, but only with the ones that are irreparable. In other words, what costs would be imposed on the defendant, the court, and third parties by the preliminary injunction that would not be remedied if the defendant ultimately prevailed on the merits?

This qualification about irreparability takes on particular importance because of the possibility of an injunction bond. When a federal court grants a preliminary injunction, the Federal Rules of Civil Procedure state that the plaintiff is required to post security,[41] and similar requirements apply in many states.[42] On the assumption that the injunction bond is set high enough to cover the costs a wrongly granted injunction would impose on the defendant,[43] those costs should be removed from consideration to the extent they are amenable to proof. Any costs to the defendant that can be recovered under the bond would be remediable if the defendant wins; they are not irreparable costs.

Second, what is the probability that these costs of preserving the remedial option will be incurred? The preliminary injunction may impose real costs on the defendant, but if these are simply the costs of following the law—which may be the case if the plaintiff ultimately prevails—then those costs do not count for the preliminary injunction analysis. Again the merits are relevant, as is the court's choice of final remedy.

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40 RESTATEMENT (THIRD) OF TORTS: REMEDIES § 55(c)(2) (A.L.I., Tentative Draft No. 4, 2025).

41 *See* FED. R. CIV. P. 65(c). The requirement is often honored in the breach. *See* Bray, *supra* note 5, at 220–21. Note that instead of requiring a bond, the court could require the plaintiff to commit to pay whatever damages may be subsequently assessed on account of the wrongfully granted interim injunction. *See* Russell v. Farley, 105 U.S. 433, 444–46 (1882); Ben Kremer, *The Origin of the Usual Undertaking as to Damages When Obtaining Interlocutory Injunctive Relief*, 17 J. EQUITY 211, 228 (2024).

42 *See, e.g.*, ALA. R. CIV. P. 65(c).

43 *See* Mead Johnson & Co. v. Abbott Lab'ys, 201 F.3d 883, 888 (7th Cir. 2000).

3. Learning

The previous variables (costs of inaction, cost of action) involve a set of estimates about the future consequences of protecting or not protecting one of the court's ultimate remedial options.[44] These estimates could be wrong. Especially for the prediction of the merits, the error costs are substantial, given the truncated record and the judge not having "the advantage of 'living with the case' and getting to know its factual nuances."[45] And the court may err in its prediction of the magnitude of the costs from granting or denying the preliminary injunction.

In other words, this is the familiar problem of decisionmaking under uncertainty. And yet there is a critical difference from many other judicial decisions that are made under uncertainty: The decision to grant or deny a motion for a preliminary injunction is not final. If the court denies the motion, it can revisit it, granting a preliminary injunction. If the court grants the motion, it can revisit it. And the court may grant the preliminary injunction but make it time-limited—for a day, a week, a month, a year, and so on. It is a basic principle that every injunction is subject to modification or dissolution if circumstances warrant it, and the standard for modification or dissolution is less demanding for a preliminary injunction.[46] Moreover, the preliminary injunction (under current doctrine) does not commit the court as to the merits or the final remedy.[47]

So it is decisionmaking under uncertainty but with relatively easy updating of the court's estimates. Thus the third key variable is

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44 For acute analysis of this point, see LAYCOCK, *supra* note 3, at 119–120, 123.

45 Aaron-Andrew P. Bruhl, *Law and Equity on Appeal*, 124 COLUM. L. REV. 2307, 2363 (2024). On error costs and interim injunctions, see LAYCOCK, *supra* note 3, at 111; POSNER, *supra* note 18, § 21.4, at 522.

46 On the modification and dissolution of preliminary injunctions, see *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 88 (1922) ("If it be only interlocutory, the court at any time before final decree may modify or rescind it."); *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256–57 (2d Cir. 1984) (noting the inapplicability of Federal Rule of Civil Procedure 60(b)(5) to preliminary injunctions and stating that "when reviewing an order modifying a preliminary injunction we look to see whether or not the *status quo* is maintained by the modification," *id.* at 257); and *Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd.*, 74 F.R.D. 621, 623 (S.D.N.Y. 1977) (noting that a court has "continuing plenary power over its interlocutory orders"). On the general principle that injunctions can be modified or dissolved by the court, see Bray, *supra* note 24, at 547 & n.81, 564–65, 583.

47 For recognition that the court's determinations on a preliminary injunction motion are not the law of the case, see *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 198–99 (1950); *Cayuga Indian Nation of New York v. Seneca County*, 978 F.3d 829, 834 (2d Cir. 2020); *Brody v. Village of Port Chester*, 345 F.3d 103, 110 (2d Cir. 2003) (Sotomayor, J.); and *Community Nutrition Institute v. Block*, 749 F.2d 50, 56 (D.C. Cir. 1984) (Scalia, J.). *But see* Comcast of Me./N.H., Inc. v. Mills, 988 F.3d 607, 612 (1st Cir. 2021); Daunt v. Benson, 999 F.3d 299, 309 (6th Cir. 2021).

learning. To borrow from Professor Jonathan Wiener's discussion of adaptive policy learning, a judge who is deciding whether to grant or continue a preliminary injunction must "adapt as the world changes," which "entails a shift from single to multiple decisions—sequential, learning, adaptive regulation."[48] The learning variable is distinct from and not commensurate with the costs of inaction and of action.

There are two pathways that could lead the court to update its estimates.

The first is the litigation process. As the litigation continues, there will be more discovery, including documents, expert reports, and depositions. This factual development is obviously relevant for questions about the costs that the parties and the public will suffer with or without the preliminary injunction.

Less obvious, perhaps, is how the progression of the litigation can improve the judge's prediction of the legal merits. Even purely legal questions can benefit from development—successive rounds of briefing that crystallize the issues, decisions in the meantime from other courts,[49] and most importantly the way legal questions are situated within factual ones. Moreover, when legal questions depend on what happened in the past, as is increasingly the case in federal courts because of the U.S. Supreme Court's turn toward history in constitutional interpretation,[50] it can take time for the parties to undertake the inquiry necessary for the case.[51]

48 Jonathan B. Wiener, *Learning to Manage the Multirisk World*, 40 RISK ANALYSIS 2137, 2140 (2020). Useful mechanisms include "monitoring of key variables, *ex post* retrospective review, ongoing periodic review (every set period of time) . . . and discretionary reviews or automated adjustments." *Id.* (citations omitted). On retrospective reviews, see Lori S. Bennear & Jonathan B. Wiener, *Institutional Roles and Goals for Retrospective Regulatory Analysis*, 12 J. BENEFIT-COST ANALYSIS 466 (2021).

49 On the question of when lower courts should consider the possibility of change in the views of an apex court, see Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851 (2024) (reviewing PHILOSOPHICAL FOUNDATIONS OF PRECEDENT (Timothy Endicott et al. eds., 2023)).

50 The literature on this subject is vast, but for entry points, see JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); and Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015). Perhaps the question is less annual and more perennial than it seems. *See generally* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969) (explaining that the Supreme Court's turn to history is a longstanding feature of constitutional interpretation).

