"Preliminarily" Enjoining Elections: A Tale of Two Ninth Circuit Panels

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I. INTRODUCTION

If anyone ever doubted the importance of remedy in American jurisprudence, one has only to look at *Bush v. Gore*.[1] The decision generated intense and passionate claims about the partisanization of the Court,[2] claims that found their genesis in the 5-4 split between the so-

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1. 531 U.S. 98 (2000).

2. Books and articles on *Bush v. Gore* are legion. The following captures some of the debate. Some thought the decision partisan. *See* David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 737–39 (2001) (arguing that the majority per curiam opinion was driven by a fear that the Florida Supreme Court would, for partisan reasons, deliver Florida's electoral votes to Vice-President Gore); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at

called conservative and liberal wings of the Court regarding the outcome of the case and the outcome of the 2000 Presidential election. Would the claims have been as intense and as passionate if the Court had ruled 7-2 and if that majority consisted of the three conservatives on the Court (Justices Scalia and Thomas and Chief Justice Rehnquist), two moderates (Justices O'Connor and Kennedy), and two liberals (Justices Souter and Breyer)?[3] Would such a united front have greatly dampened the furor that enveloped the Court after the decision was handed down? Such a supermajority did exist with respect to the claim that the recount procedure authorized by the Florida Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment. Where did the supermajority unravel? It did so around the question of remedy. Five Justices ordered,[4] in effect, a halt to the recount;[5] the other two Justices in that supermajority would have remanded the matter back to the Florida Supreme Court to craft a recount procedure that would comply with the demands of equal protection under the law.[6]

108–09 (2001) (arguing that the aim of the per curiam majority was to elect Governor George Bush to the Office of President). Some saw the decision as flawed but defensible. Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1 (2001) (arguing that the Court's desire to end the uncertainty over the outcome of the 2000 Presidential election warranted the order ending the recount). Some saw the decision as correct. John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001). *See generally* Richard L. Hasen, *A Critical Guide to* Bush v. Gore *Scholarship*, ANN. REV. POL. SCI. 297 (2004).

3. I use the common characterizations attributed to identify the legal ideologies of the Justices. The terms conservative, moderate and liberal have little intrinsic meaning when applied to Supreme Court Justices. The terms are probably best understood as reflecting a relative ranking as between the members of the Court, rather than an absolute ranking in some political, cultural, social, or philosophical sense.

4. The Court's per curiam opinion finding that the recount procedure ordered by the Florida Supreme Court had constitutional problems was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *Bush*, 531 U.S. at 110–11 (reversing the judgment of the Florida Supreme Court because it could not be completed by December 12, 2002, the date federal law set as the last date for the conclusive selection of presidential electors).

5. The recount was initially stopped by a stay, not an injunction. Bush v. Gore, 531 U.S. 1046 (2000) (granting certiorari and staying recount ordered by Florida Supreme Court). The requirements for a stay closely parallel those required for equitable injunctive relief. *See, e.g.*, Curry v. Baker, 479 U.S. 1301, 1302 (1986) (Powell, J., Circuit Justice) (stating that the Court will grant a stay pending disposition of the petition for certiorari only when there is a reasonable likelihood that a majority of the Court will find the decision below to be erroneous—i.e., the appellant will likely prevail on the merits—and irreparable harm will likely result unless the decision below is stayed), *cert. dismissed*, 479 U.S. 1023 (1986).

6. *Bush*, 531 U.S. at 129 (Souter, J., dissenting). In Part III of his dissent, Justice Souter agreed that the recount procedures violated the equal protection clause:

> [T]he record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of

In September, 2003, a three judge panel ("panel") of the Ninth Circuit Court of Appeals enjoined a recall election that was scheduled in California for October 7th,[7] but that decision was vacated within a week by an eleven judge en banc panel ("en banc panel") of the Ninth Circuit.[8] The panel read *Bush v. Gore* rather broadly;[9] indeed, the only part of the Court's equal protection analysis the panel did not cite was the part where the Court majority tried to limit the precedential weight *Bush v. Gore* should have.[10] That was and is an impossible task, somewhat akin to George Orwell's request that no biography be written about him.

> machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). . . . I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.
>
> In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days.

Id. at 134 (citations omitted). Justice Breyer joined this part of the dissent; Justices Stevens and Ginsburg did not. *Id.* at 129.

7. Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir. 2003) (per curiam) (*Southwest Voter II*), *rev'g* 278 F. Supp. 2d 1131 (C.D. Cal. 2003) (*Southwest Voter I*), *vacated*, 344 F.3d 913 (9th Cir. 2003) (*Southwest Voter III*), *aff'd*, 344 F.3d 914 (9th Cir. 2003) (en banc) (*Southwest Voter IV*).

8. *Southwest Voter IV*, 344 F.3d at 914.

9. The panel stated:

> No voting system is foolproof, of course, and the Constitution does not demand the use of the best available technology. However, what the Constitution does require is equal treatment of votes cast in a manner that comports with the Equal Protection Clause. Like the Supreme Court in *Bush*, "[t]he question before [us] is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." [*Bush*, 531 U.S. at 109.] Rather, like the Supreme Court in *Bush*, we face a situation in which the United States Constitution requires "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." [*Id.*] It is virtually undisputed that pre-scored punchcard voting systems are significantly more prone to errors that result in a voter's ballot not being counted than the other voting systems used in California. As the Supreme Court observed in *Bush*: "This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter." [*Id.* at 104.]

Southwest Voter II, 344 F.3d at 895–96.

10. The Supreme Court wrote:

> The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

Bush, 531 U.S. at 109.

Both efforts failed. The panel, notwithstanding its protests to the contrary, used *Bush v. Gore*'s equal protection analysis to require a State to, in effect, use the best technology available to count votes.[11] The en banc panel saw the case differently. In affirming the district court's denial of injunctive relief, the en banc panel relied primarily on the principle that the district court's call regarding the propriety of issuing a preliminary injunction should be afforded deference. While the en banc panel was not prepared to say that the district court got it right, it was also not prepared to say that the lower court got it so wrong that the decision should be vacated or reversed. The three judge panel decision focused on the substantive correctness of the claim; the en banc panel focused on the process by which correctness was determined.[12] Process won!

The California Recall case provides an opportunity to examine remedy at the crux of a democratic society—the election. Courts have, for half a century since *Baker v. Carr*,[13] involved themselves in the electoral process:[14] campaign finance,[15] ballot access,[16] redistricting,[17] ballot

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11. *See supra* note 9. Different voting systems produce different error rates; if those error rates produce equal protection problems, the inevitable push is to obtain the technology with the lowest error rate. It is possible that the panel would not have found an equal protection problem had all California counties used "punch card" voting systems. While this would have increased the number of lost votes, there would not have been any disproportionate impact among the counties. *See infra* notes 93–96 and accompanying text.

12. *See Southwest Voter IV*, 344 F.3d at 917 (citing panel's reliance on *Bush v. Gore*); *id.* at 918 (noting that *Bush v. Gore* expressly left open the question whether "local entities . . . may develop different systems for implementing elections"). Unlike the three judge panel, the en banc panel cited *Bush v. Gore* only twice, but neither reference addressed the scope of the Court's holding.

