

EMERGENCY INJUNCTIONS UNDER DEMOCRATIC GOVERNMENT: PUBLIC JUSTIFICATION FOR CONTESTED OUTCOMES

*Alexandra D. Lahav**

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INTRODUCTION

Courts provide a special contribution to democratic government in the United States because they allow individuals to participate in their own governance by filing a lawsuit.¹ The lawsuit forces a kind of reckoning by setting in motion a series of events including an answer that responds to the plaintiff’s claims, revelation of information relating to those claims, and ultimately a hearing on those claims by a neutral arbiter. Unlike other branches of government, which act collectively and in a representative fashion, for the most part the courts act individually—a trial judge makes a decision with respect to a single case, sometimes a single plaintiff. A court provides process and, if appropriate, a remedy for the case before it.

As part of the process of determining the validity of a lawsuit and the appropriate remedy, however, courts produce benefits that go beyond that

* Anthony W. and Lulu C. Wang Professor, Cornell Law School. I am grateful to participants in the Tel Aviv/Cornell Conference on Law and the Challenges to Democracy for their comments, especially Issi Rosen-Zvi, Natalie Davidson, Avihay Dorfman, and Brad Wendel, and to participants in the Northwestern Faculty Workshop, especially Monica Haymond, Zach Clopton, Jim Pfander, John McGinnis, and Andrew Koppelman. Conversations with Emad Atiq, Sam Bray, Kevin Clermont and Maggie Gardner influenced my thinking and inspired much of what is written here. I dedicate this piece to Judge James Boasberg, whose preliminary injunction in *J.G.G. v. Trump*, No. CV 25-766 (JEB), 2025 WL 890401 (D.D.C. Mar. 24, 2025), serves as a model of reason giving under emergency conditions.

¹ See generally ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION (2017).

individual case, including the production and vetting of information and a forum for dialogue that could be part of a larger deliberative or contested conversation about rights and wrongs, changes to regulatory structures, or legislative action. Like any power, the power to sue can be both good and bad. There is nothing inherent in the act of seeking redress from the court that promises that the decision to sue is socially beneficial.² This fact puts pressure on procedure to shut down social harmful lawsuits. But the processes adopted by courts should nevertheless promote democratic values, including a vetting of claims for the truth of the matter and public justification for contested outcomes.

In this Article, I will discuss emergent procedures that have been used to undermine dialogue and truth-seeking rather than promote it. This is particularly problematic in situations claimed to be or that are in fact an emergency. To this end, I discuss two innovations, both involving recent public law cases where a party requests a preliminary injunction. These are often used in challenges to new laws, or challenges to older laws based on new judicial precedents that place those laws' validity at risk.³ Parties in these cases seek relief on an emergent basis, pushing the court to decide early in the case whether to issue a temporary restraining order (TRO) or preliminary injunction.

A TRO or preliminary injunction allows a litigant to obtain a temporary remedy to prevent irreparable harm until the merits of their case can be decided. This remedy has been understood as extraordinary and only available when the harm is truly imminent and irreparable.⁴ It is an equitable remedy, which has traditionally meant that the court's analysis is very fact specific: the equities of the case (i.e., the particular facts affecting the particular litigants) are crucial to the determination of the remedy. If the harm could be compensated with money damages, for example, or the action reversed, then the harm is not irreparable and a preliminary injunction should not issue. There are three requirements in addition to irreparable harm for issuing a preliminary injunction: that the movant is likely to succeed on the merits (or in some circuits that there are "serious questions" going to the merits), that the balance of equities favors

² For an economic analysis of this point, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

³ For a discussion of the "new law" problem in preliminary injunctions, see Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809, 857-872 (2025). Much of the discussion here was prompted by Bray's work on this topic.

⁴ *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). See also *Grounds for Granting or Denying a Preliminary Injunction*, 11A Fed. Prac. & Proc. Civ. § 2948 (3d ed. Apr. 2025) ("It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.").

the movant, and that the injunction is in the public interest, or at least does not harm the public interest.⁵

The first innovation is the adoption of rules of thumb to replace analysis in a set of public law preliminary injunction cases. The second is the adoption of a new procedural mechanism at the district court level—the “administrative stay”—that purports to freeze a court decision without decision, with the avowed purpose of promoting legitimacy by not deciding. In one a decision comes without reason, in the other reason, and even a decision (the *sine qua non* of judging), are disclaimed altogether. The first two parts of this Article discuss these developments; the final part sets them in the context of the proper relationship between judicial decisions, rules, and reasons.

I. RULES OF THUMB REPLACE FACTS AND REASONS

Recently, there have been public law cases, where individuals or interest groups have sued governments to enjoin new laws or administrative action, in which the courts deciding the preliminary injunction motion have started using a set of “rules of thumb” rather than case-specific, individualized inquiries. The next two sections discuss two of these rules, one that most compliance costs (that are not *de minimis*) constitute an irreparable injury and the second that constitutional violations constitute *per se* irreparable injury.

A. Compliance Costs

Consider cases in which an entity challenges a regulation and claims irreparable harm on grounds that the regulation imposes compliance costs that may be unrecoverable. For example, in *Restaurant Law Center v. United States Department of Labor*,⁶ the Fifth Circuit held that a federal regulation that federal minimum wage applied to tipped employees would cause irreparable harm to restaurants. The court explained that “the nonrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm.”⁷ This is the case, the court implied, even if the costs of compliance are relatively low. Contrary to the general equitable rule that irreparable harm is non-compensable through money damages, the court explained that “[e]ven purely economic costs may

⁵ *Winter*, 555 U.S. at 20; *State Farm Mutual Automobile Insurance Company v. Tri-Borough NY Medical Practice P.C.*, 120 F.4th 59, 79–80 (2d Cir. 2024) (applying the “serious questions” standard). § 2948 Grounds for Granting or Denying a Preliminary Injunction, 11A Fed. Prac. & Proc. Civ. § 2948 (3d ed. Apr. 2025) (discussing the circuit split). *See also* Kevin J. Lynch, *Preliminary Injunctions in Public Law: The Merits*, 60 *Hous. L. Rev.* 1067, 1083–89 (2023) (describing and defending the “serious questions” test.)

⁶ 66 F.4th 593 (5th Cir. 2023)

⁷ *Id.* at 597.

count as irreparable harm ‘where they cannot be recovered ‘in the ordinary course of litigation.’”⁸ The court detailed the potential costs of the new rule, mostly involving recording employee time. And the court found that such costs are typically not recoverable because of sovereign immunity. It is true that in private law cases, a defendant’s insolvency or likelihood of fraudulent transfer will permit a finding of irreparable harm.⁹ And the Fifth Circuit’s generous approach to the irreparable harm standard is consistent with Douglas Laycock’s observation in the 1990s of the death of the irreparable injury rule,¹⁰ and with what he observed courts were doing on the ground.

The court in the *Restaurant Law Center* case did analyze the costs of compliance to some extent, but, in the end, it fell back on the “rule” that any compliance cost that is more than “de minimis” constitutes an irreparable harm. The dissent took the court to task in that case, arguing that the appellate court’s analysis was based on self-serving testimony that was vague and general.¹¹ But the real problem is the rule of thumb. If anything other than de minimis costs is an irreparable harm, every regulation causes irreparable harm and analysis is hardly necessary.¹² While the problem of governmental immunities preventing recovery by regulated entities is real, this is unlike the private law situation in which most defendants are not insolvent or engaged in fraudulent behavior to hide their assets. An irreparable harm rule that permits an injunction to lie for any cost of compliance would create a one-way ratchet in favor of injunctive relief

⁸ *Id.*

⁹ See, e.g., *McGirr v. Rehme*, 891 F.3d 603, 614 (6th Cir. 2018) (risk that defendant will continue to hide assets, based on prior actions, justified finding of irreparable harm).

¹⁰ See generally DOUGLAS LAYCOCK, *DEATH OF THE IRREPARABLE INJURY RULE* (1991) (arguing with empirical evidence that courts generally decide injunctions based on the merits, not whether the harm is irreparable).