51 For an instance of judicial recognition of the tension between a preliminary injunction motion and adequate historical investigation, see *Frey v. Nigrelli*, 661 F. Supp. 3d 176, 205 (S.D.N.Y. 2023) (noting that the historian expert for the state provided examples of historical regulations "[w]hile admitting that the opportunity to conduct thorough historical research was limited due to the time constraints of a preliminary injunction schedule

There are, of course, criticisms of the case method of adjudication, most memorably captured in the title of Professor Fred Schauer's article *Do Cases Make Bad Law?*[52] Yet our system decisively rejects those criticisms. It rests on the assumption that legal questions are best considered when they are embedded in particular cases. As Professor Dick Fallon put it, invoking a foundational controversy about federal judicial power in 1793, "*The Correspondence of the Justices* is almost universally regarded as having liquidated the meaning of Article III as flatly forbidding the federal judiciary from issuing advisory opinions."[53] For this jurisprudential rejection of abstract pronouncements and concomitant commitment to a dispute-resolution model, the foundations are deeper than the U.S. Constitution.[54] As a young Oliver Wendell Holmes, Jr., wrote, "The common law begins and ends with the solution of a particular case."[55]

That factual embeddedness is generated by the litigation process, which in turn can influence the judge's own view of the legal questions.[56] The claim I am making is not a naïve one that judges come to a case with their views of the law being *tabula rasa*. But the factual and legal development of a case can shift how the court frames the question it is answering, as well as the answer the court gives.[57] Legal questions are not simply binaries offered up for judicial decision. Legal questions

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and the fact that certain of the historical research involves in-person review of in paper archives").

52 Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

53 Fallon, *supra* note 50, at 1773–74.

54 On the dispute-resolution model and the rival law-declaration model, see WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92–95 (8th ed. 2025). On constitutional backdrops, see Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

55 Book Review, 5 AM. L. REV. 715, 716 (1871) (identified as Justice Holmes's work in Felix Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717, 718, 797 (1931)). The year before, he wrote: "It is the merit of the common law that it decides the case first and determines the principle afterwards." *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) (also identified by Justice Frankfurter as Justice Holmes's work in Frankfurter, *supra*, at 797); *see also* Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 41 (2013) ("Giving attention to the problem at hand sharpens and focuses, as an *epistemic matter*, our more abstract speculations."). Similarly, Justice Brennan remarked on the Court's "recognition that resolution of even the most abstract legal disputes is advanced by the presence of a concrete set of facts." Mitchell v. Forsyth, 472 U.S. 511, 549–50 (1985) (Brennan, J., concurring in part and dissenting in part).

56 A trial can also influence the public perception of a legal question. *See, e.g.*, KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL (2015).

57 For two examples, see MICHELLE ADAMS, THE CONTAINMENT: DETROIT, THE SUPREME COURT, AND THE BATTLE FOR RACIAL JUSTICE IN THE NORTH 129 (2025); and *Thomson Reuters Enterprise Centre GMBH v. Ross Intelligence Inc.*, 765 F. Supp. 3d 382 (D. Del. 2025) (Bibas, J.).

involve variability in both their judicial characterization and the intensity of their judicial resolution—intensity with respect to the principle articulated, the remedy awarded, and the treatment of precedent.[58] Once these various dimensions are recognized, it is not plausible to say that the characterization and intensity of the court's resolution of a legal question is unaffected by the factual situation in which that question is presented.[59]

The second pathway to updating the court's estimates is not about the litigation itself but about changes that happen in the world. Consider, for example, a newly promulgated agency rule that is challenged before it goes into effect. The plaintiff argues that the rule will have huge negative social consequences; the agency argues that to the contrary the costs of compliance will be relatively modest and the social benefits will be large and immediate.

Who is right? Before the rule goes into effect, the court might rely on expert testimony put forward by the parties, two competing parades of horribles. But the court's assessments would be more reliable if it knew the rule's actual effect. As Professor Yair Listokin put it, "Before implementing a policy, policymakers may have only a dim idea about [its] effects . . . . After implementing the policy and observing its effects, policymakers will often have a much better sense of the outcomes associated with the policy in current and future periods."[60] Such learning is more likely if the court does not grant a preliminary injunction, or if the preliminary injunction would protect the plaintiff from enforcement but allow enforcement of the rule against other regulated entities.[61] Of course, this new information needs to be brought into the legal process, and that will usually occur through discovery or the introduction of evidence at trial, rather than through judicial notice.

These two pathways to the court updating its priors have different implications. The possibility of updating through the litigation process should encourage the judge to consider something other than a preliminary injunction that runs on autopilot until judgment. The judge might phase in the preliminary injunction, allowing time for factual

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58 *See, e.g.*, Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014).

59 The implausibility of a "facts do not matter to the law" position is heightened by the intense scrutiny that appellate lawyers and Supreme Court clerks give to the question of whether a case is a good "vehicle" for a legal question.

60 Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 483 n.1 (2008).

61 Other interactions between a new rule and innovation are possible. For example, a new rule could authorize some kind of experimentation that was not previously possible or licit, or a new rule could prevent a private actor from stopping innovation by other private actors. In other words, there are a cascading set of possible baseline positions against which to mark experimentation and innovation, just as there are multiple baselines for assessing harm. I am grateful to Professor Lee Fennell for suggesting this point.

development before it goes into effect. Or the judge might limit the duration of the preliminary injunction, phasing it out to encourage the prompt development of the factual record (which could in turn induce the court to grant another preliminary injunction).[62] Or the court could turn the injunction off and on at predictable intervals, monitoring outcomes (to see if either parade of horribles actually comes to pass). Or, in a challenge to an agency rule, the court could monitor outcomes for persons or entities protected from enforcement by an injunction versus outcomes for other persons or entities against whom the rule may be enforced.[63]

The other pathway, the regulatory experimentation one, suggests a different lesson. It counsels the need for plaintiff-protective injunctions especially when the plaintiff is challenging a new legal norm. That is because a narrower injunction allows continued experience with and learning from the policy ("splits" rather than "flips" to use Professor Dan Hemel's terminology[64]).

If the challenged statute, rule, or policy is of long standing, however, there is little knowledge to gain from continued enforcement (barring some kind of technological innovation or societal change that makes an old norm have new effects). It is precisely where the legal norm is new that information about its real-world effects is most valuable.

4. Errors and Biases

As a court makes these assessments, there will be predictable errors in its analysis. In part, these are simply the foreseeable results of

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62 As illustrations, consider *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929) (per curiam) (conditioning a preliminary injunction on the plaintiff's "expedition"); *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. 1963) (Friendly, J.) (criticizing the district court for not acting quickly after it granted a preliminary injunction); and *Gimbel v. Signal Cos.*, 316 A.2d 599, 617–18 (Del. Ch. 1974). On the general principle that courts may condition equitable relief, see, for example, *Walden v. Bodley*, 39 U.S. (14 Pet.) 156, 164 (1840) ("Where a case for relief is made in the bill, it may be given by imposing conditions on the complainant consistently with the rules of equity, in the discretion of the Court."); *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557, 567–68 (1870) ("It is the advantage of a court of equity . . . [that] it may refuse its decree unless the party will consent to . . . take a decree upon condition of doing or relinquishing certain things to the other party."); *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935) (noting that a court of equity "in its discretion may . . . deny relief upon performance of a condition which will safeguard the public interest and secure substantial justice to the complainant").