13. 369 U.S. 186 (1962) (holding that whether a malapportioned state legislature violated the equal protection clause presented a justiciable case or controversy within Article III of the Constitution).

14. Professor Hasen has noted the significant increased attention that election issues now receive. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 1 (2003) (noting that since 1960, the number of election law cases on the Court's docket has increased from ten cases per decade (1900–1960) to sixty cases per decade (1961–2000) and that election law cases now constitute approximately 5% of the Court's docket).

15. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (holding that limitations on contributions to candidates for federal office imposed by Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–456 (2000), were constitutional, but limitations on expenditures by candidates or their supporters were not).

16. Bullock v. Carter, 405 U.S. 134, 144–49 (1972) (subjecting filing fee requirement for placement on ballot to close scrutiny and concluding that state failed to articulate sufficient and adequate justification for enforcing filing fees for various offices); Williams v. Rhodes, 393 U.S. 23 (1968) (ordering that third party candidate George Wallace be placed on the ballot because State's ballot qualification requirements made it "virtually impossible" for third party candidate to qualify).

17. Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating proposed redistricting plans for the Alabama legislature because they violated the principle of "one person, one vote").

content,[18] etc. While much of this involvement has occurred as a result of the judiciary's role as constitutional guardian, courts have also been drafted by Congress and state legislatures to provide oversight for broad and pervasive reforms of the electoral process, such as the Federal Voting Rights Act of 1965 and its subsequent amendments.[19] And while courts, using these powers, both statutory and constitutional, have ordered new elections,[20] conducted recounts, and ordered appropriate remedies[21] (including, of course, an end to recounts), the California Recall case represented a dramatic raising of the stakes; the panel enjoined the holding of a duly scheduled, statewide election until a point in time in the future the panel deemed more appropriate. There are instances in the past where courts have enjoined or threatened to enjoin elections, but they are exceedingly rare.[22] Certainly, there are no instances of a court

18. Rubin v. City of Santa Monica, 308 F.3d 1008 (9th Cir. 2002) (considering, but ultimately rejecting, claim that candidate was entitled to designation as "peace activist" on ballot), *cert. denied*, 124 S. Ct. 221 (2003); Rosen v. Brown, 970 F.2d 169, 176–78 (6th Cir. 1992) (declaring unconstitutional a state statute that prohibited placement of Independent designation below candidate's name on ballot).

19. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971–1974 (2000)).

20. Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967) (ordering new election for office of Justice of the Peace due to widespread harassment and intimidation of registered African American voters at polling places on election day).

21. *See, e.g.*, Broadhurst v. City of Myrtle Beach Election Comm'n, 537 S.E.2d 543 (S.C. 2000) (ordering a new election after protest of election when examination disclosed voting machines malfunctioned); *In re* 1984 General Election, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985) (ordering new election after voting machine failure resulted in prospective voters not voting).

22. Requests to enjoin scheduled elections are routinely rejected. *See, e.g.*, Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988) (vacating district court order enjoining upcoming Louisiana election to State Supreme Court); Banks v. Bd. of Educ., 659 F. Supp. 394, 398–403 (C.D. Ill. 1987) (noting that courts should be particular loathe to consider, much less grant, requests to enjoin scheduled elections because of the disruption and uncertainty the order might engender). *See generally* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1042–54 (rev. 2d ed. 2002) (collecting cases and materials on enjoining elections). The power, however, to enjoin an election is not unknown. *Cf.* Hamer v. Campbell, 358 F.2d 215, 217–18 (5th Cir. 1966) (stating that district court should have enjoined election when African-Americans were denied an opportunity to register as voters due to a four-month prior registration requirement and a poll tax); *see also* Lucas v. Townsend, 486 U.S. 1301, 1305 (1988) (Kennedy, J., Circuit Justice) (enjoining election pending timely docketing of appeal raising meritorious claims under the Voting Rights Act), *aff'd*, 493 U.S. 1052 (1990); Gilmore v. Greene County Democratic Party Executive Comm., 368 F.2d 328 (5th Cir. 1966) (staying election to permit minor party candidates to be added to ballots after they had been improperly excluded). Recently, the primary election for Mayor of the City of New York was postponed and rescheduled due to the terrorist attack on the

enjoining the holding of a duly scheduled statewide election to recall a governor. How should courts approach this task? In the context of many election challenges, given time constraints involved, preliminary injunctions will be the remedy of necessity for those who seek postponement of the election. Are the tests for granting preliminary injunctions adequate for the task? Are the standards for reviewing district court decisions sufficient? These are the questions I pursue in this Article.

II. THE RECALL CASE

Southwest Voter Registration Education Project v. Shelley[23] (the California Recall case) arose, like *Bush v. Gore*,[24] out of the use of the prescored punch card system to record votes during elections. The punch card system can fail in two ways. The voter can punch out two votes for a single office. This is known as overvoting. Alternatively, a voter can fail to apply enough pressure to punch through the card. This leaves the chad. The pressure applied may have been sufficient only to partially separate the chad from the card—the hanging chad. The pressure applied may not have been sufficient to separate the chad from the card—the dimpled or pregnant chad. The two may also be combined. A voter may have a hanging chad *and* a dimpled chad, indicating two votes for the same office. The permutations are plentiful. There are also reading and processing errors that can arise when the votes are counted; however, most of the errors are caused by improperly punched ballots.[25]

The plaintiffs in the California Recall case sued, claiming that the use of punch card voting technology violated their right to equal protection under the law and violated section 2 of the Voting Rights Act.[26] Their primary complaint was that the error rate for punch card voting was higher than other voting technologies. For instance, the California counties that used punch cards had substantial minority populations; therefore, the use of punch card technology in these counties would disproportionately affect minority voters. The various opinions in the

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World Trade Center on September 11, 2001. The election, which was scheduled to be held on Tuesday, September 12, 2001, was cancelled by a state court judge; New York Governor Pataki later extended the postponement statewide. Associated Press, *Primary Elections Are Cancelled*, N.Y. L.J., Sept. 12, 2001, at 3.

23. 344 F.3d 882 (9th Cir. 2003), *aff'd*, 344 F.3d 914 (9th Cir. 2003).

24. 531 U.S. 98 (2000).

25. *See generally* Alan Agresti & Brett Presnell, *Statistical Issues in the 2000 U.S. Presidential Election in Florida*, 13 U. FLA. J.L. & PUB. POL'Y 117 (2001) (discussing punch card technology, ways in which it may fail, and whether the failure is meaningful); Jason B. Binimow, Annotation, *Challenges to Punch Card Ballots and Punch Card Voting Systems*, 103 A.L.R. 5TH 417 (2002) (collecting decisions that have considered challenges to punch card voting systems).

26. *Southwest Voter II*, 344 F.3d at 890.

California Recall case identified the error rate as approximately 40,000 lost votes, or about 2.23% of the total vote.[27] California had, through a prior consent decree, agreed to end its use of punch card voting machines by March 4, 2004—the date of the California primary for the November 2004 general election.[28] Plaintiffs requested that the recall election be postponed until March 4th, when the new voting technology would be in place. The district court denied relief, but a panel of the Ninth Circuit reversed and ordered that the election be postponed, as requested by the plaintiffs.