¹¹ 66 F.4th at 603.

¹² The subsequent procedural history of the case demonstrates the complexity of the legal question, further undermining the decision to stay the regulation, although ultimately the regulation was struck down. After the preliminary injunction was appealed, the district court upheld the regulation on summary judgment. The Fifth Circuit reversed, and part of that reversal was based on the change in caselaw between the initial preliminary injunction motion and the summary judgment decision. *Rest. L. Ctr. v. United States Dep’t of Lab.*, 115 F.4th 396, 404 (5th Cir. 2024), *opinion withdrawn and superseded on reh’g*, 120 F.4th 163 (5th Cir. 2024) (“While the district court was of course correct to apply the *Chevron* framework at the time of its decision, the Supreme Court’s intervening opinion in *Loper Bright* requires us to depart from the district court’s analysis at the very start.”). The superseding opinion, 120 F.4th 163, came to the same conclusion. Thus, there was at least a serious question as to whether the regulation would be upheld, which means that the tipped employees not paid minimum wage during the intervening period (more than a year) also lost the benefit of a regulation. The appellate court had initially remanded the case for consideration of the other factors, including balancing of the equities, but it is still telling that the costs of non-compliance were never mentioned in the opinion. If the restaurants did not track worker time in the interim, and the regulation did go into effect, workers would not be paid what they were lawfully entitled because it would be impossible to prove to what pay they were entitled.

against the government. At the same time, it highlights the problem that governmental immunities create for litigants who have been wronged.¹³

Contrast the reasoning in *Restaurant Law Center* with the cases from which the rule of thumb originated. In *Texas v. United States Environmental Protection Agency*, the Fifth Circuit held that an EPA regulation would require an investment of approximately two billion dollars and the size of this compliance cost constituted irreparable harm.¹⁴ It has long been held that if the outcome of the litigation could destroy a business (rather than simply imposing a cost that can be recompensed) this constitutes irreparable harm.¹⁵ The court in *Texas v. EPA*, in turn, quoted Justice Scalia's concurrence in *Thunder Basin Coal Co. v. Reich*, where he wrote that "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."¹⁶ Justice Scalia's observation is truer today than when he wrote it. The problem is this quote is taken somewhat out of context. *Thunder Basin* involved a regulation that required mines to allow union representatives entry and the Supreme Court held that the district court lacked pre-enforcement jurisdiction. Justice Scalia agreed with this outcome—in other words, the Court held that there would not be pre-enforcement review of the agency's action. His concern about the costs of compliance (in this case the harm of allowing a union representative who might expose company trade secrets, for example) was mitigated by his view that so long as a fine or other enforcement action allowed for court review after the fact, there was no need for further court action based on compliance costs alone.¹⁷

In any event, the statement that compliance costs constitute irreparable harm, in a context where the statute forbade preliminary review, seems a rather weak hook on which to hang a doctrine that overturns settled equity practice in every public law case involving any regulation, particularly in light of the same Justice's later pronouncement that traditional equity principles govern injunctions.¹⁸ Consider as a contrast to this *per se* rule

¹³ See, e.g., Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–20 (2018) (arguing that qualified immunity "renders the constitution hollow.").

¹⁴ *Texas v. United States Env't Prot. Agency*, 829 F.3d 405, 433 (5th Cir. 2016).

¹⁵ See, e.g., *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 719 (4th Cir. 2021) (finding irreparable harm in a case where action threatened to close 150-year-old, multi-generational family business).

¹⁶ *Texas v. United States Env't Prot. Agency*, 829 F.3d at 433 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)).

¹⁷ Justice Scalia explained: "In my view, however, the preclusion of pre-enforcement judicial review is constitutional whether or not compliance produces irreparable harm—at least if a summary penalty does not cause irreparable harm (e.g., if it is a recoverable summary fine) or if judicial review is provided before a penalty for non-compliance can be imposed." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220 (1994).

¹⁸ See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999) (declining to permit use of novel equitable remedy); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006) (holding that equitable test applies to all types of cases).

the concurrence in *eBay v. MercExchange* which explained: “[T]here is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate. ‘Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.’”¹⁹ I will return to the importance of cabined discretion in complying with the rule of law in the last section.

Intuitively, it seems that a regulation imposing compliance costs that would existentially threaten a business would be irreparable harm, and the courts have so held,²⁰ but all regulations impose some compliance costs. Even de-regulation potentially imposes costs of retooling existing structures. A *per se* rule that compliance costs are irreparable undermines the fundamental idea behind the standard for a preliminary injunction, which is to weigh the equities in the particular case carefully.²¹ The exercise of balancing equities has value because it forces the court to confront the impact of its hasty action, surfaces the risks to observers of the legal proceedings, and demonstrates equal concern and respect to the parties before it and all the stakeholders.

B. *Constitutional Violations*

Another example of the rise of rules of thumb in the preliminary injunction context are cases involving impairment of a constitutional right. If the case involves a constitutional right, a minority of appellate courts have ruled, then the harm is automatically irreparable. For example, in a recent case in California challenging a regulation that prevented open-carry of weapons in counties with populations over two hundred thousand, the Ninth Circuit affirmed a preliminary injunction against the government on Second Amendment grounds.²² The court listed the four preliminary injunction factors but then explained that the first, likelihood of success on the merits, was the most important and, strangely, that success on the merits was equivalent to irreparability. The court explained: “It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he

¹⁹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, J. concurring, with Scalia, J. and Ginsburg, J. joining in the concurrence) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)).

²⁰ See *Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm*, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. Apr. 2025) (“[W]hen the potential economic loss is so great as to threaten the existence of the moving party’s business, then a preliminary injunction may be granted, even though the amount of direct financial harm is readily ascertainable.”).

²¹ See Samuel L. Bray, *Preliminary Injunction Realism*, 44 REV. LITIG. (forthcoming 2025), <https://ssrn.com/abstract=5230970> [<http://dx.doi.org/10.2139/ssrn.5230970>].

²² *Baird v. Bonta*, 81 F.4th 1036 (9th Cir. 2023)

is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation.”²³

This rule is not, in fact, “well-established.” The authority cited for this extraordinary proposition was a case from 2014 involving a limitation on access to abortions in Arizona which required that medications used to induce abortions must be prescribed on-label.²⁴ In that case, the appellate court reversed a trial court’s decision to deny an injunction without addressing the question of irreparable harm. Instead, the appellate panel found a likelihood of success on the merits and remanded to the district court with instructions to issue the injunction.²⁵ The district court had found there was no irreparable harm because even if there was a greater burden on some women, “[w]hether or not these factors are substantial obstacles to abortion remains to be seen, but based on the limited record before the Court they do not qualify as irreparable harm.”²⁶ One can imagine many good arguments that the appellate court could have made to find irreparable harm in the case of abortion access, and the court should not have neglected these arguments even if they seemed obvious. But the omission of those arguments is not a holding that impairment of every constitutional right constitutes a *per se* irreparable harm. Rather, it is better understood as an example of incomplete reasoning.

Returning to the open-carry regulation, it is not at all obvious that not being able to carry weapons openly, as opposed to concealing them, would be irreparable harm. After all, the gun owners could still carry their guns for self-protection under the current law. But the point here is not whether or not a regulation forbidding gun owners from visibly carrying their weapons is in fact irreparable harm. Rather, it is the decision not to hold a hearing on the question, or to consider what the plaintiff has shown at the preliminary stage to justify extraordinary relief. Instead, the court assumes its answer to a core question in the traditional preliminary injunction standard, which is a violation of a fundamental idea that litigation is about presenting arguments and rendering a reasoned decision. The core principle of litigation is that the court is charged with finding and evaluating facts. Assuming away contested facts undermines a crucial function of litigation.

The difficulty in the temporary restraining order or preliminary injunction context is the lack of time to develop a full record. These emerging rules of thumb may be meant to combat this problem. Courts are often called on to decide critical issues of governmental power in the public law context without a full development of the underlying facts or

²³ *Id.* at 1040.

