Michigan Law Review

Volume 117 | Issue 5

2019

The Preliminary Injunction Standard: Understanding the Public Interest Factor

M Devon Moore
University of Michigan Law School

https://doi.org/10.36644/mlr.117.5.preliminary

NOTE

THE PRELIMINARY INJUNCTION STANDARD: UNDERSTANDING THE PUBLIC INTEREST FACTOR

*M Devon Moore**

Under Winter v. NRDC*, federal courts considering a preliminary injunction motion look to four factors, including the public interest impact of the injunction. But courts do not agree on what the public interest is and how much it should matter. This Note describes the confusion over the public interest factor and characterizes the post-*Winter *circuit split as a result of this confusion. By analyzing the case law surrounding the public interest factor, this Note identifies three aspects of a case that consistently implicate the direction and magnitude of this factor: the identity of the parties, the underlying cause of action, and the scope of injunctive relief. By centering the public interest factor on these three aspects, courts and litigants will achieve a unified conception of the public interest factor.*

TABLE OF CONTENTS

---

* J.D. Candidate, May 2019, University of Michigan Law School. I am grateful to Professor Maureen Carroll for substantive guidance and suggestions. Thanks also to Arianna Scavetti for inspiration, to Michael Abrams, Kristin Froehle, Emily Minton Mattson, and Chris Pollack for feedback, and to the *Michigan Law Review* Notes Office for edits.

INTRODUCTION

A preliminary injunction is an extraordinary remedy. In recent years, courts granted preliminary injunctions to protect trade secrets,[1] put a new candidate on a state ballot,[2] resolve commercial disputes,[3] and even halt enforcement of an executive order.[4] Given the power of a preliminary injunction, it is important that courts grant them in appropriate circumstances. In *Winter v. Natural Resources Defense Council, Inc. (NRDC)*, the Supreme Court provided courts with such a framework, clarifying that the decision to grant a preliminary injunction depends, among other factors, upon whether "an injunction is in the public interest."[5]

Despite *Winter*'s framework and the inclusion of the public interest factor in that framework, the content and weight of the public interest factor lack clarity. For example, Wright & Miller's *Federal Practice and Procedure* offers only anecdotal advice on what courts might consider in assessing this factor.[6] And a survey of circuit and district court opinions shows a variety of approaches for weighing this factor and the circumstances in which an injunction is or is not in the public interest.[7] Although the public interest is just one factor in the preliminary injunction analysis, the sheer power of a preliminary injunction demands that this factor be better understood.

This Note inspects the unstructured and often conflicting articulations of the public interest factor. It proposes guidelines for determining in what circumstances "a preliminary injunction is in the public interest."[8] Part I explores the history of the preliminary injunction, with an emphasis on the flexibility employed by courts of equity. Part II examines the state of the preliminary injunction post-*Winter*, which reveals that the disagreement be-

1. PEO Experts CA, Inc. v. Engstrom, No. 2:17–cv–00318–KJM–CKD, 2017 WL 4181130 (E.D. Cal. Sept. 21, 2017).

2. United Utah Party v. Cox, 268 F. Supp. 3d 1227 (D. Utah 2017).

3. hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099 (N.D. Cal. 2017).

4. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md.), *vacated as moot*, 138 S. Ct. 353 (2017).

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

6. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.4 (3d ed. 2011) (noting further that "[c]onsiderable ingenuity appears to be exercised to find an exception to these restrictions when compelling cases for interlocutory relief are presented").

7. *See infra* Part II.

8. Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).

tween circuit courts applying *Winter* largely comes from how the courts weigh the public interest factor. Part III provides flexible structural guidelines for assessing the public interest implications of a preliminary injunction. These rules provide a basic framework for the public interest factor while preserving equitable discretion and flexibility.

I. THE ROAD TO *WINTER*

The present-day notion of a preliminary injunction, described in Rule 65 of the Federal Rules of Civil Procedure[9] and outlined in *Winter v. NRDC*,[10] evolved from a history of equitable remedies fashioned by the English Court of Chancery.[11] That history elucidates the Supreme Court's formulation of the preliminary injunction standard in *Winter*. This Part pays particular regard to the historical constraints on injunctive relief[12] and the considerations that influence lower courts' applications of the *Winter* test.[13]

A. *Equitable Origins of the Preliminary Injunction*

Preliminary injunctions have always been an equitable remedy. Courts of equity, not law, had jurisdiction to grant preliminary injunctions to protect rights "from irreparable or at least from serious damage pending the trial of the legal right."[14] That is, the decision to grant or deny a preliminary injunction was a purely equitable one.[15]

Early definitions of preliminary injunctions resemble modern formulations in several important ways. In his 1927 overview of injunctions, William Williamson Kerr wrote, "The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters *in statu quo* until the hearing or further order."[16] Modern authorities on federal civil procedure mirror

9. FED. R. CIV. P. 65.

10. 555 U.S. 7 (2008).

11. Rachel A. Weisshaar, Note, *Hazy Shades of* Winter*: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1018 (2012).

12. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999) (finding that federal courts had no jurisdiction to grant the equitable relief sought because the type of relief requested was not "traditionally accorded by the courts of equity").

13. *See* Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1286 (10th Cir. 2016) ("In exercising equitable discretion over motions for temporary relief, courts cannot woodenly employ a one size fits all mindset.").

14. WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 15 (6th ed. 1927). Before the merger of federal law and equity courts in 1938, courts of equity "based decisions on general principles of fairness in situations where rigid application of common-law rules would have brought about injustice." *Jurisdiction: Equity*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-equity [https://perma.cc/P8AG-P5MU].

15. *See* KERR, *supra* note 14, at 15.

16. *Id.* at 2 (citation omitted).

Kerr's language.[17] Both early and modern definitions identify a common purpose of the preliminary injunction: ensuring that final relief will be possible at the end of the trial.

Because of these equitable roots, rulings on preliminary injunctions emphasized both flexibility and fact specificity. Early courts often remarked that preliminary injunctive relief required a careful consideration of facts with a specific aversion to mechanical and deterministic applications of some rule.[18] This emphasis on flexibility might have reflected a desire to maintain comity between courts of equity and courts of law.[19] Courts of equity were reluctant to pass judgment on the underlying merits of a claim regarding a legal right, lest they impermissibly express an opinion on the proceedings of a court of law.[20] This flexibility is a common thread in many early cases discussing preliminary injunctions.

There is also case law from this early period distinguishing mandatory injunctions from prohibitory injunctions.[21] This is perhaps related to the notion of maintaining the status quo;[22] courts sought to prevent a party from acting, instead of compelling action.[23] Though this consideration is absent from *Winter*, it still appears in some district court opinions.[24] It accounts for some of the disparity between the circuits in applying the *Winter* test.

Crucially, early chancery courts sometimes considered the impact on nonparties of granting preliminary injunctive relief.[25] For example, in 1823 the High Court of Chancery in Scotland reviewed a preliminary injunction concerning literary rights over an unpublished book.[26] The ruling explained that when in need of a tiebreaker, courts should consider "[w]hether the

17. *See* WRIGHT ET AL., *supra* note 6, § 2947 ("[A] preliminary injunction is an injunction that is issued to protect a plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."); *Preliminary Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A temporary injunction issued . . . to prevent an irreparable injury from occurring before the court has a chance to decide the case.").