The injunction that the three judge panel issued was a preliminary injunction. There was no trial on the merits before the district court. Had the three judge panel's decision stood, it was unlikely, due to the passage of time, that a trial on the merits of the plaintiffs' claims would have been held. By the time a trial could have been held, the postponed recall election would likely have been held.[29] Moreover, the punch card system could not be used in California after March 4, 2004, thus, mooting the case.[30] The three judge panel's decision is acceptable if it

27. Checking the math is difficult due to the fact that calculating lost votes was based on speculation and the methodologies by which the 40,000 lost votes or roughly 2.23% of the vote was calculated do not appear in the published opinions. The district court and the en banc panel saw the problem in terms of percentage of lost votes, which was small. *Southwest Voter IV*, 344 F.3d at 917 (noting an error rate of a low 2.23%). The three judge panel saw the problem in terms of aggregate lost votes, which was large. *Southwest Voter II*, 344 F.3d at 888, 893 (noting the approximately 40,000 voters would be disenfranchised). Each court appeared to consciously shape the issue in a manner favorable to the conclusion it reached.

28. *Southwest Voter II*, 344 F.3d at 891; Common Cause v. Jones, No. 01-03470 SVW(RZ), 2002 WL 1766410, at *1 (C.D. Cal. May 9, 2002). That consent degree led to a spirited debate whether principles of res judicata precluded reconsideration of the issue of the lawfulness of the use of punch card technology regarding an election scheduled prior to March 4, 2002. The three judge panel rejected the argument, *Southwest Voter II*, 344 F.3d at 901–05, while the en banc panel did not address the question. That issue is not addressed in this Article.

29. The likelihood that intervening events will moot the claim for relief may support judicial action to maintain the status quo. Wise v. Lipscomb, 434 U.S. 1329, 1334 (1977) (Powell, J., Circuit Justice) (issuing stay, of mandate of court of appeals, to prevent respondents from holding special election that could moot appellants' claim that election should be conducted pursuant to redistricting plan adopted by city council and approved by the district court, but rejected by court of appeals).

30. A case becomes moot and, thus, nonjusticiable for federal courts when interim events or the passage of time have either erased the harm the plaintiff complains about or there is no reasonable expectation that the threatened harm will occur. *See generally* CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 12 (4th ed. 1983); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.1 (1989). Election law disputes typically trigger the "wrongs capable of repetition yet evading review" exception to the mootness

was correct, or the most correct under the circumstances; yet, how do we know that the panel's opinion was more correct than the district court's opinion? Both decisions rested on the same record. As with all preliminary injunctions, the risk of error is real, and that risk does not discriminate between trial and appellate decisionmaking. The risk of error is, I believe, also accentuated by the modern approach towards granting preliminary injunctive relief that some courts, including the Ninth Circuit, use today—the so called hybrid tests.[31]

III. TESTS FOR PRELIMINARY INJUNCTIONS

The traditional test for preliminary injunctions is well known. The plaintiff must show the likelihood of success on the merits, irreparable injury if the preliminary injunction is not granted, the balance of hardships is in the plaintiff's favor, and public policy favors the granting of injunctive relief.[32] Traditionally, courts treated this test as the equivalent of a cause of action; the plaintiff was required to satisfy each element of the test.[33] That said, the key element of the test was the likelihood of success on the merits.[34] The more likely it is that the

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rule. *Id.* at § 2.5.3; *see also* Van Wie v. Pataki, 267 F.3d 109, 113–14 (2d Cir. 2001) (discussing variations of the exception as applied to election disputes). Voluntary cessation of activity is another recognized exception to the mootness rule. CHEMERINSKY, *supra*, § 2.5.4; *see also* United States v. W.T. Grant Co., 345 U.S. 629, 632–33 (1953) (distinguishing between jurisdictional mootness, the mere possibility of revival, and prudential mootness, involving some cognizable danger of revival, in a case when defendant ceases the complained of activity). In *W.T. Grant Co.*, the Court stated that a court's discretion in evaluating a prudential mootness claim should be guided by several factors, including: (1) the bona fide nature of the expressed intent to comply, (2) the effectiveness of the discontinuance of the activity, and (3) the character of past violations. *Id.* at 633. In order to resume the use of punch card voter technology, the State would have to seek relief from the consent degree, a most unlikely prospect at the present time.

31. *See infra* notes 37–46 and accompanying text.

32. *See* U.S. Mag. J. Morton Denlow, *The Motion for a Preliminary Injunction: Time For a Uniform Federal Standard*, 22 REV. LITIG. 495, 497–98 (2003) (describing the traditional test as set forth here). Judge Denlow states that ten of the thirteen federal circuits have adopted this test, *id.* at 515, although these circuits do modify their application of the test in significant ways. *Id.* at 516–26; *see also* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 527–40 (1978) (discussing the development of this standard from the eighteenth century to the present).

33. *See, e.g.*, Black Fire Fighters Ass'n v. City of Dallas, 905 F.2d 63, 65 (5th Cir. 1990) (per curiam) (on rehearing) (holding that *denial* of preliminary injunction was proper if the applicant fails to establish any one of the four criteria), *aff'd*, 19 F.3d 992 (5th Cir. 1994).

34. *In re* Arthur Treacher's Franchisee Litig., 689 F.2d 1137, 1143 (3d Cir. 1982) ("[A] failure to show a likelihood of success or a failure to demonstrate irreparable injury, must necessarily result in the denial of a preliminary injunction."); *see also* Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1102 (9th Cir. 1998) (holding on appeal of denial for preliminary injunction that plaintiff's "100% probability of success

plaintiff will ultimately prevail on the merits, the less reason there is to delay the granting of injunctive relief until the date of trial.[35] The other elements of the test for preliminary injunctive relief—irreparable injury and balance of hardships[36]—serve to modulate the granting of preliminary injunctive relief when the likelihood of success is at the low end of the likelihood range rather than at the high end of the range. When the likelihood of success is clear and compelling—i.e., the risk of error approaches, but never quite meets, zero[37]—the preliminary injunction should issue if a final injunction would be issued as no good reason

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on the merits" negated the need for remand and warranted the immediate entry of a permanent injunction), *overruled in part on other grounds by* City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004). The Seventh Circuit's sliding scale approach expressly acknowledges the direct correlation between the probability of success on the merits and entitlement to preliminary injunctive relief. AM General Corp. v. DaimlerChrysler Corp., 311 F.3d 796, 803–04 (7th Cir. 2002).

35. Professor Davis has recently argued that courts should be careful in assessing their ability to forecast the correct legal result. Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363 (2003). As Professor Davis correctly observes, there is a difference between errors in prediction and errors in accuracy, i.e., distinguishing between who will win (prediction) and who should win (accuracy). *Id.* at 364, 367–69. Professor Davis asks that courts factor in the risk of error, defined as the difference between the result the court believes is correct and the result the court would reach if it were omniscient, *id.* at 369, in crafting a remedy. The problem with this approach is that it discounts the well documented overconfidence of human beings in their own capabilities. *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting that the great majority of newly married couples believe that they will not get divorced even though the expected divorce rate is approximately 50%); Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 ACTA PSYOCHOLOGICA 143, 146–47 (1981) (reporting that persons overestimate their capabilities as drivers of motor vehicles). I doubt any judges can really envision how they would decide the case if they were omniscient, and if they cannot envision that point, there is no baseline or benchmark to determine the risk of error in any objective manner.