²⁴ *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014), *abrogated by*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

²⁵ *Id.*

²⁶ *Planned Parenthood Arizona, Inc. v. Humble*, 13 F. Supp. 3d 1017, 1026 (D. Ariz.), *rev’d*, 753 F.3d 905 (9th Cir. 2014).

even a full evaluation of the legal issues. They may rely on the say-so of interested witnesses and lack sufficient time to conduct a searching inquiry. Rules of thumb exacerbate this phenomenon, because they further reduce the import of facts and encourage judges to act without consideration of the specific case before them.

In other cases where courts have considered the irreparable harm to gun owners of various gun regulations, they have found no irreparable harm justifying the extraordinary relief of a preliminary injunction. For example, in a case involving a challenge to a Delaware law prohibiting sale and limiting possession of assault weapons and large capacity magazines, the Third Circuit upheld a denial of a preliminary injunction because the plaintiffs had failed to demonstrate irreparable harm.²⁷ The court explained that the likelihood of success on the merits is “not enough for a preliminary injunction.”²⁸ The court rejected the argument that because “constitutional rights are priceless,” the likelihood of success on the merits should be sufficient to support a preliminary injunction.²⁹ Instead, the court focused on the nature of equitable balancing which requires judicial discretion. A rule assuming irreparable harm in constitutional violations denies the court such discretion.³⁰ And as the court explained, the preliminary nature of the remedy requested by definition means that the record has not been fully developed and might change as the case moves forward:

Early in a case, the merits are seldom clear, even when they seem black and white. The litigation process gradually adds hues to this monochrome sketch, sharpening the issues until the trial provides full color. Jumping to conclusions this early is like finding guilt right after hearing each side’s key witness, without keeping an open mind long enough to reflect on their weaknesses. A rushed judgment is a dangerous one; judges must be humble enough to stay their hands.³¹

Sometimes the issue is so pressing that the preliminary decision determines the outcome. Consider a case seeking to prevent the government from permitting logging in an ancient forest. If the logging goes forward, there is no returning the forest to its previous state. The preliminary decision determines the case. That is not the case with, for example, gun ownership. In the Delaware case, the plaintiffs submitted four declarations

²⁷ Delaware State Sportsmen’s Ass’n, Inc. v. Delaware Dep’t of Safety & Homeland Sec., 108 F.4th 194, 197 (3d Cir. 2024), *cert. denied sub nom.*, Gray v. Jennings, No. 24-309, 2025 WL 76443 (U.S. Jan. 13, 2025).

²⁸ *Id.* at 202.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 203.

from Delaware residents who wanted to purchase assault weapons and large capacity magazines. These declarations stated no time sensitive issues, such as the threat that the state tried to enforce the disputed law by seizing the weapons they already owned or that they needed the weapons immediately for some reason.³² And if the Delaware residents had not purchased these weapons over the previous however many years when there was no limitation on such purchases, it is not clear why they needed them immediately as opposed to waiting for a full and complete hearing. Courts need to distinguish between emergent issues that will truly create an irreparable harm, meaning one that cannot be undone, and those which are manufactured to create the illusion of urgency. The irreparable harm standard is meant to help the court make this distinction and not rush to judgment.

Although otherwise correct, the Third Circuit did affirm its commitment to a presumption of irreparable harm in the First Amendment context. This is consistent with the approach of many other courts³³ but is just as mistaken. It is true, and cannot be disputed, that American law has a heavy presumption against prior restraints on speech.³⁴ But that is a presumption in the substantive law, not to be confused with the preliminary injunction standard. That is, a defendant's likelihood of success on the merits against the government is very high when prior restraint is at issue. But the court must still determine whether the government will be irreparably harmed by publication of the information.

Consider the most famous preliminary injunction case involving a prior restraint, the *Pentagon Papers* case.³⁵ A classified historical study on Vietnam policy had been leaked to various news outlets, including *The New York Times*. The United States government sought to enjoin *The New York Times* and *The Washington Post* from publishing the study. Cases against the newspapers proceeded in both New York and Washington, D.C. Judge Gurfein in the Southern District of New York issued a temporary restraining order against *The New York Times* prohibiting the newspaper

³² *Id.* at 205.

³³ *See, e.g.,* *Elrod v. Burns*, 427 U.S. 347 (1976); *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education*, 82 F.4th 664, 695 (9th Cir. 2023); *Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010); *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998).

³⁴ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”). In that case, the state of Rhode Island had passed a law creating the Commission to Encourage Morality in Youth. The Supreme Court held that the commission’s practices stopped circulation of certain publications in many parts of the state without any judicial review, without notice or a hearing available to the publication that was being reviewed or blocked. The procedural posture of the case was a declaratory judgment action, not a preliminary injunction, so the issue of whether mere likelihood of success on the merits was sufficient did not arise as the merits had already been determined.

³⁵ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

from publishing the contents of the study and three days later held a hearing on whether to issue a preliminary injunction. The issue was a novel one: whether national security permits a prior restraint on a newspaper.³⁶ After an *in camera* hearing, the district court found that “Without revealing the content of the testimony, suffice it to say that no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned, would vitally affect the security of the Nation.”³⁷ The government had the burden of showing that the nation’s security would suffer irreparable harm, and had failed to meet that burden. The court denied the preliminary injunction.³⁸ The case was stayed pending appeal, and the Second Circuit remanded and continued the stay.³⁹ The Supreme Court reversed.⁴⁰ It issued a complicated set of concurring opinions, but all justices agreed that the government had not met its burden of justifying the restraint.⁴¹ The preliminary injunction decided the case, as once the study was published there was no pulling it back.

What is important for purposes of this Article is that the district court in the *Pentagon Papers* case held a hearing in which it interrogated the government’s position and made an (albeit preliminary) determination as to irreparable harm. There was no *per se* determination, no rule of thumb that decided the irreparability question. Rather, this was a case involving a very thorny and difficult legal issue (as evidenced by the Supreme Court’s splintered opinion) in which the factors of the preliminary injunction test had to be balanced and in which a factual inquiry as to the nature of the national security threat of publication was conducted.

The fact that the legal issue was complex and therefore the decision could only be tentative at that early stage is crucial. As the Third Circuit explained in *Delaware State Sportsmen’s Association*, mentioned earlier, judges can keep an open mind even if they have made an initial determination for preliminary purposes. It is true that Judge Gurfein’s original determination at the preliminary stage ultimately won approval by the Supreme Court, but reviewing that decision with full hindsight fails to capture the pressure of the moment and the uncertainty that characterized his order at the time it was issued.

At the Supreme Court level, facts are often boiled down to an essence or even ignored.⁴² One very interesting example is the case used by most

³⁶ *United States v. New York Times Co.*, 328 F. Supp. 324, 326 (S.D.N.Y. 1971).

³⁷ *Id.* at 330.

³⁸ *Id.* at 331.

³⁹ *United States v. New York Times Co.*, 444 F.2d 544, 544 (2d Cir. 1971).

⁴⁰ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁴¹ *Id.* at 714.

⁴² See Antonia Mysyk, *Keeping Faithful to the Facts*, 74 CASE W. RES. L. REV. 157, 159, 166–73 (2023). Mysyk shows how the facts in *Kennedy v. Bremerton School District*, 142 S. Ct 2504 (2022) had not been sufficiently developed for the Supreme Court to render a decision, but that the Supreme Court went ahead anyway resulting in opinions that presented opposing

courts to support the proposition that First Amendment violations are *per se* irreparable harm: *Roman Catholic Diocese of Brooklyn v. Cuomo*.⁴³ In that case, two religious institutions—one Catholic, one Orthodox Jewish—challenged a state-imposed restriction on religious services in certain zones. In red zones, services were restricted to no more than ten persons. In describing the case, the Court stated that the plaintiffs asserted “without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.”⁴⁴ In a *per curiam* opinion with two concurrences and three dissents, the Court found that all four requirements of the preliminary injunction standard were met. On irreparable harm, the Court wrote the following (which I reproduce in full):

There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion). If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance. App. to Application in No. 20A90, at 26–27.⁴⁵

Note that the opinion describes the facts (that many people who wish to attend religious services in person will not be able to do so), rather than

factual narratives on issues that were properly the province of the jury, including questions such as whether the school district attempted to accommodate the football coach’s request to pray after games. Some of these issues might be related to a form of cognitive illiberalism. As Dan Kahan, David Hoffman, and Donald Braman have explained in the context of a different summary judgment decision in the Supreme Court: “By insisting that a case like *Scott* be decided summarily, the Court not only denied those citizens an opportunity, in the context of jury deliberations, to inform and possibly change the view of citizens endowed with a different perspective. It also needlessly bound the result in the case to a process of decision-making that deprived the decision of any prospect of legitimacy in the eyes of that subcommunity whose members saw the facts differently.” Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841–42 (2009).