18. *See* KERR, *supra* note 14, at 10–12.

19. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 530–31 (1978).

20. *Id.* at 535.

21. *See* Longwood Valley R.R. Co. v. Baker, 27 N.J. Eq. 166, 171 (N.J. Ch. 1876) ("The court will not, however, interfere by mandatory injunction, unless extreme or very serious damage, at least, will ensue from withholding that relief . . . .").

22. KERR, *supra* note 14; *see also* Blakemore v. Glamorganshire Canal Navigation (1832) 39 Eng. Rep. 639; 1 My. & K. 154 (noting a preference for maintaining the facts of the case "in *statu quo*").

23. Gale v. Abbott (1862) 6 LT 852; 8 Jur. N.S. 987 (noting that a mandatory injunction was inappropriate before a final hearing on the merits).

24. *See, e.g.*, Ball Dynamics Int'l, LLC v. Saunders, No. 16–cv–00482–NYW, 2016 WL 7034974, at *3 (D. Colo. Dec. 1, 2016); Hellerstein v. Desert Lifestyles, LLC, No. 15-cv-01804-RFB-CWH, 2015 WL 6962862, at *13 (D. Nev. Nov. 10, 2015).

25. *See, e.g.*, *Reports of Cases Argued and Decided in the High Court of Chancery*, 38 EDINBURGH REV. 281, 296 (1823).

26. *Id.* at 281.

public, in a case nearly balanced, has any interest either way."[27] Clear concern for the public interest was rare compared to the public interest concern of twentieth-century legislation and litigation. But those formulations show that courts have long considered the interests of the public at large as part of preliminary injunction analysis, and they provide historical grounding for public interest analysis in the *Winter* standard.

B. *Preliminary Injunctions in the Modern Age*

Standards for preliminary injunctive relief remained varied throughout the twentieth century despite earlier attempts to develop a uniform framework.[28] The courts of law and equity merged in 1934,[29] and while courts continued to treat a preliminary injunction as an equitable measure,[30] even Supreme Court decisions suffered from inconsistencies.[31] Though many courts listed the same four key factors,[32] there was little consistency in the precise definition of each factor.[33] Further, some courts maintained that preliminary injunctions existed to preserve the status quo. Or prohibitory preliminary

27. *Id.* at 296.

28. *Compare* Benson Hotel Corp. v. Woods, 168 F.2d 694, 697 (8th Cir. 1948) ("A temporary injunction should usually be granted where the questions presented are grave and injury to the moving party will result if it is denied and the final determination should be in his favor."), *with* G.F. Heublein & Bro. v. Bushmill Wine & Prods. Co., 39 F. Supp. 549, 551 (M.D. Pa. 1941) ("A preliminary injunction should be issued only where the proof is clear or undisputed or where withholding the preliminary injunction clearly would be more damaging to the moving party than to the defendant in the motion.").

29. *See* 28 U.S.C. § 723(c) (1934).

30. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 440–42 (1944) (justifying a fact-specific approach to preliminary injunctive relief as rooted in the traditional practice of courts of equity).

31. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (explaining that the "traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits," but failing to mention public interest considerations in a case regarding a local obscenity ordinance).

32. *See* Leubsdorf, *supra* note 19, at 539. That is, the four factors later captured in *Winter*: "[T]ypically the plaintiff's likelihood of success on the merits, the prospect of irreparable harm, the comparative hardship to the parties of granting or denying relief, and sometimes the impact of relief on the public interest." *Id.* at 525.

33. Consider the balance-of-equities factor. This factor is sometimes described the factor as measuring any harm to any person besides the moving party. *See, e.g.*, Friendship Materials, Inc. v. Mich. Brick, Inc., 679 F.2d 100, 102 (6th Cir. 1982) ("Whether the issuance of a preliminary injunction would cause substantial harm to others."). Other courts instead focused only on harm to the defendant. *See, e.g.*, Direx Isr., Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812 (4th Cir. 1991) (describing the factor as measuring "the likelihood of harm to the defendant if the requested relief is granted"). Still other courts restricted this factor to considerations of *irreparable* harm only. *See, e.g.*, Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984) ("In deciding whether to grant a preliminary injunction, the court must also consider any irreparable harm that the defendant might suffer from the injunction . . . .").

injunctions were favored over mandatory ones. Other courts made no mention of these background preferences.[34]

A truly unified standard only emerged in the Supreme Court's recent articulation of the preliminary injunction standard in 2008's *Winter v. NRDC*. In *Winter*, the court outlined a four-part test for motions for preliminary injunctive relief. A "plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."[35] But *Winter* lacks any discussion of the status quo or an emphasis on prohibitory injunctions. Also absent, at least from the majority opinion, is a discussion of the equitable origins of the preliminary injunction, which emphasized flexibility.[36]

In the decade since *Winter*, the Supreme Court has not provided any further guidance on how to apply the four-factor standard.[37] Although the Court has considered several other cases involving preliminary injunctions, the cases have not required recapitulation of the full preliminary injunction standard test.[38] Thus, the Court has not had occasion to endorse or reject Justice Ginsburg's dissenting remark in *Winter* that "courts have evaluated claims for equitable relief on a 'sliding scale,' . . . . This Court has never rejected that formulation, and I do not believe it does so today."[39] Lower courts, however, have had plenty of opportunities to apply the *Winter* test, and their divergent approaches reveal that a truly unified standard remains elusive.

II. PRELIMINARY INJUNCTIONS & PUBLIC INTEREST AFTER *WINTER*

Even after *Winter*, lower courts continue to disagree on the correct application of that standard. In fact, circuits were still refining interpretations of *Winter* as recently as 2017.[40] While it is difficult to neatly divide these circuit court decisions, this Note categorizes the presently employed tests into three schools: the sequential test, the threshold test, and the sliding-scale

34. Leubsdorf, *supra* note 19, at 525.

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

36. In a dissenting opinion, Justice Ginsburg devotes several paragraphs to a discussion of the equitable preference for flexible standards. *Id.* at 51–52 (Ginsburg, J., dissenting).