36. *See* Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 197 (2003) (noting that conventional wisdom is that the chief concern regarding awarding of preliminary injunctive relief is that the court may err in assessing the merits of the claim). Professor Lichtman argues in his paper that the "optimal" rule is one that assesses both the risk of an erroneous forecast of the outcome on the merits *and* the risk of an erroneous estimate of the harm that will arise if the injunction is granted or denied. *Id.* I do not tie these concepts as closely together as does Professor Lichtman.

37. At least outside the Ninth Circuit. *See Baby Tam & Co.*, 154 F.3d at 1102 (identifying plaintiff's likelihood of success as 100%); *but cf.* Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 972–73 (9th Cir. 2002) (finding that the possibility that defendant might supplement record on remand warrants conclusion that plaintiff's likelihood of success does not quite reach 100% and, thus, requires assessment of other factors regarding appropriateness of awarding preliminary injunctive relief).

exists to deny the plaintiff the remedy (injunctive relief) to which she is entitled.

Dissatisfaction with the treatment of the likelihood of success on the merits factor as *prima inter pares* with respect to the other elements of the prima facie test for injunctive relief led to the development of the hybrid tests. Hybrid tests recast the traditional test for preliminary injunctive relief into a permutation of that test, one with different emphasis and stress. For example, the Ninth Circuit has stated that the moving party may meet its burden for obtaining preliminary injunctive relief by demonstrating *either*: (1) a combination of probable success on the merits and the possibility of irreparable injury, *or* (2) that serious questions are raised and the balance of hardships tips sharply in its favor.[38] The Ninth Circuit has added a coda to this formulation: "[T]here are not really two entirely separate tests, but that they are merely extremes of a single continuum."[39] What this means is not entirely clear. In *Benda*—and some, but not all, subsequent Ninth Circuit decisions—the continuum was said to refer to the relationship between likelihood of success and balance of hardships,[40] which effectively marries the Ninth Circuit to the Seventh Circuit's sliding scale test.[41] This explanation, however, only addresses the first alternative test; it does not address the second alternative nor explain how the "or" in the hybrid test means something other than "or." It also does not explain how the two alternatives reform into a single continuum. Some Ninth Circuit cases appear to treat the hybrid test as simply an elevation of the balance of hardships factor to the position of *prima inter pares*,[42] which is a plausible application of the second alternative of the hybrid test, but not an adequate explanation of how both prongs of the hybrid test represent a continuum.

Uncertainty is encouraged, moreover, by inconsistent application of the hybrid test. For example, when the Ninth Circuit granted an en banc

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38. William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 526 F.2d 86, 88 (9th Cir. 1975) (citing Charlie's Girls, Inc. v. Revlon, Inc. 483 F.2d 953, 954 (2d Cir. 1973)).

39. Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978).

40. *Id.*; *see also* San Diego Comm. Against Registration and the Draft v. Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471, 1473 n.3 (9th Cir. 1986) (holding that these are not two distinct tests, but rather the opposite ends of a single "continuum in which the required showing of harm varies inversely with the required showing of meritoriousness"); *see also* Lichtman, *supra* note 36.

41. *See infra* notes 43–44.

42. Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir. 1993); *see also* Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997) (stating that the most important factors relevant in determining whether preliminary injunctive relief should be granted is harm to the plaintiff if injunction is denied and harm to the defendant if the injunction is granted; once the balancing is completed, the court *then* considers the likelihood of success on the merits).

rehearing in the California Recall case and ultimately upheld the district court order permitting the election to proceed, the en banc panel fixed the test somewhat differently. First, it stated the version of the hybrid test set forth above. Then, however, it set forth an alternative version of the hybrid test (in effect, an alternative to the alternative):

> [A] plaintiff is required to establish "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest (in certain cases)." This analysis creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.[43]

This test has the look and feel of the Seventh Circuit's sliding scale test.[44] Its presence in the lexicon of Ninth Circuit jurisprudence raises some

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43. *See Southwest Voter IV*, 344 F.3d 914, 917–18 (9th Cir. 2003) (citations omitted).

44. *See, e.g.*, Sofinet v. INS, 188 F.3d 703 (7th Cir. 1999):

> Our analysis of the four factors governing these stays is necessarily case-specific. . . . [T]he party seeking a preliminary injunction must first demonstrate "some" likelihood of succeeding on the merits, and that it has no adequate remedy at law and will suffer irreparable harm if the preliminary relief is denied. In deportation cases, . . . the lack of an adequate remedy at law is always present. No one suggests that the United States government could be required to pay money damages later on to a person whose asylum application was erroneously denied. As is the case in many areas of traditional equity jurisprudence, this is a situation where specific relief is the only possible solution. The other two factors, numbered 1 and 2 . . . require more comment. . . . [I]f the moving party cannot establish some likelihood of success and irreparable injury, the court's inquiry is at an end and the injunction must be denied. If the applicant meets those threshold requirements, the court will consider the balance of hardships to the moving and non-moving parties, from the denial or grant of injunctive relief respectively, and the public interest, which [we have] defined as "the consequences of granting or denying the injunction to non-parties."
>
> These factors do not have absolute weights. Instead, this court uses a sliding scale approach, under which "the more likely it is that plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh toward its side." Although there is thus a minimum threshold for likelihood of success, we held . . . that it is a low one: "[i]t is enough that the plaintiff's chances are better than negligible . . . ." That does not mean, of course, that applicants for interim injunctive relief with relatively weak cases will always obtain injunctions. The less compelling the case on the merits, the greater the showing of irreparable harm must be.

Id. at 707 (citations omitted); *cf.* White v. Davis, 68 P.3d 74, 91 (Cal. 2003) (stating that grant of preliminary injunction "involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief"). This version of the

difficulties. There are apparently now three tests a district court (or a reviewing court) can use in the Ninth Circuit to determine whether to grant a preliminary injunction (or to decide whether the decision was proper): (1) the traditional test, (2) the hybrid test, and (3) the alternative to the hybrid test, which looks to be equivalent to the Seventh Circuit's balancing test.

Other federal, and some state, courts have adopted variations of the hybrid test expressed by the Ninth Circuit.[45] While I do not want to minimize differences in word choice and phraseology in other statements of the hybrid test, I want to focus on the Ninth Circuit's version as I believe the various formulations of the tests are substantially similar and the Ninth Circuit's test is representative of the genre.

The Ninth Circuit's hybrid test proposes two paths or alternatives that a plaintiff may take to obtain preliminary injunctive relief. First, the plaintiff may show that she is likely to succeed on the merits of her claim *and* that there is, at least, a possibility of irreparable injury should she not receive preliminary injunctive relief. This suggests that if she satisfies these two elements, the injunction should issue even if the balance of hardships tips in favor of the defendant, and perhaps even if it tips strongly in defendant's favor—or maybe not if the enigmatic coda has any meaning.[46] Under the second alternative, the plaintiff can obtain a preliminary injunction if she shows that her claim(s) raise serious questions *and* that the balance of hardships tips strongly in her favor—i.e., plaintiff will suffer substantially greater harm if the injunction is not

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Ninth Circuit's hybrid test also resembles the approach in some circuits that apply the traditional test but see the elements of the test as factors that can be balanced rather than bars that must be hurdled. *See* Denlow, *supra* note 32, at 516–22.