⁴³ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020).

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 19.

only saying that a freedom of religion case constitutes a *per se* irreparable harm. The opinion assumes, however, that being unable to attend religious services is irreparable, a fact that might be contested. What if religious observance can be accommodated in some manner? Should the possibility of such accommodation of the state's interest in preventing outbreaks weigh in the calculus of how irreparable the harm is? At least it should weigh into the balancing of the equities and the public interest prongs of the test. For example, suppose that at a hearing it was found that the Catholic church creates opportunities for parishioners to receive communion at home when they cannot attend Mass for health or other good reasons.

Even if it were the case that alternatives to collective in-person prayer are available, this does not mean that the case was wrongly decided because here the substantive law interacts with the irreparability requirement. The Supreme Court has been reticent to consider the sincerity of religious beliefs in free exercise cases.⁴⁶ The question in free exercise cases is one of sincere belief, which is difficult (if not impossible) for a court to determine, rather than religious doctrine. This often justifies a finding of irreparable harm based on litigant testimony. Even if the case did not come before the court on an emergency motion, but simply considering whether a regulation of prayer will be upheld, the Court would have most likely held that the religious litigants' representation regarding their prayer practices and the importance of in-person attendance was sufficient to result in a finding of irreparable harm for that parishioner, even if other members of the same religion might differ in their interpretation. In this context, courts are justifiably reluctant to make determinations of theology.

This observation—that the question here is one of the substantive law of free exercise—contradicts the idea that not being able to attend religious services is a *per se* irreparable harm (and therefore, by some transmutative property, all First Amendment cases or all constitutional cases involve *per se* irreparable harm).⁴⁷ *Roman Catholic Diocese* should not be understood to stand for that proposition, but it seems to have been interpreted that way by some courts.⁴⁸ Rather, the case illustrates the importance of the interrelationship between the substantive law and the irreparability requirement. If the substantive law requires that a court take subjective representations of sincere belief at face value, then the assertion

⁴⁶ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014) (discussing the difficulty of determining whether stated religious beliefs are insincere).

⁴⁷ *Hanson v. D.C.*, 120 F.4th 223, 244 (D.C. Cir. 2024) (“Even in the sensitive areas of freedom of speech and religion, where the risk of chilling protected conduct is especially high, we do not “axiomatically” find that a plaintiff will suffer irreparable harm simply because it alleges a violation of its rights.”).

⁴⁸ See *supra* note 33 (citing cases). *But see* *Hanson v. D.C.*, 120 F.4th 223, 244 (D.C. Cir. 2024) (“Even in the sensitive areas of freedom of speech and religion, where the risk of chilling protected conduct is especially high, we do not “axiomatically” find that a plaintiff will suffer irreparable harm simply because it alleges a violation of its rights.”).

that being denied the ability to go to one's place of religious worship to pray is irreparable is sufficient evidence of irreparable harm.

The reason there ought to be no generalizable rule for irreparable harm is that assuming that the harm is irreparable without discussion based on a general rule of thumb rather than an analysis cuts off the conversation about the type of harm at issue. That is, it replaces reasoned argument and fact development with announcement and say-so, abdicating the courts' responsibility to analyze the particular facts of the case. That responsibility is crucial to the functioning of democratic government because it forms the basis of broader discussions on issues of grave public import.

Consider a recent D.C. Circuit case involving a challenge to the District of Columbia's enactment of the Firearms Registration Amendment Act of 2008, a law that criminalized possession of a magazine holding more than ten bullets. The plaintiffs sued because they wished to own magazines containing up to seventeen bullets.⁴⁹ The court did not find that the plaintiff seeking to enjoin the fifteen-year-old law had carried his burden of showing irreparable harm for three reasons. The most important of these was that the plaintiff did not show why being able to shoot eleven rounds (ten in the magazine plus one in the chamber) without pausing rather than being able to shoot eighteen rounds without pausing would irreparably harm his ability to defend himself.⁵⁰ The evidence from the preliminary injunction hearing, particularly plaintiffs' admission that most of the time simply brandishing a weapon sufficed in the self-defense context, was crucial to this determination. This part of the D.C. Circuit's analysis demonstrates the importance of a hearing which reveals facts that might otherwise not be mentioned in briefs or affidavits.⁵¹ The D.C. Circuit also pointed to some circumstantial evidence.⁵² Rather than pushing the case to trial, the plaintiff instead filed an appeal of the preliminary injunction denial which had the effect of long delaying the ultimate determination on the merits. The circuit court explained that the plaintiff "consented to a stay of district court proceedings pending resolution of this appeal while at the same time failing to seek expedited review from this court."⁵³ This was evidence of a lack of urgency in the case.

⁴⁹ *Hanson v. D.C.*, 120 F.4th at 230.

⁵⁰ *Id.* at 244.

⁵¹ The importance of oral argument to the court's decision is notable. "Hanson himself has explained that, '[i]n most self-defense circumstances, pulling out a weapon and brandishing it will scare off somebody else.'" *Hanson v. D.C.*, 120 F.4th at 245 (citing Oral Arg. Tr. 75:9–10).

⁵² The plaintiff conceded that some limits to the number of bullets in a magazine would be constitutional, which the D.C. Circuit held required a line drawing exercise not appropriate for a court to consider at a preliminary stage. *Id.* at 245. It is not clear why the court thought that the request for drawing a different line in-and-of-itself was an argument against irreparability.

⁵³ *Hanson v. D.C.*, 120 F.4th at 245–46.

II. ADMINISTRATIVE STAYS AND THE ABDICATION OF DECISION

A second, more recent development in public law preliminary injunctions is the district court issued “administrative stay.” A motion for an emergent order in federal district court is governed by Rule 65. That rule provides for two types of preliminary orders: a temporary restraining order which can last up to fourteen days,⁵⁴ and a preliminary injunction which may last during the pendency of the litigation.

The administrative stay originates in appellate procedure. Appellate courts have sometimes granted what they call an administrative stay to “freeze” the process pending appellate consideration of the request for relief in the form of a stay pending appeal.⁵⁵ The idea is that the administrative stay expresses no consideration of the merits but merely “buys the court time to deliberate.”⁵⁶ As Justice Barrett pointed out in a concurrence arguing for the validity of this appellate procedure, the decision to issue a stay is made against the backdrop of the four factor test for stays pending appeal. Justice Barrett explained:

But such orders rarely generate opinions, which means that there is no jurisprudence of administrative stays, much less a one-size-fits-all test that courts apply before entering one. That does not strike me as a problem: Play in the joints seems appropriate for a measure that functions as a flexible, short-term tool.⁵⁷

She recognized the import of short duration, explaining that “[a]n administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal.”⁵⁸ And she suggested that if it were to last too long, such a stay would be reviewed by the Supreme Court under the standard for stays pending appeal.⁵⁹

Justice Barrett’s Supreme Court concurrence approving of administrative stays was published in March of 2024. By August of that year, the administrative stay concept had trickled down to the district courts. In *Texas v. United States Department of Homeland Security*, a district court issued an administrative stay enjoining a rule issued by the DHS.⁶⁰ This order was initially set to last for fourteen days, the same

⁵⁴ Such an order may, in some cases, be extended an additional fourteen days.