63 For suggestions about judicial learning, I am grateful to Professor Jonathan Wiener.

64 Daniel J. Hemel, *Flips and Splits in Administrative Law*, 74 DUKE L.J. 1703 (2025).

decisionmaking with less evidence and argumentation. Error costs are higher when courts predict the merits with only a truncated record.[65]

In addition, when judges predict the merits early on, they are assuming a certain "shape" to the case, but in the litigation process it sometimes happens that there is a shift in what the case seems to be centrally about. Indeed, this happens even after trial. When a case moves to a court of appeals, or when it moves from a court of appeals to the Supreme Court, judges can shift in how they frame the central issues in a case—and that shape shifting occurs for purely legal questions.

Even beyond these error costs, there are predictable biases in courts' assessments of the relevant costs for a preliminary injunction.

One is a bias in favor of considering costs to the parties, and not to nonparties. That bias is what the "public interest" factor in preliminary injunction tests is supposed to counteract, but the briefing about nonparties and their interests is still being done by the parties themselves.[66] And this bias is entrenched when courts conflate the public interest with the interest of a government litigant.[67]

Another systematic bias is in favor of the judge's a priori view of the case. The possibility of the preliminary injunction creates a moment where the judge must look ahead to the merits. It is not just an initial view internally held by the judge, but an initial view that is expressed to the parties, thus contributing to the phenomenon of "lock-in."[68] That public prediction of the merits creates friction on judicial learning, biasing the court in favor of its initial view. This is not like the old adage about multiple-choice exams: Stick with the first answer you write down. That adage does not apply if you fill out the exam *before learning the material.* This systematic bias in favor of the judge's a priori views is intensified when litigants are able to select an individual judge precisely for those views.[69] Although the focus here is on the epistemic consequences of this bias, when combined with heightened judicial

65 LAYCOCK, *supra* note 3, at 111; POSNER, *supra* note 18, § 21.4, at 522; Bray, *supra* note 3, at 822.

66 Intervention can partially ameliorate this concern. For analysis of intervention and national injunctions, see Monica Haymond, *Intervention and Universal Remedies*, 91 U. CHI. L. REV. 1859 (2024).

67 For an example of the trend toward merging the public interest factor with the equities in a suit against the government, see *Singh v. Berger*, 56 F.4th 88, 107 (D.C. Cir. 2022).

68 *See* Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779 (2014); *see also* Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 577–79 (2001).

69 *See* Alexander Gouzoules, *Choosing Your Judge*, 77 SMU L. REV. 699, 717–27 (2024); James E. Pfander, *The Supreme Court, Article III, and Jurisdiction Stuffing*, 51 PEPP. L. REV. 433, 467 & n.187 (2024).

polarization and forum-shopping, it is in tension with the proper role of courts in a democratic society.[70]

5. Adding Complexity

The analysis so far can be summarized like this: For the option-preserving function of a preliminary injunction, the key variables are the costs of inaction and the costs of action. Each involves a set of predictions.[71] These predictions are mostly about social costs that would not be remedied after trial, as well as the probability of those costs being realized, which interacts with the court's prediction of the merits.

The preceding discussion of costs has an apparent but misleading simplicity. The normative analysis of whether a preliminary injunction is justified under the option-preserving function has several points of additional complexity.

The first is implicit in the discussion of learning: Every prediction related to costs is dynamic and based on shifting evidence. Imagine, for example, a wise judge—we can call her Athena—who is constantly reevaluating each prediction in real time as new information comes in (via the parties and via judicial notice).

A second point of complexity is about the exact preliminary injunction that is the subject of the predictions. Not only do the costs of inaction and of action shift over time, but they also vary based on the preliminary injunction's scope and intensity.[72] If Athena is updating all of her cost predictions in real time, then they have to be updated not for a monolithic "preliminary injunction" but for all the different preliminary injunctions that could be formulated.

A third is that because a preliminary injunction is equitable, a number of other considerations are relevant.[73] Athena may consider equitable maxims and defenses, the managerial burdens a preliminary injunction may impose on the court, and equity-flavored justiciability doctrines.[74] She might consider the representations of the parties: For example, has a defendant committed to forbearance toward the

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70 *See* Bray, *supra* note 3, at 874.

71 *See* LAYCOCK, *supra* note 3, at 119–20, 123.

72 *See* Abbott Lab'ys v. Mead Johnson & Co., 971 F.2d 6, 12 & n.2 (7th Cir. 1992); Bray, *supra* note 5, at 231–34.

73 *See, e.g.*, Bray, *supra* note 5, at 226.

74 *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1797 (2022) ("For legal claims, justiciability is a threshold, and once through the door the plaintiff is able to obtain remedies without much consideration of whether the plaintiff just barely made it over the threshold. But in equity it all connects—the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be.").

plaintiff during the litigation?[75] And she should consider the substantive policies of the relevant statute or common law field, for "equity follows the law."[76]

6. Seeking Simplicity

The functional analysis given in this Article may have seemed straightforward at the beginning. When the costs of inaction and action were discussed, it might have seemed like these could be reduced to a formula, not unlike the famous Leubsdorf-Posner formula for preliminary injunctions.[77] But as the analysis has continued, the number of considerations has grown much larger, more incommensurate, and more dynamic. The question, then, is how to make the preceding normative analysis tractable for a judge.[78]

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75 *See, e.g.*, JTH Tax, Inc. v. ITS Fin., LLC, No. 08-cv-271, 2008 WL 11512368, at *3 (E.D. Va. Dec. 15, 2008).

76 *See* BRAY & SHERWIN, *supra* note 38, at 460 (quoting J.D. HEYDON, M.J. LEEMING, & P.G. TURNER, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES § 3-030, at 71 (5th ed. 2015)); *id.* at 464.

77 *See* Leubsdorf, *supra* note 3, at 541–44. For Judge Posner's elaboration, see *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 593–94 (7th Cir. 1986); and POSNER, *supra* note 18, § 21.4, at 522. The Leubsdorf-Posner formula has proved remarkably influential, and it captures the essential interplay of the various considerations. It has also been criticized on various grounds. *See, e.g.*, LAYCOCK, *supra* note 3, at 123; Bray*, supra* note 3 at 838; Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541 (1987); Linda J. Silberman, *Injunctions by the Numbers: Less than the Sum of Its Parts,* 63 CHI.-KENT L. REV. 279 (1987).