45. The Second Circuit pioneered the use of hybrid tests. *See, e.g.*, Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969). Its formulation is substantially similar to the Ninth Circuit's test, a not surprising result given that the Ninth Circuit applied the Second Circuit's approach in *Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941, 943 (9th Cir. 1972), and subsequent decisions treated this as an adoption of that test. *See* William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 526 F.2d 86, 88 (9th Cir. 1975).

46. *Costandi*, 456 F.2d at 943 (holding that "[a]ffirmance of the injunction pendente lite does not depend upon a . . . demonstrated . . . likelihood of success at . . . trial"). *Costandi* is somewhat unclear on whether the district court may dispense with the likelihood of success factor or whether only the appellate court may do so when reviewing the district court's decision for an abuse of discretion. The Second Circuit has reached a similar conclusion under its hybrid test. *See* Dino DeLaurentiis Cinematografica, S.P.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966) ("[L]ikelihood of success is 'merely one strong factor to be weighed along with the comparative injures of the parties.'") (citation omitted). The force of *DeLaurentiis* is cut back by the fact that the district court found probable success; thus, whether an injunction would issue if the test is not met was not answered. The question is whether "merely" means what "merely" suggests: that the success factor does not mean "more likely than not."

granted than defendant will suffer if it is granted.[47] On the surface, this variation of the hybrid test suggests that the plaintiff can obtain a preliminary injunction even if the court believes that the defendant will prevail on the merits, or perhaps even if the plaintiff's claims are weak, but not frivolous!

Both of the approaches set forth in the hybrid test have significant gaps. Should an injunction issue simply because the court finds, at the preliminary injunction stage, that the plaintiff is likely to prevail? The possibility of irreparable injury is not explained. Does possibility mean foreseeable or does it contemplate a more restrictive use of the term? Does possibility mean plausible or nonfrivolous? The term is, and remains, largely open ended.[48] Would a preliminary injunction issue if this first alternative of the hybrid test is met, but the balance of hardships tips sharply in defendants' favor—i.e., the plaintiff would realize only a small gain if the preliminary injunction were issued, whereas the defendant would sustain a great loss? This first alternative does not expressly require balancing of hardships. Should such a requirement be backdoored through the coda? If such a requirement is imposed, what is the *real* test for preliminary injunctive relief—the stated test or the test between the lines? Similar observations can be directed at the second alternative in the hybrid test. What makes a question serious? Does serious mean large or important in terms of dollars and cents? Does serious mean large or important in a public context? As to the balance of hardships, what is a sharp tilt?

Professor Dobbs has looked at these formations with something akin to a skeptical gaze.[49] He reads all of the tests as imperfect (or incomplete) expressions. According to Dobbs, the problem is the striking of an

47. In many decisions the balance of hardships is the focus of attention. This factor has received critical attention in health care cases when the refusal to provide or pay for a particular type of treatment may result in the death of the plaintiff. Not surprisingly, when the balance of hardships includes the component death, the scales tend to weigh heavily in favor of the plaintiff. On the other hand, providing care that is not required under the health care plan imposes costs on the defendant that may adversely affect the level and availability of health care to others. The question knows no easy solution and has resulted in great uncertainty due to the inability to predict how the courts will rule. *See generally* Symposium, *Health Care Providers, Insurers, and Individual Patients; The Right to Treatment; Economic and Policy Issues*, 27 SUFFOLK U. L. REV. 1499, 1516 (1994).

48. JAMES M. FISCHER, UNDERSTANDING REMEDIES § 15g (1999) (discussing different formulations of the foreseeability test). The possibility of irreparable injury may be just another empty vessel into which courts may pour their subjective values and beliefs and set sail on the sea of law.

49. DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.11(2) (2d ed. 1993).

appropriate balance of competing concerns. On the one hand, the parties have claims to a particular state of affairs. The court should either order one state into being by granting the request for preliminary injunctive relief or should maintain the other state of affairs by refusing to grant a preliminary injunction. On the other hand, there is the risk of error; the risk of judicially harming a party by erroneously granting or erroneously denying preliminary injunctive relief. Professor Dobbs argues that the elements that constitute the traditional or hybrid tests can aid a judge in striking an appropriate balance between the competing concerns; however, the tests should not be applied as black letter text. The elements should guide decision making in this area, not control or dictate the end result of decision making in this area.

Professor Leubsdorf [50] and Judge Posner[51] have addressed the problem by creating approaches that seek to assess and weigh the costs of error to each party regarding the grant of preliminary injunctive relief. The decision to grant or deny injunctive relief should favor the party with the most to lose if the court decides the matter incorrectly—i.e., erroneously grants or erroneously denies the request for preliminary injunctive relief. Both Leubsdorf and Posner appear to accept the traditional statement of the elements of the test for preliminary injunctive relief. Their common insight is that the central concern in this area is over the risk of error and their shared effort to marry that insight to the relative risk that the court's decision poses to each party. On the one hand, their approach is conceptually akin to Professor Dobbs's balancing approach. On the other hand, their approach differs in the suggestion (implicit by Leubsdorf,

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50. Leubsdorf, *supra* note 32, at 525.

51. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 605–06 (5th ed. 1998). Judge Posner expressed his approach as a mathematic formula he believed followed in the footsteps of Judge Learned Hand's famous formula for negligence (United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)):

> These mistakes can be compared, and the one likely to be less costly can be selected, with the help of a simple formula: grant the preliminary injunction if but only if P x Hp > (1-P) x Hd [(where P is the probability of success, Hp is harm to the plaintiff, and Hd is harm to the defendant)], or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error. That probability is simply one minus the probability that the plaintiff will win at trial; for if the plaintiff has, say, a 40 percent chance of winning, the defendant must have a 60 percent chance of winning (1.00 - .40 = .60). The left-hand side of the formula is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right-hand side simply the probability of an erroneous grant weighted by the cost of grant to the defendant.

Am. Hosp. Supply Corp., 780 F.2d at 593.

explicit by Posner) that the balancing test can be made concrete, if not formulaic. The discretion-based test of Dobbs is made more formal and objective by Leubsdorf and Posner. The critical issue in this area, around which the critics and defenders of the above models gather, is whether a subjective, largely intuitive, discretion-based test should remain, or rather be reformatted as a more objective, formal, rule oriented test?[52] The concerns are not new, having been raised in other contexts that present similar conflicts, such as pain and suffering determinations.[53]

The Dobbs, Leubsdorf, and Posner approaches are helpful, but they do not fully explain why the courts moved toward the hybrid models. They do not evaluate the consequences of moving to hybrid models in terms of easing or impeding the availability of preliminary injunctive relief. Their main benefit is that they provide an overarching construct through which to understand the process for granting or denying preliminary injunctive relief.

The movement toward hybrid models appears to be driven by the desire to make it easier for a plaintiff to qualify for preliminary injunctive relief. It is difficult to detect any pattern in the early decisions adopting the hybrid models that suggests a bias toward a particular class of litigants or claims, such as one finds in the bond requirement cases where the courts are quite explicit that relaxation of the bond is done to encourage public interest litigation.[54] The intent to ease the tests for

52. *Am. Hosp. Supply Corp.*, 780 F.2d at 602 (Swygert, J., dissenting) (characterizing Judge Posner's approach as a "wholesale revision of the law of preliminary injunctions"); *see also* Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 543 (1987) (contending that "Judge Posner's efforts to Benthamize civil procedure are an abomination in theory and practice"). Professor Leubsdorf was never subjected, as far as I can tell, to such vituperative attacks, which is hard to reconcile with the similarity in their approaches to awarding preliminary injunctive relief.