⁵⁵ *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (quoting Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1942 (2022)). These have become a problem from the perspective of public reason as they are granted more frequently and pending for longer amounts of time.

⁵⁶ *Id.*

⁵⁷ *Id.* at 799.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *State of Texas v. U.S. Dept of Homeland Security*, Order, 6:24-cv-00306-JCB, filed 08/26/24, ECF #27.

number of days as a temporary restraining order. But the court kept the order in place much longer.⁶¹ The court extended the administrative stay twice, ultimately keeping it in place until November 8, 2024, months after the initial stay was ordered. A consolidated hearing on the preliminary injunction motion and bench trial was held on November 5, 2024. After that hearing, the court ordered vacatur of the rule as a final remedy.⁶² During this entire period, the court did not consider at any point the requirements for a temporary restraining order or a preliminary injunction. It issued no ruling on the question of whether the plaintiff states were likely to succeed on the merits, would suffer irreparable harm, nor did it consider the balance of equities or the public interest.

The Eastern District of Texas' administrative stay barred a Biden-era immigration rule. More recently, a D.C. District Court judge issued an administrative stay on similar grounds with respect to a Trump-era executive order. The purpose was to freeze the status quo so that it might await briefing to decide the case.⁶³ For authority, the D.C. court relied on Justice Barrett's concurrence described above, *Texas v. Department of Homeland Security*, and a D.C. District Court case ordering an administrative stay pending consideration of a temporary restraining order without explanation as to the nature of this procedure or its provenance.⁶⁴ Quoting Justice Barrett, the district court emphasized that the administrative stay did not reflect an evaluation on the merits. The stay in the D.C. District was very short, lasting only five days (from January 28 until February 3).

⁶¹ See Stephen Vladeck, *Bonus 105: More "Administrative Stay" Shenanigans in Texas*, ONE FIRST (Oct. 31, 2024), <https://www.stevevladeck.com/p/bonus-105-more-administrative-stay> [<https://perma.cc/A2PX-3BMU>] (describing the administrative stay issued in Texas).

⁶² State of Texas v. U.S. Dept of Homeland Security, Memorandum of Decision, 6:24-cv-00306-JCB, filed 11/7/2024, ECF #120.

⁶³ Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget, No. CV 25-239 (LLA), 2025 WL 314433, at *2 (D.D.C. Jan. 28, 2025)

⁶⁴ *Id.* (citing *Chef Time 1520 LLC v. Small Bus. Admin.*, No. 22-CV-3587, 646 F. Supp. 3d 101 (D.D.C. Dec. 20, 2022)). The *Chef Time* case involved the claim that a restaurant was arbitrarily denied COVID-era funds because after filing an application for funds its application was accidentally deleted and the restaurant lost its place in line. The concern was that the money would be distributed. The court explained:

For the reasons stated on the record at the Court's December 1, 2022 hearing—including the facts that SBA's distribution of the remaining funds would likely moot this case; that counsel for the government has not had time to investigate why Plaintiff did not receive payment, see Dkt. 7 at 2; and that at least the Smithy received notification that its application was "approved" just a day after the priority period ended—it is ORDERED that an administrative STAY is hereby entered pending further order of the Court. During the pendency of the stay, Defendants shall not distribute the remaining RRF funds to other applicants.

Chef Time 1520 LLC v. Small Bus. Admin., Order, 22-CV-3587-RDM, filed 12/01/22, ECF #8. It is unclear why the court could not apply the TRO factors to the situation but issue a five-day TRO until the defendant could submit their briefs. The court did not explain why it issued an administrative stay or the legal support for this form of relief.

In her analysis of administrative stays, focused only on appellate level action, Rachel Bayefsky argues that they are valid under the All Writs Act and as a docket management device, but should be contained to comport with this docket management role.⁶⁵ She suggests that administrative stays should be of short duration and courts should be encouraged not to issue opinions in connection with administrative stays.⁶⁶ Indeed, Bayefsky argues that administrative stays should not be an opportunity to develop law: “[C]ourts should try to separate administrative stays from the merits as much as possible.”⁶⁷ Bayefsky recognizes that sometimes considerations of the merits would be necessary, such as with patently frivolous appeals, but she argues that “[r]educing merits analysis will help to convey to parties and the public that the court is not hastily deciding a contentious issue, thereby bolstering legitimacy.”⁶⁸

As a practical matter, it is not clear why a second, interim type of stay pending appeal is needed given that there is already a form of emergent consideration available to appellate judges. Nor is it clear that deciding not to decide, and furthermore deciding to have no standard for decision, increases judicial legitimacy. There is a good argument that where reasons are not offered, people will speculate to fill in the gaps.⁶⁹ That speculation may produce worse reasons than the court would have provided, or even wrongful reasons.

To her credit, Bayefsky proposes a limited standard applicable to such stays, one that bears no small resemblance to the equitable standard for preliminary relief in that it balances harms of granting and denying the stay.⁷⁰ But Justice Barrett disclaims any standard in favor of “play in the joints” on the grounds that no standard is needed for a very short administrative action. As Bayefsky rigorously shows, using numerous examples, the decision to grant or not to grant an administrative stay, like a stay pending appeal, may leave intact (or reverse) a district court decision with real world consequences for individuals during the period that it is pending. If there is irreparable harm, then the grant of a stay will leave the litigant injured and without recourse. While it does not completely cut off conversation, as one expects that in a few days either the legal standard of stays pending appeal will be applied, a standardless type of order that can suspend rights, even if it is only to demonstrate that the court is not being “hasty,” invites judicial abuse and arbitrary action.

⁶⁵ Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1947 (2022).

⁶⁶ *Id.* at 1972–73.

⁶⁷ *Id.* at 1974.

⁶⁸ *Id.* at 1974–75.

⁶⁹ Thanks to John McGinnis for this point.

⁷⁰ *Id.* at 1976.

This last point is evident in the *Texas v. Department of Homeland Security* case. A decision to suspend a rule for seventy-six days with no analysis, no reasoned decision, and no structure for a decision to be made except at the court's whim creates the appearance of arbitrary action. The D.C. District Court's administrative stay lasted only a few days, but this was solely a matter of unguided discretion. The court was not officially constrained once it had decided to use this tool. The reason that these decisions are so disturbing is that the Federal Rules of Civil Procedure provide for a procedure governing the exact circumstance where an emergency order needs to be issued, under extraordinary time pressure and without the benefit of a hearing: Rule 65(b).

The standard for issuing a TRO is the same as for a preliminary injunction, but of course a TRO is issued on a much shorter time frame. Ordinarily, there is not enough time for a hearing on the TRO. The other side may not even be notified, although the party moving to enjoin them must make an effort to reach them.⁷¹ The expectation is that the decision is made in haste, to the best of the judge's ability with the information she has, and that it will be revisited at the preliminary injunction hearing. For this reason, the timeframe for the pendency of a TRO is set by the rules at fourteen days. But the court is still expected to consider whether the plaintiff will suffer irreparable harm, their likelihood of success on the merits, the balance of equities, and the public interest to the extent possible on a limited record.⁷² The nature of the inquiry is extremely provisional, even more so than on a preliminary injunction where at least an evidentiary hearing can be held, and the determination is not the law of the case—the judge may reconsider it as the litigation progresses. Not only that, but the balancing approach that characterizes preliminary relief in the federal courts, based on equity practice, offers plenty of play in the joints, albeit structured. But by forcing the judge to articulate the reasons for their order—why there is irreparable harm, why there is at least a serious question going to the merits, and so on—the standard is meant to limit the possibility of arbitrary action. What may begin as a short stay until the judge can decide may become a monthslong delay without decision. Without a rule to answer to, a time limit externally imposed, and/or a procedure for appealing to a higher authority, the risk of arbitrary action is too great.