78 For astute remarks on this problem in connection with the Leubsdorf-Posner formula, see LAYCOCK, *supra* note 3, at 119–20, 123:

> My own judgment is that the Leubsdorf-Posner formula is what they said it was: a distillation of the cases intended to guide analysis. It is a helpful distillation in one important way: it focuses attention on the point of the balancing process and specifies the relationship among the factors to be balanced.
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> It is a misleading distillation in another way. It greatly oversimplifies the variables that go into the balance, including the variable of irreparable injury. The problem is not just that the variables cannot be quantified in fact. The problem is more fundamental: these variables cannot be conceptualized even in theory as having discrete values that could be represented by points on a graph or by single numbers in an equation. Rather, these variables stand for ranges of possible developments, with the probabilities changing at every point in the range.
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> What judges can do is what they do in any balancing test: they balance the relevant factors in qualitative terms. It helps to clearly identify the relevant factors and to specify the relationship among the factors and the criteria for balancing. Judges can think in terms of strong case, weak case, wholly uncertain case; severe harm, some harm, no harm; harm that can be fixed in-kind after judgment and harm that can never be fixed in-kind; harm for which substitutionary relief is imperfect, seriously inadequate, or grossly inadequate; and so on.

The blackletter law of the preliminary injunction can be understood as an attempt to summarize these functional considerations, and in particular to put them into a few heuristics. The costs of inaction are expressed as irreparable injury (with nonparty costs being considered under the public interest factor). The costs of action are weighed in the balance of equities (as well as the public interest factor). The merits are given their own factor. The doctrine nods toward learning by separating the temporary restraining order from the preliminary injunction, and by making both of them subject to modification or dissolution by the court.[79] High error costs about the merits prediction are reflected in the blackletter rule that a preliminary injunction does not determine any point of fact or law.[80] The bias toward the costs of parties is counteracted by the public interest factor, the possibility of intervention, and the occasional admonition by a court of appeals that district court judges should not accept all-or-nothing options given to them by the parties.[81] Interlocutory appeals from the grant or denial of a preliminary injunction can be seen as a recognition of bias toward a judge's a priori views.[82] If the judge is wrong about the preliminary injunction decision, it is better to correct it right away; otherwise an initial error will adversely affect the entire course of the litigation. And courts sometimes recognize the points of complexity described above, including how the normative evaluation of a preliminary injunction can shift depending on how it is tailored.[83]

Even so, the current doctrine does not fully correspond to the functional analysis described here. Several improvements suggest themselves.

First, for purposes of option preservation, the merits should have less dominance in federal court decisionmaking about preliminary injunctions. The merits should not be a separate consideration, for they matter only because they affect the probability that the irreparable costs will be incurred.[84] Moreover, error costs at an early stage are especially high for the merits, as is the possibility of lock-in. One use of the merits inquiry at the preliminary injunction stage is therefore as a "negative filter": That is, a court should deny an application for a

79 *See* Bray, *supra* note 24, at 547 & n.81, 564–65, 583.

80 *See* Bray, *supra* note 3, at 822.

81 For trenchant observations on this point, see *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 22–23 (7th Cir. 1992).

82 28 U.S.C. § 1292(a) (2018). On interlocutory appeals in equity more generally, see Bruhl, *supra* note 45.

83 *See, e.g.*, *Abbott Lab'ys*, 971 F.2d at 23.

84 As discussed elsewhere, one way to reduce the dominance of the merits is not to consider that factor first. *See* Bray, *supra* note 5, at 213. This aligns with the *Restatement (Second) of Torts*, which makes the prediction of the merits the third factor. *See* RESTATEMENT (SECOND) OF TORTS § 936(2) (A.L.I. 1979).

preliminary injunction if the party seeking it cannot show the existence of a serious question on the merits.[85] A showing of a serious question on the merits should be necessary, but not sufficient, for the court to grant a preliminary injunction.

Second, courts should consciously recognize the value and imperative of learning throughout the litigation process about a preliminary injunction's costs. This means, for example, that courts should not treat legal questions as ones that can be decided without the benefit of factual development.[86] And courts should be more willing to update their predictions as the litigation process continues. That means courts should more frequently grant preliminary injunctions that are expressly limited in their duration. And courts should explicitly instruct the parties to suggest benchmarks or milestones that would provide new information about whether a preliminary injunction should be dissolved or extended. When a preliminary injunction is used to protect the court's ultimate remedial options, a functional analysis cannot support the current routine of a one-time assessment by the court with no subsequent updating. Courts should ask how confident they are about the tentative conclusions they are making and expressly consider the possibility that they will obtain new information (from the litigation or the world) that would change that confidence in the future.

A related implication for appellate courts is about remand. When an appellate court reviews a trial court's decision on a preliminary injunction—no matter whether it was a grant or denial, and no matter whether it is being affirmed or reversed—the appellate court should be more willing to remand so there can be an actual decision on the merits with a properly developed factual record.[87]

Third, given the complexity and dynamism of all the relevant predictions, judges should embrace satisficing. They are not looking for a perfect preliminary injunction decision, nor for a perfect preliminary injunction, nor for a preliminary injunction that will fully eliminate irreparable harm to the parties. Instead, they should stop searching when they find "an option that is good enough."[88] For starters, if the

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85 *See* Bray, *supra* note 5, at 222–23.

86 The attitude to reject is exemplified by a line from one of the preliminary injunction decisions appealed to the Supreme Court in *United States v. Skrmetti*: "The parties agree that the motion for preliminary injunction presents primarily legal questions, and thus no evidentiary hearing is necessary." Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 580 (W.D. Ky.), *rev'd sub nom.*, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *aff'd sub nom.*, United States v. Skrmetti, 145 S. Ct. 1816 (2025).

87 *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 823 (1986) (O'Connor, J., dissenting), *overruled by*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

88 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 178 (2006).

course of litigation without a preliminary injunction is "good enough" for preserving the court's ultimate remedial options, nothing should be done. The judge is not on a zero tolerance hunt for any possible harm to a party during the litigation—the decision costs and risks of error from that approach are simply too high. But when letting the parties act however they choose during the litigation is *not* good enough, and the court needs to intervene to protect a party from harm and to protect its own remedial options, then it needs to find a preliminary injunction that is good enough. This should be the aim of the "substantial discretion" that courts have in balancing the various considerations that go into the grant or denial of a preliminary injunction.[89]

These would be substantial improvements in how courts advance the option-preserving function of interim injunctive relief.

B. Previewing Decisions

Option preservation is not the only way a court can use a preliminary injunction to serve the interests of the parties. A second function of the preliminary injunction is that it can preview the ultimate decision the court will make. This preview, indicating the judge's view of the merits at a preliminary stage, encourages settlement because it "reduce[s] the gap between the parties' respective estimates of case value."[90] By promoting settlement, a preliminary injunction can reduce litigation costs.

Note that what can be previewed is more than just the merits. In fact, three different things may be previewed. The first is the court's

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89 RESTATEMENT (THIRD) OF TORTS: REMEDIES § 56(a) (A.L.I., Tentative Draft No. 4, 2025); *see also* LAYCOCK & HASEN, *supra* note 9, at 457 ("At the preliminary relief stage, the risk of injury must be *sufficiently great and sufficiently irreparable* to override the risk of error and the shortcuts with defendant's right to due process." (emphasis added)).