37. Lower courts thus rely on *Winter* in evaluating motions for preliminary injunctive relief.

38. *See, e.g.*, Benisek v. Lamone, 138 S. Ct. 1942 (2018) (per curiam); Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

39. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

40. *See, e.g.*, Reilly v. City of Harrisburg, 858 F.3d 173, 177 (3d Cir. 2017) ("We are aware there is an inconsistent line of cases within our Court holding that all four [preliminary injunction] factors must be established by the movant and the 'failure to establish any element in its favor renders a preliminary injunction inappropriate.' ").

test.[41] These tests vary as to the burden and weight accorded to each of the four *Winter* factors, particularly the public interest factor.[42]

Lower courts have exacerbated the uncertainty surrounding the *Winter* factors by articulating incompatible explanations of what exactly the public interest factor encompasses.[43] These two issues, (1) the post-*Winter* circuit split and (2) the lack of a clear framework for the public interest factor, are related. As this Part explains, the various circuit court applications of *Winter* differ in two ways: the relative weight of the public interest factor and the allocation of the burden of proof. Variation in the weight given to the factor results from uncertainty about its content. If judges cannot reliably discern what the public interest factor should include, they might hesitate to give that factor too much weight. Scholarship on the post-*Winter* split has largely focused on endorsing the "best" application of the preliminary injunction test.[44] But absent a clear understanding of what elements the public interest factor includes, it is difficult for courts to consistently weigh that factor against the rest. This Part first summarizes the post-*Winter* circuit split and then focuses on district and appellate court articulations of the public interest factor.

A. *The State of the Post-*Winter *Circuit Split*

In *Winter*, the Supreme Court expressly overruled the Ninth Circuit's "possibility" standard, which permitted a plaintiff to show a mere possibility, and not a likelihood, of irreparable harm.[45] In doing so, the Court articulated the familiar standard that "[a] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public

41. I borrow the sequential, threshold, and sliding-scale terms from other literature on the post-*Winter* circuit split, specifically Weisshaar, *supra* note 11, at 1032–34.

42. These differences are discussed more comprehensively in Section A of this Part, *infra*. Incidentally, the *Winter* court admonished the lower court for considering the injunction's public interest consequences "in only a cursory fashion." *Winter*, 555 U.S. at 26. Although the majority opinion in *Winter* spends several paragraphs assessing the public interest consequence of impeding Navy exercises, the majority offers no guidance to structure public interest analysis in future cases. *Id.* at 24–26.

43. *Compare* EUSA Pharma (US), Inc. v. Innocoll Pharm. Ltd., 594 F. Supp. 2d 570, 583 (E.D. Pa. 2009) (requiring that plaintiff "show that the public interest favors granting a preliminary injunction"), *with* Adobe Sys. Inc. v. Hoops Enter., No. C 10–2769 CW, 2012 WL 6303358, at *4 (N.D. Cal. Dec. 16, 2011) ("[T]he relevant question for this factor is whether the proposed injunction will disserve the public interest, not whether it will promote the public interest.").

44. *See, e.g.*, Taylor Payne, *Now Is the* Winter *of Ginsburg's Dissent: Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test*, 13 TENN. J.L. & POL'Y 15 (2018); Bethany M. Bates, Note, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L REV. 1522 (2011).

45. *Winter*, 555 U.S. at 21–22.

interest."[46] The circuit courts' approaches to *Winter* can be roughly grouped into three distinct tests: the sequential test, the threshold test, and the sliding-scale test. Each of those three tests, which vary in rigidity and weight of each factor, are addressed in turn below.

The most rigid application of *Winter* is the sequential test.[47] Courts that utilize the sequential test draw two additional requirements from the *Winter* opinion. First, the plaintiff[48] bears the burden of proof on all four factors.[49] Second, and notwithstanding the opinion's later mention of the need to "balance" and "weigh" certain considerations, the plaintiff must prove *all four* factors.[50] Failure to prove any one factor is fatal to the plaintiff's motion.

The Fourth Circuit has explicitly endorsed the sequential test.[51] In *Real Truth About Obama v. FEC*, the Fourth Circuit explicitly rejected its prior test, which permitted "flexible interplay" among the preliminary injunction factors,[52] in favor of a more rigid test that requires the plaintiff to prove each individual factor.[53] It explained that "*Winter* articulates four requirements, each of which must be satisfied as articulated."[54] Other circuits, including the Second, Fifth, and Tenth, have issued opinions that appear to endorse the sequential test.[55] Although no circuit goes as far as the Fourth Circuit in explicitly requiring the plaintiff to prove each of the four *Winter* factors, they all strongly imply that the plaintiff bears the burden of proof on each individual factor.[56]

The second test is the threshold test. After several post-*Winter* opinions using the sequential test,[57] the Third Circuit recently abandoned it in favor of this alternative test in *Reilly v. City of Harrisburg*.[58] The threshold test requires the plaintiff to prove only the first two *Winter* factors: likelihood of success on the merits and likelihood of irreparable harm absent an injunc-

---

46. *Id.* at 20.

47. Weisshaar, *supra* note 11, at 1032 n.133.

48. For the purpose of this Note, the terms plaintiff and movant are used interchangeably in the preliminary injunction context, though in some cases the defendants are the moving party. *See, e.g.*, 7-Eleven, Inc. v. Grewal, 60 F. Supp. 3d 272, 286–87 (D. Mass. 2014).

49. *See Winter*, 555 U.S. at 19, 27.

50. *Id.* at 20, 24.

51. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 555 U.S. 1089 (2010).

52. *Id.* at 347.

53. *Id.*

54. *Id.*

55. *See, e.g.*, Fish v. Kobach, 840 F.3d 710, 723 (10th Cir. 2016); Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 458 (5th Cir. 2016); ACLU v. Clapper, 785 F.3d 787, 825 (2d Cir. 2015).

56. *See Real Truth About Obama*, 575 F.3d at 347; *see also Fish*, 840 F.3d at 723; *Def. Distributed*, 838 F.3d at 458; *Clapper*, 785 F.3d at 825.

57. *See, e.g.*, Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205, 210 (3d Cir. 2014).

58. 858 F.3d 173, 177–79 (3d Cir. 2017).

tion.[59] Upon such a showing, the court then "balance[s] those four [*Winter*] factors" in determining whether to grant or deny the preliminary injunction motion.[60] The *Reilly* court explained that "no test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion."[61] By lowering the plaintiff's burden from four factors to two, the threshold test necessarily frames the balance of equities and public interest factors as secondary concerns. While *Reilly* lessens the weight accorded to those two factors, the opinion does not contain a discussion or analysis of their content.[62] The Third Circuit is unique among the circuits in its adoption of the threshold test.[63]

Finally, the sliding-scale test is the most flexible interpretation of *Winter*. This test permits a holistic balancing of the four *Winter* factors and notes that "these are factors to be balanced, not prerequisites to be met."[64] Like the threshold test, the requirements for the public interest and balance-of-equities factors are relaxed under the sliding-scale test.[65] This test takes the threshold test a step further; under this analysis, a strong showing on one factor can offset a weaker showing on any other.[66] This allows courts to make a "flexible consideration" of the four *Winter* factors.[67] For example, a plaintiff with a near-certain win on the merits may prevail on a motion for preliminary injunctive relief with a relatively weak likelihood of irreparable harm. Although the sliding-scale test may appear to be in tension with the

59. *Reilly*, 858 F.3d at 177–79.

60. *Id.* at 176.

61. *Id.* at 178.

62. *Id.* at 176–79.