III. THE DISCIPLINE OF REASONS

Fundamentally, the purpose of procedure is to give judicial decision-making a shape. One of the ways that procedure shapes judicial decision-making is by requiring that a judge announce a decision publicly and

⁷¹ See FED. R. CIV. P. 65(b)(1)(B).

⁷² See, e.g., *J.G.G. v. Trump*, No. CV 25-766 (JEB), 2025 WL 890401, at *1 (D.D.C. Mar. 24, 2025) (explaining reasons for issuing of TRO).

explain the reasons for it. As David Shapiro explained, “A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”⁷³

It is true that even if judges provide reasons, these may not be *good* reasons. Or these may not be their *true* reasons.⁷⁴ Explanation does not mean that the exercise of law is not arbitrary and oppressive at times, and one can certainly quarrel about the proportion of decisions that are oppressive versus those that are not (as well as disagree on what constitutes an oppressive decision). Rather, following legal structures creates the opportunity for impartiality and justice in the individual case that pure arbitrary power unconstrained by legal reasoning would not. In other words, if judges are not required to give reasons, they will be more likely to give in to the temptation to produce decisions that do not comply with reason.⁷⁵

This idea was expressed most effectively by E.P. Thompson in *Whigs and Hunters*,⁷⁶ his historical study of eighteenth-century England. The book tells the story of a set of very oppressive laws, the Black Acts, that imposed the death penalty for relatively minor infractions on land owned by the gentry. Thompson argues that law was part of a larger capitalistic movement to take certain types of land usages away from farmers and the poor and promote a kind of absolute property ownership for the rich. At the close of the book, he explains that it would be easy to see this law as purely an instrument of oppression, which it was. But it was also the case at the same time that the law in question had its own internal logic that at once promoted class oppression and provided an opportunity for resistance. “The essential precondition for the effectiveness of law,” Thompson writes, “in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, actually *being* just.”⁷⁷

Regularity, including the requirement of reason-giving as part of the regular operation of the courts, creates the possibility for justice. Procedure is part of the discipline of regularity. “In the case of an ancient historical formulation like the law,” Thompson writes, “a discipline which requires years of exacting study to master, there will always be some men

⁷³ David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

⁷⁴ Compare Shapiro, *id.* with Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1095 (2010) (expanding the lens beyond judicial decision-makers).

⁷⁵ “The sleep of reason produces monsters.” This statement is most famous from its inclusion on a 1799 print by the Spanish artist known as Goya (Francisco de Goya e Lucientes). See <https://www.metmuseum.org/art/collection/search/338473> [<https://perma.cc/JLH7-MA7Z>].

⁷⁶ E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

⁷⁷ *Id.* at 263.

who actively believe in their own procedures and in the logic of justice.”⁷⁸ Lon Fuller expressed a similar, albeit substantially more optimistic, idea when he wrote, “In so far as possible, substantive aims should be achieved procedurally, on the principle that if men are compelled to act in the right way, they will generally do the right things.”⁷⁹ At the very least there is a chance that the judge will act in a non-arbitrary manner in a hotly contested situation when she complies with the procedural regularities rather than seeking shortcuts.

Nevertheless, when a judge faces an emergency motion she might wish to dispense with regularity, to take the shortcut because she thinks the balance between accuracy (if that is more likely to be obtained by giving reasons) should give way to speed. Some balance between the two must be struck, because in a temporary restraining order or preliminary injunction context the hearing and presentation of evidence will very likely be incomplete. The reasons may also be incomplete, or, upon reflection, wrong. But the motion permits reconsideration and does not require the same level of adherence to the decision as other types of judicial decisions rendered in a less time sensitive process. An expression of the tentativeness of the determination is the rule that the law of the case doctrine does not apply to preliminary injunctions.⁸⁰

Reasons are not universal in the federal justice system. There are three areas where the judicial system tolerates decisions without reasons: the denial of certiorari by the Supreme Court, the jury verdict, and certain preliminary motions—although notably not a preliminary injunction. In the case of the Supreme Court, a denial of certiorari leaves the lower court’s reasoned decision intact, but if the Supreme Court summarily reverses without accompanying opinions, there is no reason provided.⁸¹ In a jury trial, the jury is presented with evidence and argument and is expected to deliberate and reach a decision based on those proofs and argument according to the jury instructions.⁸² It is true, however, that the jury does not declare those reasons publicly as our system expects a judge to do. Possibly, “the lack of reasons accompanying jury verdicts may be one reason why there is so much criticism of the civil jury.”⁸³

⁷⁸ *Id.*

⁷⁹ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 643 (1958).

⁸⁰ See Law of Case—Nature of the Ruling or Issues, 18B Fed. Prac. & Proc. Juris. § 4478.5 (3d ed. Apr. 2025) (citing cases).

⁸¹ Kalvis Golde, *The Decline of Summary Reversals at the U.S. Supreme Court*, COLUM. L. REV. (Feb. 07, 2025 draft) (forthcoming), <https://ssrn.com/abstract=5128855> [http://dx.doi.org/10.2139/ssrn.5128855] (describing summary reversals and presenting evidence of the decline of this form of Supreme Court decision-making).

⁸² See Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 519 (2015) (describing the lack of reasons associated with jury verdicts).

⁸³ *Id.*

Observers will often speculate as to the juror's reasons for issuing a verdict or choosing a damage amount that puts the jury in the worst possible light, accusing the jury of being emotional or lawless.⁸⁴ Nevertheless, it is true that “the fact that we accept jury verdicts as legitimate, although they do not provide reasons, demonstrates that the idea that participation in adjudication requires public reason giving is not universal.”⁸⁵ Finally, the federal rules provide a default rule that for decisions on a motion to dismiss or a motion for summary judgment, “the court is not required to state findings or conclusions[.]”⁸⁶

There are many places where our procedural law does require reasons, however. Despite Rule 52's statement that reasons are not required, Rule 56 admonishes that the “court should state on the record the reasons for granting or denying the motion.”⁸⁷ On motions for a preliminary injunction or a bench trial, the rules *require* that a court must state its reasons.⁸⁸ It is thus especially at those moments of extraordinary decisions that reasons are required, and indeed that the discipline of reasons is necessary.

A. *As Applied to Rules of Thumb for Irreparability*

Now consider the attempt to declare a “rule of thumb” that all constitutional violations constitute an irreparable harm. It is possible, perhaps, to justify such a broad rule, but a new rule such as this requires justification at some level—either from the district court, the appellate court or the Supreme Court. A statement that not being allowed to pray in person constitutes irreparable harm in the context of a religious free exercise claim where a church claims that this is a question of conscience does not easily map on to other areas such as gun rights, abortion, due process hearings, and more. All these types of claims *may* result in irreparable harm, but this depends on the situation. So, one must find another policy reason why the preliminary injunction standard ought not to apply in constitutional cases. That analysis is beyond the scope of this Article but it is not currently the law, as I explain below.

Under current caselaw, a constitutional violation is not considered a *per se* harm—individuals must still demonstrate that they were damaged. In *Carey v. Phipus*,⁸⁹ the Supreme Court considered a related question.

⁸⁴ See Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 856 (2015) (discussing perceptions that juries are emotional but judges are supposed to set those emotions aside when rendering decisions).

⁸⁵ Lahav, *supra* note 82, at 519.

⁸⁶ FED. R. CIV. P. 52(a)(3).

⁸⁷ FED. R. CIV. P. 56(a).

⁸⁸ FED. R. CIV. P. 52(a)(1), (2).