90 Robert G. Bone, *Settlement and the "Good" Judge*, 38 REV. LITIG. 211, 224 (2019). Bone notes that judges "provide tentative merits evaluations when they decide preliminary injunction motions." *Id.* at 224 n.52. There is old precedent for this function of the court's disposition of an application for a preliminary injunction. In *Tebo v. Hazel*, the Delaware Court of Chancery noted that

> it has frequently happened that the Chancellor, upon the decision of a motion for a preliminary injunction, would give his reasons at length in any case where the decision of the motion involved the consideration of the same questions that would arise at a final hearing, but this is done merely for the convenience and guidance of counsel, to enable them to determine whether they would be justified in proceeding to contest vigorously the issues involved, up to a final decree, and when the correctness of such opinion has not been questioned in any subsequent proceeding in the cause, it possesses an authority on the points of law discussed as if rendered at a final hearing.

Tebo v. Hazel, 74 A. 841, 846 (Del. Ch. 1909).

ultimate merits decision. The second is the court's view of the ultimate remedy.[91] The third is whether the ultimate decisionmaker will be the court or a jury.[92]

It is well known that how a court resolves a motion for a preliminary injunction can lead the parties to settle.[93] That observation is countered by those who report settlement is less frequent than expected.[94] And one model suggests that *grants* of preliminary injunctions actually reduce settlement, while denials increase settlement, and the latter effect dominates.[95] For purposes of this analysis, however, the correct empirical characterization does not matter. Previewing a decision in order to prompt settlement is *one function* of preliminary injunctions. The other functions do not depend on settlement. Because there are multiple functions, even if (counterfactually) every instance of the decision-previewing function led to settlement, it would still be the case that not all preliminary injunctions prompted settlement.

C. *Accelerating Decisions*

The decision-previewing function imagines a dynamic relationship between court, plaintiff, and defendant where the court's revelation of its view of the merits will encourage the plaintiff and defendant to settle. But high transactions costs may preclude settlement for many reasons, whether due to negotiation difficulties, lack of information, agency failures, bilateral monopolies, mistrust, or spite.[96] In a case

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91 If the court grants a preliminary injunction, it is signaling that the ultimate remedy will not be damages. Preliminary injunctions are unavailable in federal court in suits for damages. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 333 (1999).

92 On previewing the decisionmaker, see Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323 (2013).

93 *See, e.g.*, Bone, *supra* note 90, at 224 n.53; Huang, *supra* note 92, at 1325–26; Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 202 n.14 (2003); Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1361–62 (2020).

94 *See* Molly Grace Baldock, *Do Preliminary Injunctions Cause Settlement? Evidence from the Field* (2024) (unpublished manuscript) (on file with author); Miller, *supra* note 23, at 195.

95 Thomas D. Jeitschko & Byung-Cheol Kim, *Signaling, Learning, and Screening Prior to Trial: Informational Implications of Preliminary Injunctions*, 29 J.L. ECON. & ORG. 1085, 1088 (2013).

96 *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094–95, 1119 (1972); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999); Alan O. Sykes, *"Bad Faith" Refusal to Settle by Liability Insurers: Some Implications of the Judgment-Proof Problem*, 23 J. LEGAL STUD. 77, 85, 100 (1994); *cf.* George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL

where the parties are unable to reach a settlement, there is no need for the preliminary injunction to preview the judge's decision—if a preview happens, and there's no one there to hear it, why does it matter? Instead, the preliminary injunction would serve a different function: accelerating the ultimate decision.

The rationale for the decision-accelerating function is that litigation is slow, and delay causes harm. More precisely, litigation delay may allow one party to inflict harm on another party.[97] If the judge knows what the ultimate decision will be, a preliminary injunction allows the court to act now, reordering the relationship of the parties to match that ultimate decision.[98]

In suits against federal officers, the acceleration function allows a court to respond to government actions that are flagrantly illegal, such as President Trump's executive order purporting to abandon birthright citizenship.[99] It also allows judges to thwart a tactic executive agencies might use: ordering a large-scale transformation of an industry or some other area of human activity, even with the expectation that the agency's orders will be challenged and defeated in court, but hoping that the long litigation process will allow the required transformation to "stick" before the litigation losses occur.[100]

In suits between private parties, the acceleration function allows a court to avoid the litigation costs (to the parties) and decision costs (to the court) that will come from prolonging the litigation. This is yet another way in which the court can use the preliminary injunction to try to do justice to the parties.

II. EVALUATING THE FUNCTIONS

These functions can be served by preliminary injunctions, but each function has different pressure points. This Part offers a

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STUD. 1, 12 (1972) ("The world of zero transaction costs turns out to be as strange as the physical world would be with zero friction.").

97 *See* LAYCOCK & HASEN, *supra* note 9, at 453.

98 *Cf.* Samuel L. Bray, *Remedies in the Officer Removal Cases*, 17 J. LEGAL ANALYSIS 236, 239 (2025) (noting the implications of this point with respect to the Supreme Court's interim docket).

99 *See* CASA, Inc. v. Trump, 763 F. Supp. 3d 723, 747 (D. Md. 2025), *appeal dismissed*, No. 25-1153, 2025 WL 2141296 (4th Cir. July 29, 2025). As discussed below, a preliminary injunction may be necessary to preserve the court's ultimate remedial options, yet it is not necessary as a means of accelerating the court's decision; other procedural mechanisms can fully and effectively accomplish that acceleration. *See infra* notes 111–13 and accompanying text.

100 *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 476–77 & n.334 (2017) (illustrating this point with the Mercury and Air Toxics Standards issued by the Environmental Protection Agency during the Obama Administration).

comparative evaluation of the functions, asking two questions. First, what does each function require the court to be good at? Second, what are the available substitutes for each function?

A. *Competence*

First, the different functions require different kinds of competence from courts. Option preserving requires a court to be good at understanding final remedies, and to properly read the ways the parties might act opportunistically to eliminate one of those final remedies. The option-preserving function does not require high confidence about the merits, and in fact the normative analysis above would tend to de-emphasize the merits relative to the equities. There is much more to the inquiry: the irreparable injuries on both sides, the reduction of those injuries with injunction bonds and no-injunction bonds, the variegated possibilities for the preliminary injunction, and other equitable considerations.

By contrast, the decision-previewing and decision-accelerating functions require the courts to be good at predicting the merits. In fact, that is the only thing they require. Put another way, a test for an option-preserving preliminary injunction should emphasize irreparable injury and the balance of equities, but a test for preliminary injunctions that are meant to preview or accelerate the court's ultimate decision will emphasize—and probably even be reduced to—the merits.

In evaluating the functions on this point, a key question is the reliability of the court's prediction of the merits. If error costs are high, we should expect the decision-previewing and decision-accelerating functions to be less valuable; if error costs are low, they will be more valuable.