63. Though the *Reilly* court noted that "other circuits have agreed with our reading of *Winter*," *id.* at 178 (citing Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721 (7th Cir. 2009), and League of Women Voters of the United States v. Newby, 838 F.3d 1 (D.C. Cir. 2016)), the cases the court cites actually use the sliding-scale test. For example, the D.C. Circuit endorsed a sliding-scale test, holding that a "party seeking a preliminary injunction must make a clear showing that four factors, taken together, warrant relief." League of Women Voters of the United States v. Newby, 838 F.3d 1 (D.C. Cir. 2016) (internal quotation marks omitted).

64. *See* S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co., 860 F.3d 844, 849 (6th Cir. 2017).

65. Judge Easterbrook explains this facet of the sliding-scale test in *Hoosier Energy*. "How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.,, 582 F. 3d 721, 725 (7th Cir. 2009).

66. Notwithstanding this flexibility, a plaintiff who establishes no likelihood of success on the merits or cannot demonstrate irreparable harm is unlikely to prevail, even under the sliding-scale test. But a low likelihood of success on the merits might still be offset by a compelling public interest analysis or showing of irreparable harm. *See id.*

67. *See* Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 826 F.3d 1030, 1036 (8th Cir. 2016).

plain text of *Winter*, the dissent in *Winter* made clear that the majority did not explicitly discard this approach.[68]

In light of the circuit split post-*Winter*, several scholars have attempted to analyze and resolve the differences between the circuits.[69] The scholarship in this area is creative, informative, and thorough but tends to follow a similar recipe for describing and resolving the post-*Winter* split. Generally, each author articulates and defends a preference for one test and concludes that the Supreme Court should further clarify the *Winter* standard by specifically endorsing that test.[70]

In reaching conclusions about which tests courts should adopt, the existing literature on the post-*Winter* circuit split overlooks a fundamental issue driving the divide—courts have not articulated a clear conception of the public interest factor. Specifically, the difference between the sequential test and other applications of *Winter* is whether the plaintiff is *required* to make a showing connecting the requested relief with the public interest. Although some authors have recognized problems with the public interest factor in specific types of cases,[71] the content of the public interest factor has not been thoroughly addressed. The uncertain dimensions of the public interest factor impact the degree to which courts require plaintiffs to prove the factor. This uncertainty shortchanges the nonparty interests that this factor is designed to protect and leads to lukewarm arguments about the public interest.[72] It is not clear that a more coherent public interest factor will lead to more or fewer preliminary injunctions. What is clear is that a more structured approach to this factor will ensure that courts thoroughly consider public interests in preliminary injunction cases.

---

68. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting).

69. *See, e.g.*, Bates, *supra* note 44; *see also* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015); Weisshaar *supra* note 11.

70. For example, Weisshaar, *supra* note 11, at 1017, suggests that the Court should adopt the "sequential test it stated in *Winter*" with a limited exception for plaintiffs who demonstrate "compelling circumstances" going to the merits.

71. *E.g.*, Michael S. Mireles, Jr., *Towards Recognizing and Reconciling the Multiplicity of Values and Interests in Trademark Law*, 44 IND. L. REV. 427 (2011); Ryan Griffin, Note, *Litigating the Contours of Constitutionality: Harmonizing Equitable Principles and Constitutional Values when Considering Preliminary Injunctive Relief*, 94 MINN. L. REV. 839 (2010).

72. This is not mere hyperbole—parties do ignore the public interest factor. Consider *Benisek v. Lamone*, a recent Supreme Court preliminary injunction case about gerrymandering in Maryland. 138 S. Ct. 1942 (2018). Despite the fact that this was a preliminary injunction case, the appellant failed to mention the "public interest" in their briefing, Brief of Appellants, Benisek v. Lamone, 138 S. Ct. 1942 (2018) (No. 17-333), while appellees made only a passing reference to the factor. Brief of Appellees at 60, Benisek v. Lamone, 138 S. Ct. 1942 (2018) (No. 17-333).

B. *The Public Interest Factor in Action*

The body of literature on the public interest is immense. The literature ranges from broad conceptions[73] to niche areas of the law,[74] but none of it has focused on the public interest in the preliminary injunction context.[75] This Section surveys discussions of the public interest factor, with an emphasis on the concerns judges identify in deciding motions for preliminary injunctive relief.

As a preliminary matter, it is not clear whether a preliminary injunction must further the public interest or whether it can instead merely leave the public interest as is. On the one hand, *Winter* seems to support an affirmative, pro–public interest impact. That is, "[a] plaintiff seeking a preliminary injunction must establish . . . that an injunction is in the public interest."[76] In contrast, some courts articulate the standard using a do-no-harm formulation, which requires the plaintiff to show only that "if issued, the injunction would not be adverse to the public interest."[77] Though the distinction may appear insignificant, it matters in two important ways. First, a public interest–neutral preliminary injunction case (i.e., one that is not, strictly speaking, *in* the public interest) would fail the affirmative formulation but pass the do-no-harm one. Second, the combination of the sequential test and the affirmative formulation of the public interest factor means that a plaintiff loses the motion if she cannot prove that the injunction is in furtherance of the public interest. In both instances, the exact standard that the court uses has the potential to determine the outcome of a case. A plaintiff required to prove that an injunction furthers the public interest faces a high burden, especially in cases with little to no impact on nonparties. More troubling still is the lack of consistency across circuits; if judges follow their own circuit's requirements to the letter, entire categories of cases (such as private employment disputes or suits arising from commercial contracts) might be beyond the reach of preliminary injunctions absent some atypical public interest implication.

To see how this distinction matters, consider *Main Street Baseball*.[78] In that case, a plaintiff-buyer sought to enjoin the owners of several minor

---

73. *E.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993).

74. *E.g.*, Amber L. Weeks, Student Article, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes*, 50 NAT. RESOURCES J. 255 (2010).

75. That is not to say that "public interest" takes on some special meaning in the preliminary injunction context. Rather, given the immense power courts hold in granting preliminary injunctions, litigants deserve a clear understanding of how to prove that this factor is on their side.

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

77. Jysk Bed'N Linen v. Dutta-Roy, 810 F.3d 767, 774 (11th Cir. 2015).

78. Main St. Baseball, LLC v. Binghamton Mets Baseball Club, Inc., 103 F. Supp. 3d 244 (N.D.N.Y. 2015).

league baseball teams from completing a sale of their assets.[79] The court found that a plaintiff must show "that the public interest [is] not disserviced" by the grant of the injunction.[80] The matter was a private contractual dispute, and the court concluded that the decision was unlikely to have much impact on nonparties. The court then found that there was no public interest at stake, so the factor favored the plaintiff.[81] After considering the other *Winter* factors, the court granted the plaintiff's motion for injunctive relief.[82] Had the *Main Street Baseball* court instead required affirmative proof that the preliminary injunction furthered the public interest, plaintiffs could have lost the injunction motion. Given the ubiquity of commercial contract disputes involving "a question of purely private interest,"[83] this distinction has significant implications.[84]

Another problem stems from the interaction of the public interest factor with the balance of equities factor of the *Winter* test. The confusion stems from whether the balance-of-equities factor encompasses public interest concerns or if, instead, the factor should focus only on harm to the parties. For example, some courts articulate the balance of equities as a balance of the harm the desired injunction would cause to the defendant against the harm that the plaintiff would suffer in the absence of the injunction.[85] But other iterations of the balance of equities factor blur the line between the two, leading to substantial overlap in certain cases.[86] Still other opinions discuss the public interest factor as encompassing the aggregated concerns of nonparties, leaving the balance of equities to cover the interests of moving and nonmoving parties.[87] This confusion leaves parties ill equipped to brief

79. *Id.*

80. *Id.* at 253 (cleaned up).