⁸⁹ *Carey v. Phipus*, 435 U.S. 247, 263 (1978) (“[I]t is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor,

That case concerned two students who were suspended without a hearing after being accused of smoking marijuana on school grounds. The students argued that the mere deprivation of the right to due process, without a further showing of injury, constituted damages. The Court rejected this view, holding that damages would only issue if the person could show that they had some kind of injury because of the deprivation, although it was quite broad in its definition including emotional distress as a possible injury.⁹⁰ Reasoning from the analogy of tort, the Court held that it is not the mere violation of a right, but the injury that is compensable and therefore victims of constitutional violations must show injury.⁹¹ Because it was an important right, the Court allowed the suit to continue for nominal damages so that it might be vindicated, but the deprivation of a right in and of itself did not merit compensation.⁹² What would the Court have done if the students had sought an injunction? It would have asked whether ten days suspension from school constituted irreparable harm, or whether the students might make up the material if they were allowed to return. There have been similar cases in the lower courts, and these courts carefully consider the extent to which an emergency order is in fact required in light of the damages to the student.⁹³

This is not an argument that there ought *not* be rules, nor is it the contrary argument that the rule of law is a law of rules.⁹⁴ Rather, it is an argument that in places where the law is contested, judges owe litigants and the public reasons for their decisions. One reason for this is that reasons discipline decision-makers and lead to less arbitrary outcomes because the process of articulating reasons forces judges to question their intuitions and to check that their decision comports with legal requirements. The rule of thumb that the violation of a constitutional right is a *per se* irreparable harm has never been justified. If it were, and became the applicable legal standard, it would be appropriate for a lower court to follow it. It is likely if that were to occur there would be a tension between the preliminary injunction standard and the *per se* constitutional rule and judges might

inherently is as likely to cause distress as the publication of defamation *per se* is to cause injury to reputation and distress.”).

⁹⁰ *Id.* at 263–64.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See, e.g., Doe v. Haverford Coll.*, 656 F. Supp. 3d 540 (E.D. Pa. 2023) (denying motion for a preliminary injunction to student seeking reinstatement on sports team on grounds of the balance of hardships). *See also Matos ex rel. Matos v. Clinton School Dist.*, 367 F.3d 68, 73 (1st Cir. 2004) (denying injunction because of lack of irreparable harm in student due process case); 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed. Apr. 2025).

⁹⁴ I have written elsewhere on these issues. *See Alexandra D. Lahav, An Order, Most Fixed*, 121 MICH. L. REV. 1031 (2023) (reviewing LORRAINE DASTON, RULES: A HISTORY OF WHAT WE LIVE BY (2022)).

be tempted to apply the irreparable harm rule rather than the *per se* rule, creating inconsistencies across cases.

One of the insights of the defense of formalism, such as that espoused by Fredrick Schauer, is that rules must be followed regardless of the reason for the rule. This is, as he says, what makes formalism “formal.”⁹⁵ But he also points out that the question of rules can be understood as a question of “decisional jurisdiction.”⁹⁶ That is, there is some decision-maker who makes the rule, at the highest level of court for example, and the other, lower-level decision-makers follow this rule. That produces stability. But I do not take Schauer to say that nowhere in the system is there a point at which judges are obligated to provide reasons for rules. (For this purpose, I am setting aside legislatures which pose a different but related set of problems.) Where there is judge-made law, some judge must articulate a reason for the rule and for her decision. And in the case of the problem of constitutional violations being a *per se* harm, no such reason has ever been given by any court in the United States.

But there is also a sense that judges might prefer rules of thumb to the difficult or messy analysis that accompanies equitable balancing. The historian Lorraine Daston argues that the administration of a rule-based regime can be effective in times of relative stability.⁹⁷ But in times of instability, rules break down. As Daston explains, “Discretion, judgment, and reasoning by analogy” have become an object of mistrust, and the underlying skills, “are in danger of slipping into the murky regions inhabited by intuition, instinct, and inspiration, all opaque to critical scrutiny.”⁹⁸ It has been the case that some modern jurists have preferred rules, arguing that rules are more stable, predictable, and effective than standards. But it is also the case that people evade rules, and the technology of evasion is constantly renewing itself. The four-part balancing standard for a preliminary injunction, by contrast, requires judgment and reason, careful attention to facts and circumstances. This is important because it provides a defense against both arbitrary action and opacity to critical scrutiny.

B. *As Applied to Administrative Stays*

Because procedure gives shape to decision-making that makes justice possible, the idea that a procedure should be permitted that specifically disclaims decision while in fact deciding is deeply wrong. When a procedure

⁹⁵ Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988) (“What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying behind the rule.”).

⁹⁶ *Id.* at 540.

⁹⁷ “When rule-governed world orders do come into being, the rules depend on the order just as crucially as the order does on the rules.” LORRAINE DASTON, *RULES: A SHORT HISTORY OF WHAT WE LIVE BY* 20 (2022).

⁹⁸ *Id.* at 273–74.

permits a decision but imposes no obligations on the decision-maker, there is no legal craft to discipline whim, intuitions, raw preferences, or simple prejudice. It may be convenient for the judge to create the appearance that she has suspended a decision and made no judgment for short term political purposes, but a stay *is* a decision. This is true regardless of the name of the device that either prevents or requires action. And this is true even if the stay is of short duration. There is a reason that, for example, the law traditionally requires a showing of imminent irreparable harm in order to issue a TRO. And there is a reason that such orders are of limited, concrete duration (fourteen days). These requirements limit arbitrary action.

A decision to enjoin an action, for however long, should comport with regularized process including a reasoned decision. Similarly, it may be convenient for a judge to assert a new rule of thumb rather than conducting an analysis of the facts before the court. But this too easily can shift into *ipse dixit* rather than legal analysis and may allow judges who are so inclined to abandon legal analysis altogether and rely instead on preferences or whim. The requirement of analysis under the standard sets in motion the logic of justice which in turn creates the possibility of a just outcome. This is the idea of judicial craft.

Invented procedures used for short term convenience and created out of whole cloth promote instability, whim, and caprice, even if they may have the benefit to judges of avoiding announcing their reasoning, any ensuing political blowback, or even the fear of getting it wrong or being perceived to act in haste. As a result, procedures created to suit the moment, particularly out of fear or other emergent pressures, are more likely to produce arbitrary action. When there is a procedure already existing, to create a new procedural box to avoid the requirements of established procedures, and particularly of reason-giving, violates the stability norm. Finally, one must worry that the invention of procedures, particularly procedures that are created for the special circumstance of (say) governmental action to which the judge objects and for which the judge need not give an accounting, are not impartial. Or at least they risk the appearance of partiality.⁹⁹

⁹⁹ I have argued elsewhere that judges can develop procedures in a common-law-like fashion. See Alexandra D. Lahav, *Multidistrict Litigation and Common Law Procedure*, 24 LEWIS & CLARK L. REV. 531, 532–33 (2020). It could be argued that the claim here is inconsistent with the claim I made in that piece, which is that judges have the discretion in their use of the procedural law in MDLs. Here is my response to critics who argue that MDL procedures are “ad hoc”, exceptional, and border on lawless as a result:

Scholars critical of MDL common law procedure recognize that discretion characterizes the rules of procedure as a general matter; the difference between us is one of emphasis. But the emphasis matters, because the exceptional aspect of MDLs is not the procedural problems judges face, but rather the substantive issues these large lawsuits raise. The undue focus on MDLs as procedurally exceptional distracts from the more serious problems: the lack of a normative set of principles for what aggregate litigation is trying to achieve as a matter of substantive law,

When Justice Barrett explains that “there is no jurisprudence of administrative stays, much less a one-size-fits-all test that courts apply before entering one”¹⁰⁰ she is as much as admitting that these are judicial actions without regularity, publicity, stability, and impartiality—the qualities that we expect from law. It is hard to fathom how such decisions do not descend into arbitrariness.