There are good reasons to think error costs are higher for the merits than for irreparable injury. These are summarized by Judge Mosman, a federal district court judge sitting by designation on a panel of the Ninth Circuit:

> As between the two, a district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of success. In fact, it is not unusual for the parties to be in rough agreement about what will follow a denial of injunctive relief. In this case, for example, the parties agree that more than 1,600 acres would be logged in the absence of an injunction. While they disagree about the implications of the logging—such as the extent of environmental impact or the value of natural recovery—the mere fact of logging is undisputed.
>
> But predicting the likelihood of success is another matter entirely. As mentioned, the whole question of the merits comes before the court on an accelerated schedule. The parties are often mostly

> guessing about important factual points that go, for example, to whether a statute has been violated, whether a noncompetition agreement is even valid, or whether a patent is enforceable. The arguments that flow from the facts, while not exactly half-baked, do not have the clarity and development that will come later at summary judgment or trial. In this setting, it can seem almost inimical to good judging to hazard a prediction about which side is likely to succeed. There are, of course, obvious cases. But in many, perhaps most, cases the *better* question to ask is whether there are serious questions going to the merits. That question has a legitimate answer. Whether plaintiffs are likely to prevail often does not.[101]

We could also disambiguate preliminary injunctions into ones with higher and lower error costs. Error costs are likely to be higher where more factual development is needed, where legal questions are novel and thus more likely to change in shape through litigation, where legal questions need to be factually situated to be properly resolved, or where judicial variance is high (especially if forum-shopping allows the selection of a judge with views that deviate markedly from the median judge[102]). Error costs are likely to be lower where factual development is less necessary, where the legal questions are not novel and do not need to be factually situated, and where judicial variance is low. Error costs are likely to be higher for the application of a standard and lower for the application of a rule.[103]

Contrast in this regard two kinds of situations in which preliminary injunctions are often given. In one situation, a federal court enjoins the enforcement of an agency's newly promulgated rule before it goes into effect based on the court's view of the merits and the costs the rule will impose on regulated entities.[104] Here, unless the rule is flagrantly illegal, there are numerous indicia of high error costs: Factual development about the consequences of the rule would be helpful; the legal questions may be novel or depend on the interaction of law and fact; and judicial variance is high, as is the ability to exploit

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101 All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1139–40 (9th Cir. 2011) (Mosman, J., concurring).

102 The assumption made is that the median judge in the federal district courts and court of appeals is more likely than an outlier judge to reach the "right" decision on a legal question (as measured by the only way internal to the legal system to decide "rightness," which is the long-term resolution of the question by relevant constitutional actors—especially, but not exclusively, the courts, and within the courts, especially, but not exclusively, the U.S. Supreme Court). If that assumption does not hold, then greater judicial variance and forum shopping could *reduce* error costs. Whether it would in fact do so would turn on whether the Supreme Court was aligned with the edge of the distribution of federal district court judges that was sought out by plaintiffs.

103 On rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

104 *See, e.g.*, Tex. Top Cop Shop, Inc. v. Garland, 758 F. Supp. 3d 607 (E.D. Tex. 2024).

that variance through forum-shopping by geographically large plaintiffs or coalitions of plaintiffs.[105]

In another situation, a federal court enjoins an employee who was the subject of a noncompete clause from working at a direct competitor. Here, unless the noncompete clause is unusually aggressive in terms of geographic scope or restriction intensity, there are numerous indicia of low error costs: The validity of the noncompete clause may be settled by circuit precedent and not be dependent on factual development (and thus be more rulish than standardish), and the variance between federal judges in the resolution of the case may be minimal.

The normative analysis so far can be summarized briefly.

First, the functions diverge in how reliable a judge's prediction of the merits needs to be. Reliable prediction of the merits is more essential for decision previewing and decision accelerating.

Second, the relative value of the different functions will vary across substantive areas, and even within substantive areas it can vary for different kinds of questions or cases. This is because error costs and transactions costs are heterogenous. Where they are both low, for example, the decision-previewing function will be valuable; where they are both high, it will not be. The decision-accelerating function does not require low transactions costs (because settlement is not the goal), but it does require low error costs. The option-preserving function is useful when a preliminary injunction can protect the court's ability to give final remedies that will do justice to the parties. Unlike the other functions, the option-preserving function requires neither low error costs nor low transactions costs.

B. Substitutes

Each function—option-preserving, decision-previewing, and decision-accelerating—is valuable to assign to some procedural device within a legal system. But not every function may need to be performed by the preliminary injunction. The analysis now considers the degree to which there are substitutes for each function within the legal systems of the United States.

The option-preserving function has no readily available substitutes in most circumstances. If the case is a dispute about personal property, until the court resolves the case it could take the property into its own custody. In some cases, a receiver could be appointed to administer property or to receive asset flows until their ownership can

105 *See* Baude & Bray, *supra* note 11, at 168–69, 171.

be determined.[106] But in most cases, if the court is concerned about losing an ultimate remedial option, there is no alternative to granting a preliminary injunction (or else requiring a no-injunction bond that will take the place of the preliminary injunction[107]).

The decision-previewing function can be achieved in other ways, but imperfectly. In a settlement conference, some judges will indicate their sense of the merits, or, less commonly, their sense of the likely magnitude of damages.[108] These previews of judicial thinking increase the probability of settlement, because they bring into closer alignment the parties' views of the expected value of the litigation. But there is no precommitment by the judge. She can suggest to the parties that the case is strong or weak, or any of the myriad shades in between, and later retreat and adopt a different position. What differentiates an opinion about the grant or denial of a preliminary injunction is that it is a formal, public act that is accompanied by reasons.[109] After that, it is less easy for the judge to climb down.[110]

True, the court has other ways to publicly signal its view of the merits. These include the court's resolution of a motion to dismiss or a motion for summary judgment. But when a court resolves one of those motions, there is a strong burden on the moving party. A win for the nonmoving party on a motion to dismiss or a summary judgment motion does not necessarily indicate whether there is likely success on the merits.

In short, although there are substitutes for the decision-previewing function of the preliminary injunction, they are imperfect. Decision previewing is a useful function not fully served by other procedural tools.

By contrast, for the decision-accelerating function, there are near-perfect substitutes for the preliminary injunction. Judge Bibas recently summarized them:

> First, a district court may move up the trial to consolidate it with the preliminary-injunction hearing. Second, the court may convert a preliminary-injunction motion into a summary-judgment motion if they first give the parties enough notice. Third, rather than move

106 Note that the normative analysis in this Article is substantially applicable to receivers. The appointment of a receiver usually serves an option-preserving function, but it also may preview the court's view of the merits.

107 On no-injunction bonds, see Bray, *supra* note 3, at 869–71.

108 On damage calculations, see LAYCOCK, *supra* note 3, at 116.

109 On reason-giving and courts, see LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 74–75 (2004).

110 On interim injunctions and the risk of judicial "lock-in," see Lanjouw & Lerner, *supra* note 68, at 577–79; and Lynch, *supra* note 68.

for a preliminary injunction, the parties may agree to an accelerated trial.[111]

Those substitutes, Judge Bibas wrote, "have many advantages" over a preliminary injunction,[112] including efficiency, better decisionmaking, and better appellate review. The other devices for accelerating a decision are as good or better than a preliminary injunction. The decision-accelerating function of interim injunctive relief is therefore unnecessary.[113]

C. Summary

The preliminary injunction allows a court to do justice to the parties by acting quickly under conditions of incomplete information. The court's action can serve any of three functions: preserving options, previewing decisions, and accelerating decisions. Of these functions, the option-preserving one is nearly unique to the preliminary injunction: It is usually the only procedural device that can serve this function. The decision-previewing function has partial substitutes, but it is still valuable if transactions costs and error costs are low. The third function, decision-accelerating, does not need to be served by the preliminary injunction. There are full substitutes available to a judge who wants to move up the resolution of a case.