81. *Id.* Note that private disputes *can* implicate the public at large. This is particularly true when the private dispute has the potential to affect nonparties, as discussed in Section III.B.1, *infra*.

82. *Main St. Baseball*, 103 F. Supp. 3d at 262. ("Neither party has called to the court's attention any public interest that would be served or disserved by granting an injunction. Nor do any such interests appear to be at stake.").

83. *Id.* at 263.

84. And courts do rule this way. *See, e.g.*, N. Am. Airlines, Inc. v. Int'l Bhd. of Teamsters, No. 04-CV-9949 (KMK), 2005 WL 926969, at *5 (S.D.N.Y. Apr. 19, 2005) ("This case does not appear to implicate the public interest as it is essentially 'a purely private litigation.' . . . Thus, this factor further counsels in favor of denying the motion." (quoting Greenige v. Allstate Ins. Co., No. 02 Civ.9796 JCF, 2003 WL 22871905, at *3 (S.D.N.Y. Dec. 3, 2003))).

85. *See, e.g.*, Rhinehart v. Scutt, 509 F. App'x 510, 515 (6th Cir. 2013) (limiting the balance of equities factor to the harm suffered by the parties).

86. *See* NFL Players Ass'n v. NFL, 270 F. Supp. 3d 939, 955 (E.D. Tex.) ("[The public interest] factor overlaps substantially with the balance-of-hardships requirement."), *vacated and remanded*, 874 F.3d 222 (5th Cir. 2017).

87. *See, e.g.*, Bernhardt v. Los Angeles County, 339 F.3d 920, 931 (9th Cir. 2003) ("The public interest inquiry primarily addresses impact on non-parties rather than parties." (quoting Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 974 (9th Cir. 2002))).

and argue each factor competently. Further, it impedes the gatekeeping function of each factor by muddying the content of both.

This confusion between the balance-of-equities and public interest factors was apparent in the district court opinion leading to *Winter*. There, the trial judge treated the two factors as interchangeable, noting that the "public interest outweighs the harm that Defendants would incur (or the public interest would suffer) if Defendants were prevented from using MFA sonar."[88] *National Propane Gas Ass'n v. U.S. Department of Homeland Security* serves as an example of the second problem, in which courts allow substantial overlap between the factors by reading the public interest factor as a component in the balance of equities.[89] There, plaintiffs moved for a preliminary injunction to prevent enforcement of a safety regulation affecting chemical facilities.[90] Plaintiffs argued that the preliminary injunction would not harm the Department of Homeland Security, and thus the balance-of-equities factor tipped in the plaintiff's favor.[91] The court rejected this argument, stating "there is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct an agency to develop and enforce."[92]

Complex questions arise when a party seeks an injunction against a government entity or action. Concerns about federalism,[93] the separation of powers,[94] and individual rights[95] color discussions of the public interest factor when a government entity is party to the motion. The cases here reveal a tendency for courts to find that, when the government is a party to the litigation, the balance-of-equities factor overlaps almost entirely with the public interest factor.[96]

A further variation on this government-party trend involves cases with government entities on both sides of a preliminary injunction motion. In these cases, some courts have identified a knock-out effect, in which analysis of the public interest factor is neutral.[97] That is, because the government

88. Nat. Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1118 (C.D. Cal. 2008).

89. 534 F. Supp. 2d 16 (D.D.C. 2008).

90. *Nat'l Propane Gas Ass'n*, 534 F. Supp. 2d at 18.

91. *Id.* at 20.

92. *Id.*

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

94. *See* Patrick T. Gillen, *Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles?*, 8 DREXEL L. REV. 269, 279–80 (2016).

95. *See* G.G. *ex rel* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *vacated and remanded* 127 S. Ct. 1239 (2017)..

96. *See* Nken v. Holder, 556 U.S. 418, 420 (2009) (observing in a stay-pending-appeal case that "[t]he third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party"). The validity of this assertion is addressed below in Part III, *infra*, but I mention it here to point out this trend.

97. Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 789 (7th Cir. 2011) ("[A]nalysis [of the public interest factor] is not necessary in this case [between a state government and a federal agency], however, because the parties themselves . . . are governmental

stands for the public interest, in a government-versus-government dispute the public interest is likely neutral.[98] The simplicity of this knock-out effect is appealing, but a rigid, categorical rule is at odds with the flexibility and discretion that characterize equitable relief. Further, if the public interest factor is a placeholder for nonparty interests,[99] it seems unlikely that the aggregated interests will be the same on either side whenever two government entities are on opposite sides of a preliminary injunction, especially cases where states sue the federal government.

There is an often unstated presumption that government actions are taken in the public interest. That presumption may falter in cases in which government actions run up against constitutional rights. As the Second Circuit has noted, that presumption is rebuttable, and "once a court finds a likely [constitutional] violation, it is then institutionally well-positioned to evaluate whether a specific remedy (that is, a preliminary injunction) would serve the public interest."[100] The Fifth Circuit, however, found that the public interest factor favored the Department of State's strong national-defense interest over a nonprofit organization's First and Second Amendment rights when that organization sought to release weapon schematics.[101] Surely the merits of the underlying actions influence a court's view of the public interest factor, but it is worth noting that there is some disagreement here. The presumption that the government speaks to the public leads to a "house always wins" scenario, stacking the deck in the government's favor.

III. WHEN SHOULD THE PUBLIC INTEREST FACTOR MATTER?

In light of the various applications of the public interest factor, this Part attempts to provide a more structured framework. This Part first argues that some courts improperly assess the public interest factor using content that is better analyzed in the likelihood-of-success or the balance of equities factors. Though the factors do not need to have completely unique content, such double counting further obscures the public interest factor. This Part then identifies three structural elements of a case that courts should use to frame the public interest factor: the parties involved, the underlying cause of action, and the scope of the proposed injunction.

A. *What Courts Should Not Consider in Assessing the Public Interest Factor*

Judicial analysis of the public interest factor should not merely double count content from other factors. While there can be overlap between the

entities that represent the interests of the public."). See discussion of this point in Section III.B.1, *infra*.

98. *See U.S. Army Corps*, 667 F.3d at 789.

99. Bernhardt v. Los Angeles County, 339 F.3d 920, 931, 931–32 (9th Cir. 2003).

100. Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs., 769 F.3d 105, 112 n.4 (2d Cir. 2014).

101. Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 458–59 (5th Cir. 2016).

public interest and other *Winter* factors,[102] the public interest factor should be analytically distinct from the other three. It should not be conflated with the merits of the case or the balance of equities between parties.