53. *See generally* Don Rushing et al., *Anchors Away: Attacking Dollar Suggestions For Non-Economic Damages in Closings*, 70 DEF. COUNS. J. 378 (2003) (expressing concern that permitting plaintiff's counsel to use lump sum and per diem arguments to the jury as suggestions for an appropriate award of pain and suffering or emotional distress damages represents a dangerous and ill considered attempt to define the inestimable); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 150 n.1 (3d ed. 2002) (discussing split in authorities as to the legitimacy of devices that reduce subjective losses to objective measure).

54. *See, e.g.*, Pharm. Soc'y v. N.Y. State Dep't of Soc. Servs., 50 F.3d 1168, 1174 (2d Cir. 1995) (affirming waiver of bond requirement of organization suing on behalf of public interest); California *ex rel.* Van De Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985) (waiving or requiring only nominal bond is appropriate when litigation involves matters of public policy).

preliminary injunctions appears to reflect dissatisfaction with the rigor of the traditional test. Disaggregating the elements of the traditional test and reformulating them in various configurations, each of which is a product of some but not all of the elements, serves to lower the bar to obtaining interim injunctive relief.[55] The downward pressure will be accentuated by verbal reformulation of the elements themselves. It is very different to tell a plaintiff that she must show the possibility of irreparable injury rather than the probability of irreparable injury.

The main problem with the hybrid test is that it takes the court's eye off the primary issue: the larger context in which the request for preliminary injunctive relief is being made. Likelihood of success on the merits is evaluated with the possibility of irreparable injury, but the impact of granting or denying relief on the defendant or the public is not directly assessed, except to the extent that issue may be subsumed within the evaluation of the merits of the claim or the irreparable injury requirement.

Defenders of the hybrid test will argue that these concerns are overstated. A review of the decisions shows that courts commonly consider both alternatives of the hybrid test and, thus, all elements of the traditional test. As the hybrid test is actually applied, courts determine whether the plaintiff can show likelihood of success and the possibility of irreparable injury *and* whether the plaintiff can show serious questions have been raised and the balance of hardships tips sharply, or at least tips, in the plaintiff's favor. A decision granting preliminary injunctive relief will commonly show that *both* alternatives of the hybrid test have been satisfied: the plaintiff demonstrates the likelihood of success on the merits and the possibility of irreparable injury *and* that serious questions are raised and the balance of hardships tips in plaintiff's favor. All elements of the traditional test are satisfied. I will largely concede the point. In most of the Ninth Circuit decisions affirming the granting of preliminary injunctive relief, of which I am aware, the court has found that the elements of the traditional test were met. In assessing the impact

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55. Disaggregating a unit into its component parts generally appears to ease proof problems. For example, disaggregating a pain and suffering award into physical pain and loss of enjoyment of life leads to larger awards when the components are given individualized values than when a single pain and suffering award is made, which includes both elements. *Cf.* McDougald v. Garber, 536 N.E.2d 372, 376 (N.Y. 1989):

> If we are to depart from this traditional approach and approve a separate award for loss of enjoyment of life, it must be on the basis that such an approach will yield a more accurate evaluation of the compensation due to the plaintiff. We have no doubt that, in general, the total award for nonpecuniary damages would increase if we adopted the rule. That separate awards are advocated by plaintiffs and resisted by defendants is sufficient evidence that larger awards are at stake here. But a larger award does not by itself indicate that the goal of compensation has been better served.

of the hybrid tests, I detect a curiosity—a dog that didn't bark.[56] What does the hybrid test do if it simply replicates in application the traditional test for granting a preliminary injunction?

IV. APPELLATE REVIEW OF DECISIONS REGARDING THE ISSUING OF PRELIMINARY INJUNCTIONS

A further complicating factor in determining whether a preliminary injunction complies with applicable legal standards is the imprecision, if not confusion, that exists with respect to the standard of review. Appellate courts frequently intone that the trial court's decision granting or denying a preliminary injunction will be reviewed under an abuse of discretion standard.[57] That standard, as generally understood, requires deferential review and reversal only if the trial court's decision was a miscarriage of justice or a clear failure to exercise judgment.[58]

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56. *See* A. CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383, 397 (Doubleday & Co. 1930):

> "Is there any point to which you would wish to draw my attention?"
> "To the curious incident of the dog in the night-time."
> "The dog did nothing in the night-time."
> "That was the curious incident," remarked Sherlock Holmes.

57. *See, e.g.*, Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 172, 175 (2d Cir. 2001) (denying injunction), *rev'd*, 277 F.3d 635 (2d Cir. 2002); Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 450–51, 456–57 (Minn. Ct. App. 2001) (granting injunction).

58. The terms miscarriage of justice and abuse of discretion are frequently used together. *See, e.g.*, *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1255 (7th Cir. 1984). *But see* Schlup v. Delo, 513 U.S. 298, 333–34 (1995) (O'Connor, J., concurring) (citations omitted):

> [T]he Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy. It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. Having decided that the district court committed legal error, and thus abused its discretion . . . the Court need not decide the question—neither argued by the parties nor passed upon by the Court of Appeals—whether abuse of discretion is the proper standard of review. In reversing the judgment of the Court of Appeals, therefore, the Court does not disturb the traditional discretion of district courts in this area, nor does it speak to the standard of appellate review for such judgments.

Courts have recognized that the term abuse of discretion is, itself, imprecise. *See, e.g.*, C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983); *see also* LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 74–75 (2d Cir. 1985) (noting that the term "abuse of discretion" is capable of widely varying interpretation); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 390 (7th Cir. 1984) (noting that abuse of discretion "describe[s] a range of standards"); Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984) (noting that "'abuse of discretion' is a variable standard"); *cf.* Wildbur v. Arco

In the context of preliminary injunctions, that deferential command is countermanded by the requirements (1) that the trial court prepare findings of fact and conclusions of law[59] and (2) that the decision granting or denying a motion for preliminary injunctive relief is immediately appealable as a final judgment.[60] Requiring the district court to set forth the factual and legal basis for the decision and subjecting that decision to immediate appellate review is hardly consistent with a norm of deferential review; rather, the process suggests concern with the risk of error. Written findings and conclusions provide a pathway to facilitate the disclosure of error: a reviewing court need not guess why the district court ruled as it did. Immediate review permits fast error correction. Immediate review based on a developed record of findings of fact and conclusions of law is also consistent with the view that the decision whether to grant preliminary injunctive relief is a significant judicial act with important and lasting consequences to the parties before the court. Were the injunctive relief only transitory, as, for example, a temporary restraining order,[61] the need for findings, conclusions, and immediate review as a matter of right would lessen.