III. THE PROBLEM OF FORM

This Part considers the interaction between the form that interim injunctive relief takes and the function(s) that it serves. At present there are two forms in U.S. legal systems: preliminary injunctions and temporary restraining orders. Is that too many or too few? And should different forms be matched to the different functions described above? This Part explores these questions, and when put together, they suggest a thought experiment in which the two current forms are replaced by two different ones that are functionally specific: a preliminary injunction that preserves the court's options, and a preliminary judgment that previews the court's decision. This thought experiment further illuminates the tensions in the current use of the preliminary injunction.

111 Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 206 (3d Cir. 2024) (Bibas, J.) (citations omitted).

112 *Id.*

113 Nor does it generate the benefits of doctrinal redundancy identified in F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635 (2016).

A. The Number of Forms

In most legal systems within the United States, interim injunctions come in two forms: the temporary restraining order and the preliminary injunction. Both have the same effect: they are orders enforceable by contempt.[114] The draft of the *Restatement (Third) of Torts: Remedies* puts the point this way: "Temporary restraining orders are functionally equivalent to an injunction. They order defendant to act or, more commonly, to refrain from acting, and a defendant who disobeys can be held in contempt of court and punished for disobedience, coerced to comply, or both."[115] And the criteria for when each should be granted are typically identical.[116]

The differences between the two forms are about speed, basis, and duration. A temporary restraining order may be granted very quickly, even ex parte, and on a more truncated record than a preliminary injunction, but it is limited in how long it lasts unless extended by the court.[117] The overall distinction between a temporary restraining order and a preliminary injunction does track real concerns. Sometimes an interim injunction does need to issue ex parte or on an hour's notice. When that happens, the injunction is a stopgap measure that should be revisited as soon as possible.

These concerns about speed, basis, and duration are linear, however, not chunky. For example, the Federal Rules of Civil Procedure set the outer limit for the expiration of an unextended temporary restraining order at fourteen days.[118] But fourteen days is not a "seam" for the relevant normative considerations. If time is of the essence, the court may need to issue an interim injunction on a hasty and extremely thin evidentiary basis. That basis might be so thin that it would support an injunction lasting for one day, or it might support one lasting for ten days, or for a hundred days.

Thus the need for and concern about rapid judicial action are real, yet for neither is there any special significance to fourteen days. Indeed, as Professor Doug Laycock and Professor Rick Hasen show, there is much confusion in the courts about the borderland between temporary restraining orders and preliminary injunctions, especially when a court issues a TRO with notice and extends it beyond the fourteen-day period.[119] The un-crisp line between the two forms leads

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114 *See* F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1072–73 (2021).

115 RESTATEMENT (THIRD) OF TORTS: REMEDIES § 57 cmt. a (A.L.I., Tenative Draft No. 4, 2025).

116 *Id.* § 57 cmt b.

117 *See id.* § 57.

118 FED. R. CIV. P. 65(b)(2).

119 *See* LAYCOCK & HASEN, *supra* note 9, at 476–78.

Laycock and Hasen to ask, "Should judges have some discretion to fashion hybrid orders, where they give reasonable notice and hearing on the TRO but want to hear still more on the preliminary injunction?"[120]

One solution might be to increase the number of forms. There could be an instant restraining order that lasts one week and can be issued ex parte, and a not-quite-so-temporary restraining order that requires notice but can last four weeks. And we would not have to stop with TROs. There could be several different kinds of preliminary injunctions that last for different lengths of time and require different showings on irreparable injury and the merits.

The problem with multiplying interim injunctive forms is that every one of these units would also have an artificial boundary. The underlying considerations—how fast does the court need to act? what are the fairness concerns for each side? what is the risk the court will get things wrong? how much does litigating this interim order just cause more delay?—are not chunky in a way that fits the division between any of these doctrinal forms. The added complexity from a proliferation of legal forms hardly seems worth it given the underlying linear differences.[121]

Given that problem, one could go in the opposite direction and simply combine the preliminary injunction and temporary restraining order into a single form. If it were granted ex parte, there could be one outer limit for expiration; if it were given with notice but without a hearing there could be another; and if given with notice and a hearing there could be no outer limit short of final judgment.

A major practical hurdle for consolidating the two forms would be appeals.[122] At present, preliminary injunctions are subject to interlocutory appeal, whereas temporary restraining orders are only sometimes appealable.[123] Any legislative reform to consolidate the preliminary injunction and the temporary restraining order would need to take seriously the scope of interlocutory appeal.

In sum, the two forms of interim injunctive relief presently available do not clearly track the underlying normative considerations. The

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120 *Id.* at 478.

121 *See* Samuel L. Bray, *On Doctrines that Do Many Things*, 18 GREEN BAG 2D 141, 147–48 (2015).

122 I am grateful to Professor Rick Hasen and Professor Doug Laycock for the following points about appeals of preliminary injunctions and temporary restraining orders.

123 *See* Bernadette Bollas Genetin, *Appealable TROs: Restoring Irreparable Harm as the Touchstone for Instant Interlocutory Appeal of Temporary Restraining Orders*, 75 BAYLOR L. REV. 372, 377, 402–03 (2023); Tyler B. Lindley, Morgan Bronson & Wesley White, *Appealing Temporary Restraining Orders*, 77 FLA. L. REV. 973, 980–81 (2025). For a recent high-profile dispute about the appealability of a temporary restraining order, see *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669 (D.C. Cir. Feb. 15, 2025) (per curiam).

number of forms could be multiplied, or they could be reduced to one. The latter approach may be better (and would be a return to earlier days of equity before the sharp distinction between the two forms set in). But it runs into difficulties relating to appeals. One form of interim injunctive relief may be better, but two forms is not bad.

B. *Should the Forms Match the Functions?*

As discussed above, the preliminary injunction serves three functions, and two are functions for which the preliminary injunction is useful above and beyond the other procedural tools available to the court. Should the same form of preliminary injunction preserve options and preview decisions, or should there be different forms to match the different functions?

The current characteristics of the preliminary injunction are well-suited to protecting the parties by preserving the court's ultimate remedial options. Its temporary duration, its lack of final determination of any question of law and fact, its basis in partial evidence, and its requirement of irreparable injury are all calculated to advance the purpose of option-preservation.[124]

The preliminary injunction is not well designed, however, for previewing the court's view of the merits. Consider five points of disconnection between this function and the law of the preliminary injunction.

First, the most basic requirement for a preliminary injunction is that the plaintiff establish irreparable injury, that is, significant harms during the course of litigation that cannot be remedied after judgment. Irreparable injury is the "sine qua non of preliminary injunctive relief."[125] But irreparable injury is epiphenomenal to a preview of the merits; for the decision-previewing function there is no need to require a showing of irreparable injury.