A specific type of double counting occurs when courts improperly conflate the public interest factor with a general preference for lawfulness. This tendency occurs when courts equate "upholding the law" with a general furtherance of public interest.[103] This double counting was rejected by the Third Circuit in *Continental Group, Inc. v. Amoco Chemicals Corp.*, a case in which a bottle manufacturer sued a former employee because it feared that the disgruntled employee would breach a nondisclosure agreement.[104] In granting the plaintiff's motion for a preliminary injunction, the district court noted that "[t]he public interest warrants protection against the loss of the [plaintiff's intellectual] property."[105] The Third Circuit disagreed; it rejected this formulation as "not sufficiently specific" and "axiomatic."[106] The court noted that "[i]f the interest in the enforcement of contractual obligations were the equivalent of the public interest factor . . . it would be no more than a makeweight for the court's consideration of the moving party's probability of eventual success."[107] Merely stating that the law is on the moving party's side should not impact the analysis of the public interest factor, as that determination is properly assessed under the merits factor.

Further, when analyzing the public interest factor, courts should primarily consider the ramifications of an injunction on *nonparties*—not on the parties themselves.[108] To include the harm *to the parties themselves* would blur the distinction between the public interest factor and the balance-of-equities factor. The *Winter* court used language that obscured this distinction, describing the third factor as the "balance of equities,"[109] rather than using the "balance of hardships between the plaintiff and defendant"[110] language used in other cases. The latter formulation more clearly explains that the third *Winter* factor weighs the relief to the plaintiff against the burden on the defendant. When the government is a party to the litigation the factors

---

102. Consider that a plaintiff very likely to succeed on the merits of her constitutional claim against the government likely has the public interest on her side as well.

103. *See* Pashby v. Delia, 709 F.3d 307, 329–31 (4th Cir. 2013); Cont'l Grp., Inc. v. Amoco Chems. Corp., 614 F.2d 351, 357–58 (3d Cir. 1980).

104. 614 F.2d at 353–55.

105. *Amoco Chems. Corp.*, 614 F.2d at 357 (quoting the district court judge).

106. *Id.* at 357–58.

107. *Id.* at 358.

108. *See, e.g.*, Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 907 (9th Cir. 2003) ("[T]he public interest analysis in preliminary injunction cases is focused on the impact on non-parties rather than parties.").

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

110. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); *see also* WRIGHT ET AL., *supra* note 6, § 2948, at 124 ("[T]he state of the balance between this harm and the injury that granting the injunction would inflict on defendant.").

may merge,[111] but allowing the factors to merge is not the default approach to analyzing these two factors.

B. *What Courts Should Consider in Assessing the Public Interest Factor*

First, when determining the weight of the public interest factor, courts primarily consider the nonparties that would be directly affected by the injunction. The public interest factor is likely to be more influential when the government is a party to the litigation and less influential when the litigation is between two private parties. In addition, courts should consider the basis of the plaintiff's cause of action in weighing the public interest factor. Relative to other types of claims, constitutional challenges suggest that the public interest factor will have a relatively heavy weight in the preliminary injunction analysis. Finally, the scope of the requested injunction necessarily drives the public interest weight, with broader injunctions requiring a more careful consideration of public interest consequences.

1. Parties and Directly Affected Nonparties

Although the *harm* to the parties is correctly assessed under the balance-of-equities factor, courts should nonetheless use the *identity* of the parties as a preliminary indicator of the strength of the public interest factor. Three rules emerge from case law on the types of parties that shape public interest analysis. First, when the government is a party to the suit, the public interest factor is likely to have a large impact on the preliminary injunction test. Second, in private disputes between individual plaintiffs, courts are less likely to engage in rigorous public interest analysis. This second rule is mitigated by the third rule: when a nonparty—especially *many* nonparty individuals—will be affected by the preliminary injunction, the public interest factor is more likely to be determinative.

The public interest factor is clearly implicated when the government is a party to a case, particularly the federal government. This is true whether the government seeks the preliminary injunction or opposes it, though this rule should not apply when the government is involved in litigation as a market participant or in a nongovernmental role.[112] The rule applies whether the executive or legislative branch is involved, as the Supreme Court has noted that

---

111. *See* Nken v. Holder, 556 U.S. 418, 435 (2009). Alternatively, in cases in which the government is a party, courts may consider the balance of equities as involving only the "administrative and financial impact of the preliminary injunction" on the government, treating the government "in terms of its role as a litigant." Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).

112. That is, this rule should not apply when a government unit appears in a case in the same role any normal citizen could (e.g., a buyer of pencils from an office supply store). Although not couched in language of the public interest factor, the Second Circuit has required a stricter showing when private citizens challenge government action taken in the public interest (implying that government action taken in a role akin to a private citizen would not require a stronger showing). Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996).

"[v]indicating the *public* interest . . . is the function of [both] Congress and the Chief Executive."[113]

These considerations attach to all types of government entities, whether federal, state, or local. Cases involving the federal government will often raise larger public interest concerns, though, given that a higher number of individuals will be affected. When states and the federal government appear on opposite sides of a motion, however, courts should not assume that the presence of two government entities renders the public interest factor neutral.[114] Instead, courts should acknowledge the presence of potentially competing public interest considerations and, in the equitable tradition of injunctive relief, exercise discretion in assessing which way the public interest factor leans.

In related case law on stays pending appeal, the Supreme Court has noted that "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party."[115] That assessment is imprecise. First, the government does not always speak for the public interest, particularly where minority rights are concerned.[116] Second, administrative or litigation costs associated with granting injunctive relief should be considered under the balance-of-equities factor, creating a separate (albeit minor) set of considerations for these two factors.[117]

The public interest factor is less significant in purely private suits between individual parties, though a satisfactory definition of "purely private suits" may be elusive. Professor William Rubenstein has proposed a private-to-public spectrum, noting that "[t]here are not just two pure forms—the private attorney on the one hand and the government attorney on the other—but rather an array of mixes of the public and the private."[118] Such a spectrum is a useful concept for courts in considering the relative strength of the public interest factor in each case. A straightforward example of a "purely private" case is a contract dispute between two individuals without far-reaching social implications.[119] In *Bender*, for example, the D.C. District Court considered a share-purchasing dispute between a bank and one of its shareholders.[120] In scoping out the public interest implications, the court mused that "[o]ne can assume that the long-term public interest is in a fi-

113. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992).

114. *But see* Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 789 (7th Cir. 2011).

115. *Nken*, 556 U.S. at 435.

116. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

117. *See supra* note 111 and accompanying text.

118. William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2132 (2004).

119. *See* Cont'l Grp., Inc. v. Amoco Chems. Corp., 614 F.2d 351, 358 (3d Cir. 1980); Indep. Fed. Sav. Bank v. Bender, 326 F. Supp. 2d 36, 49 (D.D.C. 2004). *But see* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (barring judicial enforcement of racially based contract clauses).