But what of the argument that a judge in an emergency situation may not be prepared to make a decision or give reasons? And furthermore, why is reason-giving more valuable than rules of thumb? In an article about judicial reason-giving, Mathilde Cohen suggested a number of reasons why judges might not want to give reasons.¹⁰¹ For example, giving reasons might inflame those who disagree, result in increased contestation of outcomes, and in the process create distrust in the judicial system.¹⁰² On a multi-member judicial panel, such as the Supreme Court, giving too many individual reasons may confuse, contradict, and limit the guidance that decisions provide.¹⁰³ Judges may also engage in motivated reasoning, and this may degrade the quality of the reasons they provide or they may simply provide post hoc rationalizations rather than reasons.¹⁰⁴ The time it takes to give reasons may delay decisions, or increase the workload of overworked judges.¹⁰⁵

Here I want to focus on Cohen’s first reason for not giving reasons—that reason may inflame passions—because I think it is part of the reason that the administrative stay in both appellate and district court has become popular. By not being required to give reasons, the judge insulates herself from criticism. Cohen suggests (citing Cass Sunstein’s work on undertheorized agreements) that people may more-or-less agree on an outcome but not on the reasons, so they will be more satisfied and therefore find legitimate a decision rendered without reasons *if* they were

questions of professional responsibility in mass litigation which is not governed by federal rules, and the failure to adequately address what constitutes fair procedure geared to realizing the aims of the substantive law in context.

Id. For a contrary view, see Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 835 (2017) (arguing that MDL procedure-making challenges rule of law values); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1674 (2017) (arguing that MDLs represent a kind of common law procedural rulemaking that differs from normal or orthodox procedure and presenting evidence that judges view MDLs this way).

¹⁰⁰ *United States v. Texas*, 144 S. Ct. 797, 799 (2024).

¹⁰¹ Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 514 (2015).

¹⁰² *Id.*

¹⁰³ *Id.* at 517.

¹⁰⁴ *Id.* at 520–21.

¹⁰⁵ *Id.* at 523–24.

going to disagree with those reasons.¹⁰⁶ This argument that avoiding reasons increases legitimacy is not dissimilar to Bayefsky's argument that "[r]educing merits analysis will help to convey to parties and the public that the court is not hastily deciding a contentious issue, thereby bolstering legitimacy."¹⁰⁷ Bayefsky takes the argument against reasons one step further, stating that the court should not even consider reasons at the very preliminary stage to avoid the appearance that it is hasty in its decision-making. This she asserts despite the fact that every observer can see that by enjoining or permitting an action, whether called a TRO or administrative stay, the court has rendered a decision. It has either allowed the defendant to commit an act or forbidden them from doing so.

It is not better to render a decision that is based on no reason, because the lack of reason implies arbitrary caprice, intuition, fear, or whatever else is going through a judge's mind in the moment of granting the administrative stay. And as noted earlier, rendering a stay in an important case without reasons invites speculation as to those reasons. When tempers are high and in an increasingly polarized political environment, these speculations are not likely to be better than the reasons offered by the judge herself.

C. *Does Good Process Make Better Law?*

There is a very strong, albeit not dominant, idea in American law that process is at the core of justice. An old example is Justice Brandeis' dissent in *Burdeau v. McDowell*: "in the development of our liberty insistence upon procedural regularity has been a large factor."¹⁰⁸ Or Justice Frankfurter in *Joint Anti-Fascist Refugee Comm. v. McGrath*: "It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights."¹⁰⁹ The corollary of this idea is that by following proper processes, members of a pluralistic society can find solace in decisions rendered according to a fair process even when they disagree with the outcome. As Justice Frankfurter wrote, due process expresses "in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization[.]"¹¹⁰ More recently Tom Tyler's research into procedural justice posits that people are more likely to accept decisions as legitimate when they have

¹⁰⁶ Id. at 571 (citing Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L REV. 1733 (1995)).

¹⁰⁷ Bayefsky, *supra* note 65, at 1974–75.

¹⁰⁸ *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting). The case involved a person whose documents were stolen and ultimately in the possession of the government. The majority held that the government could use those documents against him in legal proceedings under the Fourth and Fifth Amendments. Brandeis and Holmes dissented.

¹⁰⁹ 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

¹¹⁰ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

been given appropriate process.¹¹¹ It is not clear whether judges today think that regular procedures promote the feeling of just treatment, which is to say sociological legitimacy.¹¹² Justice Barrett's defense of administrative stays indicates otherwise. But I think a more fundamental idea, regardless of public perception, is that the shape of procedure creates legal legitimacy because it forces decision-making into the logic of law where it can sometimes lead to just outcomes. At the very least in the irreparable harm and balancing of the equities factors, a rigorous analysis forces the judge to confront the outcomes she is imposing.

It is important to recognize that even good procedures evenhandedly applied do not guarantee justice. It may be that a judge evaluating whether there will be irreparable harm in a given case, evaluating the likelihood of success on the merits, and the balance of the equities, may make a decision that is unjust and harmful. It may be that the substantive law in question is immoral and that judicial action to uphold that law is also immoral. For example, in his critique of judges sentencing draft resisters in the Vietnam era, Robert Cover argued that judges were upholding an immoral law and had a duty to either resign or refuse to contribute to the strengthening of an immoral institute by marshalling creative legal arguments.¹¹³ "The federal judiciary" he wrote in 1968, referencing the draft evasion cases, slavery, and the oppression of labor, ". . . has remained faithful to its long tradition as executors of immoral law."¹¹⁴ In response, Cover advocated creativity within the constraints of law.

That judicial creativity be practiced *within the constraints* of law is critical. Returning to E.P. Thompson's insight, the structure of law is such that it tends to promote the interests of the powerful against those of the powerless. Nevertheless, it also has an internal logic that may, in some cases, result in just outcomes. There is a genuine risk in abandoning that logic entirely, because the alternative is arbitrary power. The limited claim here is that by applying the legal standard there is less of a risk of arbitrary action and injustice.

Compare how a legal regime where constitutional violations are *per se* irreparable harm and a legal regime where the specific harms must be determined at a hearing handle a case such as one involving a firearms

¹¹¹ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

¹¹² On the different forms of legitimacy see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005).

¹¹³ Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)).

¹¹⁴ *Id.* at 1005, 1005 fn. 15 ("This statement is extreme but not unsupported by evidence. The role of the federal judiciary in slavery is suggested by this review. For other instances, see, e.g., W. PRESTON, *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933* (1963). The federal judiciary crushed the I.W.W. and has helped to crush the Communist Party. See P. RENSHAW, *THE WOBBLIES* 215–42 (1967).").

regulation limiting the size of magazines to ten bullets. In the former case, the injunction standard more or less collapses into the likelihood of success on the merits inquiry.¹¹⁵ Everything turns on whether the judge thinks there is a constitutional violation after a hasty review. A judge who enjoins the legislation on the grounds that a constitutional right is at stake may end up making possible unthinkable events.¹¹⁶ The traditional standard allows that consideration to be weighed against the harm to the plaintiff of not being able to have a larger magazine for their gun. The process of determining whether the harm is irreparable itself forces the plaintiff and the defendant to present facts and arguments and to spell out more clearly to the judge and to the public what is really at stake. And it forces the judge to think through with greater care the effects of her ruling.

By contrast, a *per se* rule for constitutional violations skirts around these more difficult issues, and allows the judge to ignore the real-world, costly results of her decisions. It ties her hands, and also allows her to *claim* that her hands were tied rather than investigating and taking seriously the costs (and benefits) of a preliminary injunction. This is very different from the trial, where the court is making a final determination and the risk of error is lower. A similar argument can be made for the rule of thumb regarding compliance costs discussed above. In other words, a rule of thumb itself is a cause of limited analysis, which is harmful particularly (but not only) in the context of public law litigation.

CONCLUSION

Shortcuts rather than reasoning do the system no favors. Particularly when issues are presented to the court as emergent, compliance with procedures provides a defense against overreaching, arbitrary decision-making. Rules of thumb and the decision not to decide may be expedient and perhaps save some judges from criticism, but, in the end, they elevate a type of decision-making process that is less likely to lead to just outcomes because it lacks the detailed attention to facts and engagement with reason that we are entitled to expect from courts. Decisions without reasons and rules without justification should remain an exception in our system.

¹¹⁵ Bray, *supra* note 3.

¹¹⁶ Such as the Sandy Hook elementary school massacre where a young man shot twenty elementary school students and six adults with legally possessed semi-automatic weapons. See *Sandy Hook Shooting: What Happened?*, CNN, <https://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/index.html> [<https://perma.cc/46R6-PYG5>] (last visited May 19, 2025).