Second, preliminary injunctions are unavailable when the plaintiff is suing only for damages and not for an equitable remedy, at least in the federal courts and in some state courts.[126] Such a limitation can be justified for the option-preserving function, but it makes no sense for the decision-previewing function. In fact, many of the cases where the decision-previewing function would be most useful to the parties involve suits for damages.

124 *See* Bray, *supra* note 3, at 811.

125 Sunder Energy, LLC v. Jackson, 305 A.3d 723, 745 (Del. Ch. 2023) (quoting Kingsbridge Cap. Grp. v. Dunkin' Donuts Inc., No. 10907, 1989 WL 89449, at *4 (Del. Ch. Aug. 7, 1989)), *aff'd in part*, 332 A.3d 472 (Del. 2024).

126 *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999); E.I. Du Pont de Nemours & Co. v. HEM Rsch., Inc., 576 A.2d 635 (Del. Ch. 1989).

Third, the preliminary injunction is enforceable by contempt,[127] and that requirement puts pressure on the court to be specific in what it requires the defendant to do or not do. But contempt enforcement is unnecessary for a preview of the merits.

Fourth, every preliminary injunction test used by federal and state courts includes nonmerits factors, and even beyond the tests there are other relevant considerations about the equities (e.g., laches, unclean hands, managerial burden on the courts).[128] For the decision-previewing function, the consideration of the equities at the preliminary injunction stage is unhelpful and even has the potential to derail the successful performance of the function. Maybe the equitable considerations at the preliminary injunction stage will reproduce themselves at final judgment, but they might not. A court might, for example, consider the plaintiff to have been tardy in seeking a preliminary injunction and deny it on that ground (either under the label of laches or irreparable injury), even though the court would not deny a final injunction for the same reason.[129] In such a case, specific consideration of the equities at the preliminary injunction stage will only distort the signal sent by the court about its ultimate decision.

Finally, preliminary injunctions are subject to interlocutory appeal. Whatever the precise set of reasons may be for interlocutory appeal, it fits uncomfortably with a preview of the court's ultimate decision. Imagine, for example, that a trial court judge tells the parties in open court that they should settle the case because she does not see how the damages could be above $200,000. That statement by the judge, no matter how firmly expressed and no matter how amply supported by reasoning, is not subject to interlocutory appeal. A preview of a decision, standing alone, does not require interlocutory appeal.

What these five points show is that the current doctrine of the preliminary injunction is not a good fit for the decision-previewing function. Yet the value of that function can be seen by how parties persist in seeking it *despite the lack of fit*. The decision-previewing function would be a better fit for something other than an injunction, something like Professor Geoffrey Miller's "preliminary judgment" proposal.[130]

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127 For examples of contempt enforcement for a preliminary injunction, see *Hudson Furniture, Inc. v. Mizrahi*, No. 20-cv-04891, 2023 WL 6214908, at *16–17 (S.D.N.Y. Sept. 25, 2023); and *Bravo Pizza Enterprises, Inc. v. Azizo*, No. 23-cv-04540, 2023 WL 5548372, at *7 (E.D.N.Y. Aug. 29, 2023).

128 *See, e.g.*, William Baude & Samuel L. Bray, *When the Executive Has Unclean Hands*, 135 YALE L.J.F. 567 (2026).

129 *See, e.g.*, Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 206 (3d Cir. 2024) (Bibas, J.).

130 *See* Miller, *supra* note 23.

There is therefore a clear case for separating the preliminary injunction into two forms that are matched to two functions: a preliminary injunction that does justice to the parties by preserving the court's ultimate remedial options, and a preliminary judgment that does justice to the parties by previewing the court's ultimate decision. That case for separation is strengthened by thinking about the role of the merits in each function. An injunction designed to preserve the court's ultimate remedial options should play down the merits, and the court should try *not* to be drawn into tipping its hand more than is necessary. But a form designed to preview the ultimate decision about the merits and remedy, tipping the court's hand is the entire point. One device should conceal the signal about the merits, while the other should clarify it. It is unsurprising that in a world with a single form that tries to serve both functions, the result is incoherence.

There is, however, a major problem with such a legal reform. However imperfectly, the preliminary injunction often does serve both functions in a single case. That is, the court grants or denies a preliminary injunction based on its view of whether one is needed to preserve its ultimate remedial options, while at the same time signaling to the parties its view of the merits, which may prompt their settlement of the case. As long as the merits are part of the preliminary injunction inquiry, parties will read the court's decision for signals about the merits. It is not possible for it to be otherwise.

In short, there are reasons to consider allowing courts to grant preliminary judgments,[131] and doing so would clarify what courts are primarily doing when they grant or deny a preliminary injunction: deciding whether to intervene now to protect the court's ability later to do justice to the parties.[132]

Yet even if the forms were pulled apart, allowing more coherence and specialization, the functions can never fully be separated. A preliminary injunction to protect the court's options can still reveal how the court is thinking about the endgame, and a preliminary judgment to signal the court's thinking about the merits may require orders to the parties that are more or less identical to preliminary injunctions. And a court might find that it needed to grant both a preliminary injunction and a preliminary judgment in the same case. A total separation is impossible.

131 *See id.*

132 *See* Bray, *supra* note 3.

CONCLUSION

This Article identifies three functions that preliminary injunctions can serve: preserving options, previewing decisions, and accelerating decisions. All three are valuable for procedural devices within a legal system, but not all three need to be served by the preliminary injunction. This analysis shows the demands that each function places on a court and the degree to which each function can be served by other procedural devices. It also shows the fit or lack of fit between each function and the law of the preliminary injunction. This Article therefore offers a fundamental rethinking of preliminary injunctions and temporary restraining orders, with guidance for judges and policymakers as these procedural tools continue to evolve.

Normative legal scholarship usually accepts some measure of doctrinal constraint. Scholarship related to civil procedure and federal courts tends to hold constant most doctrinal characteristics, even while revising others. At least that is true of existing scholarship on preliminary injunctions. Nevertheless, given the shifts or even transformations in practice related to preliminary injunctions,[133] this is an apt moment for scholars to rethink the normative foundations of this increasingly important procedural tool.

The analysis offered here is also valuable for judges who use the prevailing tests for awarding preliminary injunctions and temporary restraining orders. Those tests allow the balancing of multiple factors, and that is how they are best understood: not as a checklist of necessary requirements, but as a set of factors that need to be considered and then balanced.[134] But balancing to what end?

Even with no change to current doctrine, as long as courts consider themselves able to balance the various factors, they can use the prevailing tests to consciously achieve one or more of these functions. That is, a judge can consider whether she needs to act now to preserve a valuable remedial option, using the four-factor test to that end. Or she can consider whether she wants to preview for the parties her ultimate decision about the merits and remedy, employing the four-factor test to that end. But either way it is the intelligent use of the test to achieve a conscious purpose—not the accidental use of the test without a sense of purpose—that is the appropriate path.

133 *See, e.g.*, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025) (ending universal injunctions, which were typically preliminary); Bray, *supra* note 3; Bray & Pfander, *supra* note 1; Lindley, Bronson & White, *supra* note 123.

134 *See* LAYCOCK & HASEN, *supra* note 9, at 53; Bray, *supra* note 5.