120. *Bender*, 326 F. Supp. 2d at 39.

nancially healthy and stable Bank."[121] That assumption is likely valid. But it is unlikely to determine the outcome of a motion for a preliminary injunction.[122]

A third party in a purely private contract dispute has relatively small stakes, such as precedential value of case law and shoring up the rule of law. On the other hand, many third parties might have serious concerns about the disposition of government-party cases described above. But there is a rich area between these two extremes. For example, in putative product-liability class actions, courts have recognized a public interest benefit in protecting absent class members from misinformation.[123] While courts should be mindful of the broader implications of their injunctions, in many purely private cases they should apply this private-party rule to minimize the importance of the public interest factor.

Courts should also identify the presence of nonparties likely to be directly affected by the outcome of a preliminary injunction motion. That is, thousands of people might stand in the shadow of a lawsuit that initially appears to be purely private. Consider *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, in which Mississippi Power sued its natural gas provider over a pricing dispute.[124] Mississippi Power moved for a preliminary injunction to prevent the disputed practice.[125] Under the private party rule, the case appears to involve the type of contract dispute that is unlikely to have a weighty public interest factor.[126] But the public interest analysis requires that courts look beyond the parties to directly affected nonparties.[127] Mississippi Power supplied power to thousands of Mississippi residents who bore the brunt of overcharging by the defendant.[128] Because "the public" would bear the brunt of these overcharges, the court correctly assessed that the public interest factor favored granting the plaintiff's preliminary injunction.[129]

2. Underlying Cause of Action

Like the parties to a suit, the underlying cause of action also provides structural guidance for courts addressing the public interest factor. For example, the public interest factor is given large weight in constitutional chal-

121. *Id.* at 49.

122. *Id.* Especially considering that the court was unable to determine whether the bank (and its shareholders) would be better served by the plaintiff or the defendant winning the case. *Id.*

123. *In re* Imprelis Herbicide Mktg. Sales Practices & Prods. Liab. Litig., No. 11–625–SLR, 2011 WL 4735758, *3 (D. Del. Oct. 5, 2011).

124. 760 F.2d 618, 619 (5th Cir. 1985).

125. *Miss. Power & Light*, 760 F.2d at 619–20.

126. *See id.* at 625 ("[A]n issue of the propriety of considering harm to the public when the injunctive relief sought concerns a private contract.").

127. *Id.* at 625–26.

128. *Id.* at 623–24.

129. *Id.* at 625–26.

lenges to government action.[130] Unless a statute clearly contravenes a constitutional mandate, legislation provides valid and discernable indicia of public interest factors.[131] These are effected through legislative findings, damage-amplifying and fee-shifting schemes, and laws prohibiting or requiring injunctive relief, among other methods.[132] Considering the cause of action thus provides courts with guidelines for weighing public interest analysis.

Constitutional challenges to government action implicate serious public interest concerns. Numerous lower courts have recognized that the public interest is not served by the enforcement of unconstitutional laws.[133] The treatment of constitutional challenges to government action is distinct from nonconstitutional challenges to individual action and confirms the special public interest weight attached to constitutional claims. Unconstitutional government actions are an affront to the public interest and provide an imperative *in favor* of granting a preliminary injunction.[134] This analytical move is an exception to the rule against double counting of the merits factor and is driven by the interrelatedness of the merits and public interest factors.[135] The strength of the public interest factor rises and falls with the valid-

130. *See* ACLU v. Reno, No. CIV. A. 98–5591, 1998 WL 813423, at *4 (E.D. Pa. Nov. 23, 1998).

131. *See, e.g.*, 5 U.S.C. § 7101(a)(1) (2012) ("[S]tatutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations . . . safeguards the public interest.").

132. *See, e.g.*, 15 U.S.C. § 15 (2012) (awarding triple damages to plaintiffs in antitrust suits under the Clayton Act); 29 U.S.C. § 216 (2012) (granting attorney's fees to prevailing parties in certain disputes under the Fair Labor Standards Act); *see also* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011) (analyzing the effectiveness of federal mechanisms that seek to "encourage or discourage suit, or that make it more or less likely that plaintiffs will prevail").

133. *See, e.g.*, ACLU v. Alvarez, 679 F.3d 583, 590 (7th Cir. 2012) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional."); Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth., 92 F. Supp. 3d 314, 330 (E.D. Pa. 2015) (asserting that the government "cannot properly claim a legitimate interest in enforcing an unconstitutional law"); Planned Parenthood Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048, 1077 (D.S.D. 2011) (finding that the public interest in enforcing state laws is secondary to the public interest in protecting constitutional rights and "ensuring the supremacy of the United States Constitution").

134. *See* G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

135. This Note is concerned with identifying what features of a case make the public interest factor more (or less) likely to determine the outcome of a motion for a preliminary injunction, irrespective of whether the factor favors the moving or nonmoving party. But an analysis of when the public interest factor favors the moving party here might note that government action often enjoys a rebuttable presumption of being in the public interest but that constitutional challenges are quick end to that presumption. *See, e.g.*, Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs., 769 F.3d 105, 112 n.4 (2d Cir. 2014).

ity of the underlying challenge.[136] Thus, when looking to the underlying cause of action to determine the strength of the public interest factor, courts should always begin by assessing constitutional questions. This is because constitutional challenges to legislation can supersede the otherwise-valid public interest aims articulated in legislation.[137]

When a plaintiff's cause of action originates from a piece of legislation, courts should use that legislation to give weight to the public interest factor. In the most straightforward cases, some regulatory regimes clearly authorize[138] or prohibit[139] the use of injunctive relief, embodying clear and binding public interest directives that determine the outcome of any preliminary injunction analysis. Other statutes may declare legislative findings of public interest outright, providing courts an easy starting point in determining the weight of the public interest factor.[140] "The public interest also may be declared in the form of a statute. A federal statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction."[141] Finally, some statutes create litigation incentives, such as fee shifting or treble damages, that indicate broad public interest concerns.[142] When such statutory schemes are at issue the public interest factor is likely to have greater weight.

Cases involving executive and agency action are likely to create weighty public interest concerns. Advising deference to executive action in the name of the public interest, Justice Scalia wrote, "We have in our state and federal systems a specific entity charged with responsibility for initiative action to guard the public safety. It is called the Executive Branch."[143] But the public interest weight given to executive action in preliminary injunction cases is constrained by, and weaker than, constitutional and legislative interests. In *Reynolds v. Giuliani*, for example, the plaintiffs alleged that the New York

136. *See* Premium Tobacco Stores, Inc. v. Fisher, 51 F. Supp. 2d 1099, 1108–09 (D. Colo. 1999) (finding that the public interest factor favored upholding a challenged state statute because the plaintiff's constitutional challenges were meritless).

137. *See supra* note 133.

138. 42 U.S.C. § 12188(a)(1) (2012) (limiting plaintiffs pursuing claims under the Americans with Disabilities Act to injunctive relief).

139. 26 U.S.C. § 7421(a) (2012) (prohibiting suits seeking injunctive relief "restraining the assessment or collection of any tax").

140. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (declaring a national policy in favor of limiting environmental damage).