Recognition of the importance of preliminary injunctive relief has led appellate courts to restate the abuse of discretion standard so as to more completely address the trial and appellate courts' functions in this area. A representative statement is found in *Guaranty Financial Services, Inc. v. Ryan*: "We review the district court's decision to grant the preliminary injunction for abuse of discretion, but if the court misapplied the law in making its decision we do not defer to its legal analysis."[62]

With respect to the findings of fact, courts commonly apply the clearly erroneous test.[63] A more complete statement, then, of the standard of

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Chem. Co., 974 F.2d 631, 635 n.7 (5th Cir. 1992) (noting that the difference between the phrase abuse of discretion and "the 'arbitrary and capricious' label used in this case" is semantic, not substantial).

59. FED. R. CIV. P. 52(a).

60. 28 U.S.C. § 1292(a)(1) (2000).

61. CHARLES ALAN WRIGHT ET AL., 11A FEDERAL PRACTICE AND PROCEDURE § 2962 (2d ed. 1995) (noting the general federal rule that the grant or denial of a temporary restraining order is not immediately appealable, as is the case with the grant or denial of a motion for a preliminary injunction because a TRO is of "short duration" and immediate appeal is not necessary "to protect the rights of the parties," however, an exception is recognized when the grant or denial of the TRO effectively decides the matter before the court).

62. 928 F.2d 994, 998 (11th Cir. 1991) (citations omitted).

63. Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003); *see also* Wisdom Imp. Sales Co. v. Labatt Brewing Co., 339 F.3d 101, 108 (2d Cir. 2003) (citations omitted):

> We have previously noted that the highly deferential "clearly erroneous" standard is particularly appropriate when assessing a district court's factual findings due to that court's "expertise" as a fact-finder. The fact that we may

review of district court decisions regarding preliminary injunctions is that appellate courts nominally apply an abuse of discretion test to the trial court's decision granting or denying preliminary injunctive relief, *but* if the district court misapprehends the law or the facts, the district court abuses its decision. Deference in name is not necessarily deference in fact.

Some courts have suggested an alternative approach that provides more deference to the district court's decision granting or denying the preliminary injunction. In *Sports Form, Inc. v. United Press International*,[64] the Ninth Circuit adopted a modified abuse of discretion standard of review. The court stated that it would review findings of fact under the clearly erroneous standard, but it also emphasized that the very nature of preliminary injunctive relief is that the trial record is truncated. This suggested to the court that a more deferential approach to the test was warranted.[65] A more important distinction was made in connection with review of the conclusions of law. The court stated that it would review de novo whether the district court identified the correct legal standards,[66] but would not substitute its judgment for the district court's as to whether the legal standards were correctly applied.[67]

> disagree with the district court's factual findings, in itself, does not render those findings clear error. Rather, in order to clear this threshold, any disagreement on our part must be accompanied by a firm belief that the district court was mistaken.

64. 686 F.2d 750 (9th Cir. 1982).

65. *Id.* at 753.

66. *Id.* (referring to the legal standards governing the issuance of a preliminary injunction). "The district judge applied this standard. He held that Sports Form had failed to show any chance of success on the merits. That conclusion made a determination of potential injury or a balancing of hardships unnecessary." *Id.* The *Sports Form* court had earlier stated that the district court abuses its discretion "if, in applying the appropriate standards [for preliminary injunctive relief], the court misapprehends the law with respect to the underlying issues in litigation." *Id.* at 752 (citations omitted).

67. *Id.* at 754:

> The only remaining question is whether the district court abused its discretion when it found that Sports Form had failed to demonstrate any chance of success on the merits. We intimate no view with respect to how we would decide that question on the merits, were it before us. However, we conclude that the district court did not abuse its discretion at this preliminary stage when it concluded that, applying the law to the facts as it found them, Sports Form had demonstrated no chance of success on the merits.

Compare Sports Form with Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 717 (6th Cir. 2003) (emphasis added) (citations omitted): "We review a lower court's decision to grant a preliminary injunction for abuse of

The Ninth Circuit's approach in *Sports Form* suggests that as long as the district court correctly lists the general rules triggered by the problem—i.e., provides a grade C Bluebook answer—the appellate court will review under the deferential abuse of discretion standard the district court's application of law to fact and the district court's resolution of that dialectic. The conclusions of law recited by the district court become, in effect, the equivalent of jury instructions. Courts do not generally inquire how the jury applied the instructions, or even whether the jury actually understood the instructions; rather, the inquiry is whether the form and content of the instructions are accurate statements of the law. On the other hand, if the appellate court believes that the decision should be reversed, few jury instructions can withstand rigorous judicial scrutiny as to whether the instruction was properly given in the proceedings below. That appears to capture what an appellate court can do under this standard for reviewing the district court's decision whether to grant or deny preliminary injunctive relief. On the surface, at least, the Ninth Circuit's *Sports Form* approach provides substantially more protection from appellate second guessing than formulations like those in *Guaranty Financial Services, Inc*.[68] More importantly, however, the combination of opposing concepts—such as de novo, clearly erroneous, and abuse of discretion—within a single standard creates plentiful opportunities for misapplication, either intentional or inadvertent. The abuse of discretion standard permits appellate courts to adopt an instrumentalist approach to reviewing preliminary injunctions. When the appellate court thinks the district court got it wrong, the court can apply a rigorous standard of review; when the appellate court thinks the district court got it right, the court can apply a relaxed, deferential scope of review. This ability to adopt a result-oriented standard of review was nicely illustrated in the three judge panel and en banc panel decisions in the California Recall case, to which I now turn.

V. THE PANEL OPINION

The crucible on which the three judge panel's decision turned was the view that the district court (Judge Wilson) misapplied *Bush v. Gore*. The term misapplied is critical; Judge Wilson did not appear to read *Bush v. Gore* differently from the panel. Both Judge Wilson (apparently) and the panel (explicitly) read *Bush v. Gore* as applying to the conducting of elections, as opposed to only applying to the situation before the Court

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discretion. The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, *improperly applied the governing law*, or used an erroneous legal standard."

68. *See supra* notes 62–63 and accompanying text.

in *Bush v. Gore*—a judicially supervised recount of an already conducted election. The panel disagreed, however, with Judge Wilson's view that problems associated with the use of punch card voting systems could be avoided through voter education programs planned by the California Secretary of State.[69] The panel found that the higher error rate associated with punch card systems would result in an unacceptable loss of votes by voters who actually voted, but whose votes were not counted due to human or product error associated with the punch card technology.[70] The panel concluded:

> [T]hese are issues that each party disputes. However, as we have noted, to prevail on a motion for a preliminary injunction, a plaintiff need not demonstrate that he *will* prevail at trial, or that no other reading of the evidence possibly could be "conjured up," as the district court put it. A plaintiff must only show that the likelihood is such that, when considered with the demonstrated hardship, a preliminary injunction should issue to preserve the respective rights of the parties. Here, the plaintiffs have tendered more than sufficient proof to satisfy that preliminary burden.[71]

According to the three judge panel, once plaintiffs tendered sufficient facts to show the likelihood of success on the merits, plaintiffs were entitled to injunctive relief *as a matter of right*, not as a matter of equitable discretion. Because the parties had stipulated to the irreparable injury requirement, the panel saw Judge Wilson's decision denying preliminary injunctive relief as not just wrong, but upside down wrong! The panel promulgated that, rather than denying injunctive relief, the district court should have granted plaintiffs the preliminary injunctive relief they requested—i.e., postponement of the scheduled October 7th election to the following March 4th general primary date for the November 2004 general election.