141. WRIGHT ET AL., supra note 6, at § 2948.4. Notably, the cases cited in support of this proposition involve broad pieces of legislation (e.g., national forest preservation, Medicaid programs and access, and false advertising protections) that are likely to satisfy the strong public interest factor based on the parties involved (or impacted) in Section III.B, *supra*.

142. Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., 550 F.2d 189, 197 (4th Cir. 1977), *abrogated on other grounds by* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342 (4th Cir. 2009) (noting that the antitrust statutes, permitting treble damages *and* injunctive relief, demonstrated clear public policy goals).

143. Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 393 (1997) (Scalia, J., concurring in part and dissenting in part).

City government was impermissibly denying them access to federal Medicaid benefits.[144] The court highlighted that the challenged actions by N.Y.C. officials did not bear the same public interest gloss as the underlying legislative actions would.[145] This lighter public interest weight in executive contexts makes sense, especially when executive action contravenes express or implied public interest proclamations by the legislature. In a case challenging the action of California state officials regarding access to disability benefits, the Ninth Circuit upheld this view, noting, "We are not bound by the government's litigation posture. Rather we make an independent judgment as to the public interest."[146]

Finally, a legitimate public interest factor is implicated when courts consider preliminary injunctions that might interfere with previously entered injunctions of other courts. Though such interference might be avoided through judicial molding, courts should "avoid issuing conflicting orders" because of the public interest concerns that are implicated if a party is bound by contradictory orders.[147]

3. Scope of Requested Injunctive Relief

The scope of the injunction is the final structural element in this analysis and implicates the strength of the public interest factor. This element is unlike the first two because courts can use their discretion to mold the scope of a preliminary injunction,[148] allowing them to manipulate public interest ramifications of an injunction. Broad injunctions create more public interest concerns than narrow ones and create a wider set of affected nonparties.[149]

District courts can and should use their equitable discretion to tailor the scope of a preliminary injunction. Indeed, courts already evaluate the scope of a preliminary injunction in deciding whether to grant it.[150] In cases in which plaintiffs seek to enjoin the defendant's behavior with respect to nonparties, and the interests of those nonparties are not clear or may even be harmed, a court would be wise to limit the injunction to the parties before it. In other cases, for example ones involving unconstitutional behavior by the

144. 35 F. Supp. 2d 331, 333 (S.D.N.Y. 1999).

145. *See Reynolds*, 35 F. Supp. 2d at 338 (clarifying that "a distinction may be drawn between injunctions directly challenging the enforcement of a statute or regulation from those only seeking the government's compliance with them").

146. Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).

147. Feller v. Brock, 802 F.2d 722, 728 (4th Cir. 1986).

148. WRIGHT ET AL., *supra* note 6, § 2947, at 115.

149. *See, e.g.*, Certified Restoration Dry Cleaning Network L.L.C. v. Tenke Corp., 511 F.3d 535, 551 (6th Cir. 2007); U.S. Bank Nat. Ass'n v. Friedrichs, 924 F. Supp. 2d 1179, 1186 (S.D. Cal. 2013) ("Since the injunction is narrow and limited in scope, the Court finds that the public interest is a neutral factor.").

150. *See, e.g.*, A.H.R. v. Wash. State Health Care Auth., NO. C15-5701JLR, 2016 WL 98513, at *18–19 (W.D. Wash. Jan. 7, 2016); Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 861 F. Supp. 2d 1170, 1193–94 (D. Haw. 2012).

government, the public interest may lie in one broad injunction curtailing the unconstitutional action.[151]

Cases involving the broadest injunctive relief—nationwide injunctions—are increasingly controversial. Professor Samuel Bray has argued that courts should refrain from issuing "national injunctions" against the federal government because they encourage "forum shopping, worse decision making, [and] a risk of conflicting injunctions."[152] After surveying several legal doctrines that are at odds with broad, nationwide injunctions,[153] Bray concludes that "there is no room for the national injunction" in the U.S. legal system.[154] But preliminary injunctions have long concerned the public,[155] and the efficiency gains of final and singular resolution are surely often in the public interest.[156] As long as courts continue to deploy national injunctions, trial judges should use their discretion to tailor the scope of injunctions, weighing the factors Bray cites with other concerns, namely efficient resolution of conflicts.[157]

When ruling on a motion for a preliminary injunction, federal trial judges should consider the identity of the parties, the substantive cause of action, and the scope of injunctive relief. This structured approach is not in tension with the equitable origins of preliminary injunctions but instead provides a consistent, flexible paradigm for assessing the public interest factor. Standardizing the way courts analyze the public interest will clarify when the public interest truly favors an injunction and leave litigants better equipped to argue their cases. These guidelines leave plenty of room for judicial discretion; reasonable judges may very well disagree about the public in-

---

151. Such a determination is necessarily tied to the merits of the plaintiff's case. If the plaintiff is unlikely to prevail on the merits, and therefore there is likely no constitutional violation, the motion is unlikely to be granted in the first place but certainly should not be granted broadly. *See* City of Chicago v. Sessions, No. 17 C 5720, 2017 WL 4572208, at *4–5 (N.D. Ill., Oct. 13, 2017) ("The rule of law is undermined where a court holds that the Attorney General is likely engaging in legally unauthorized conduct, but nevertheless allows that conduct in other jurisdictions across the country.").

152. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 424 (2017). "National injunction" is a term of art, and several scholars prefer the term "universal injunction." Howard M. Wasserman, *'Nationwide' Injunctions Are Really 'Universal' Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018).

153. For example, the ability of a plaintiff to use contempt proceedings to enforce a judgment and the notion that district courts decisions do not create binding precedent for other district courts. Bray, *supra* note 152, at 464–65.

154. *Id.* at 482. This idea is finding support in the judiciary as well, with Justice Thomas recently writing a separate concurrence to declare, "I am skeptical that district courts have the authority to enter universal injunctions." Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

155. *See supra* Part I.

156. This is especially true in cases where inconsistent, narrow injunctions will be unadministrable. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

157. *See* Jackson v. District of Columbia, 692 F. Supp. 2d 5, 8 (D.D.C. 2010) ("[T]he public interest is also served by allowing courts to adjudicate claims in an efficient manner.").

terest weight to give, for example, an allegedly unconstitutional practice that affects only one individual. But by thinking through these three factors in each case, courts will ensure that the public interest is meaningfully considered.

CONCLUSION

Analysis of the public interest factor suffers from a lack of consistency. This inconsistency is reflected not only in courts' analysis of the factor but also in the circuit split on the weight that the factor should be given. Courts should focus their analysis and weighing of the public interest factor on the identity of the parties, the number of directly affected nonparties, the underlying cause of action, and the scope of injunctive relief requested. These considerations, while not dispositive in every case,[158] will bring homogeneity to this factor while leaving ample room for judicial discretion. This structure gives substance to the public interest factor, moving it from an afterthought to the foreground. In working through this framework, courts will spend more time writing (and thinking) about the public interest. That is a good thing—for courts, for litigants, and for the public.

158. Consider, for example, that the presence of a clear public safety element necessarily relates to public interest, regardless of the identity of the parties. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 12 (2008).