The three judge panel also criticized Judge Wilson's combining of the balance of hardships and public interest elements of the traditional test. The panel argued that the balance of hardships test focused on the impact of the injunction between the parties, whereas the public interest

69. *Southwest Voter I*, 278 F. Supp. 2d 1131, 1139 (C.D. Cal. 2003), *rev'd*, 344 F.3d 882 (9th Cir. 2003), *vacated*, 944 F.3d 913 (9th Cir. 2003), *aff'd*, 344 F.3d 914 (9th Cir. 2003) (en banc).

70. *Southwest Voter II*, 344 F.3d at 896–98.

71. *Id.* at 899; *see also Sports Form*, 686 F.2d at 752: "The 'irreducible minimum,' however, is that the moving party demonstrate 'a fair chance of success on the merits' or 'questions . . . serious enough to require litigation.' [Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978).] 'No chance of success at all . . . will not suffice.' [*Id.*]"

element focuses on the impact of the injunction on nonparties.[72] This distinction, while supportable as a general proposition, loses much of its significance when the plaintiffs purport to represent a broad swath of the public.[73] It is, moreover, a distinction that is not universally applied.[74]

The three judge panel deemed the plaintiffs' harm as irreparable and therefore examined only the relative burden on the defendant Secretary of State. Having set up the relative hardships in this fashion, the result was a foregone conclusion: no hardship experienced by a defendant is likely to overcome a hardship deemed irreparable. But if this is the proper approach, the balance of hardships element is read out of the test. The problem here is that the panel misapplied the concept of irreparability when it used the stipulation of irreparable injury to balance the hardships. Irreparable injury does not necessarily mean great injury, although it may. Irreparable injury is not a quantitative or qualitative measure of the harm a plaintiff will sustain if the injunction is not issued. Irreparable injury means injury that cannot be as efficiently and completely remedied at law by an award of damages as in equity by an award of injunctive relief. Irreparable injury is measured comparatively to the equivalent remedy at law. Legal injury is irreparable in the sense that the legal remedy does not as adequately redress the wrong as would the remedy in equity. Irreparable injury and inadequacy of the remedy at law are wholly interchangeable terms and both convey a message not of gravity or severity of injury, but of the relative redressability of the legal injury under the remedies available at law and in equity.

In evaluating the nature and scope of the plaintiffs' claimed injury, the three judge panel did find that conducting the recall election with punch card voting technology would result in a potential risk of voter disenfranchisement and vote dilution:

> Plaintiffs have tendered credible evidence that if the election is held in October, a substantial number of voters will be disenfranchised by voting in counties utilizing pre-scored punch card technology. Thus, their votes will be diluted in comparison to the votes cast in counties with more modern technology. Once the election occurs, the harm will be irreparable because Plaintiffs are without an adequate post-election remedy.[75]

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72. *Southwest Voter II*, 344 F.3d at 907.

73. Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991) (noting that defendant city's interest is "theoretically the public's").

74. *Id.*; *see also* Holford USA Ltd. v. Cherokee, Inc., 864 F. Supp. 364, 371 (S.D.N.Y. 1994) (considering as part of the balancing of hardships the effect of granting an injunction on defendant's creditors); *cf.* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982) (stating that in considering whether to grant an injunction, equity courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" and those public consequences may counsel denial of preliminary injunctive relief even though the decision "may be burdensome to the plaintiff").

75. *Southwest Voter II*, 344 F.3d at 907.

The problem here is that any dilution was a general estimate. No individual plaintiff could know before the election, unless he or she deliberately misused the punch card technology, that his or her vote would be lost due to the overvoting or undervoting problems. Thus, if the focus was on the relative harms between the parties, as the panel stated, the test was the relative possibility a plaintiff's vote would be diluted versus the burden imposed on the State in canceling an election in progress and rescheduling it for a later date. There are some obvious difficulties in performing this calculation. How do you value the risk of dilution due to technological error? If 3,300,000 punch card votes are cast and 40,000 votes are lost, the risk per voter is 0.012%.[76] In what way is that risk meaningfully compared to the identifiable costs associated with cancellation and rescheduling. Can the 0.012% be monetized? How confident can we be in our estimates of lost votes, voter turnout, and election related costs? Uncertainty weighs heavy here, even if we accept the panel's invitation to limit the balance of hardships test to the parties' relative harms.[77]

The three judge panel's decision to separate party related harm from third party related harm created an additional bias that favored the plaintiffs. The harm sustained by third parties, in this instance the public at large, in having the recall election conducted as scheduled is never expressly weighed against the risk to a person that his or her vote will not be counted due to technology errors. That balance is not missed by courts that explicitly include third party harms in the balancing element. More importantly, the balance of hardships is expressly part of the hybrid test; the public interest is not. Thus, a court will come to the evaluation of third party interests only after it has determined that the

76. I have to use hypothetical figures for the punch card votes because no figures were provided in the opinions of the likely aggregate vote in the punch card counties to measure against the claimed 40,000 lost votes. *Id.* at 892–93. There were approximately 7.5 million votes cast for the office of Governor in the November 2002 General Election. California Secretary of State's Official Declaration of the Results of the General Election Held on Tuesday, November 5, 2002, throughout the State of California on Statewide Measures Submitted to a Vote of Electors, at vx, *at* http://www.ss.ca.gov/elections/sov/2002_general/sum.pdf (last visited Nov. 19, 2004). According to the panel, approximately 44% of the California votes are tabulated using punch card technology. *Southwest Voter II*, 344 F.3d at 892. This provides a base of 3.3 million voters using punch card technology (7.5 million times 0.44). If 40,000 of those 3.3 million would be lost, the result is a 0.012% risk per voter.

77. Lichtman, *supra* note 36, at 197 ("In most cases, the court will be just as uncertain about its estimates of the harms as it is about its prediction as to the outcome of the case.").

preliminary injunction should be granted or denied. It is doubtful that considering third party interests this late in the analysis will cause many courts to change their mind.

Finally, there is the issue of actually balancing the relative harms. The three judge panel opinion was cryptic on this point. As previously observed, the panel proceeded from the point that the plaintiffs' harm was irreparable, which the panel mistakenly took to be great in the literal sense. As to the state's harm, the panel distinguished between the recall election and the two ballot initiatives that were moved from the March 2004 primary election to the recall election after the recall was qualified.

The three judge panel accepted that canceling the recall election would involve expense to the state, but downplayed this cost because cancellation would not require a separate special election.[78] It was the special election that was being cancelled, and the recall election would be held at the next scheduled election, the statewide primary election scheduled for March 4, 2004. The panel accepted that there would be some burden and expense to the state, but that burden and expense was not quantified by the State, nor defined with much precision by the panel.

When the three judge panel turned to the accompanying initiatives, it concluded that no "significant extra burden" would be imposed by cancellation and rescheduling of the election.[79] The panel thought that adding the initiatives to the March Primary election would result in insignificant extra cost. The panel may have been influenced by the size of the recall ballot and the fact that the initiatives had first been scheduled for the March Primary, but the panel opinion was silent on this point.

The panel concluded that, as to the initiatives, the balance of hardships tipped sharply in the plaintiffs' favor; however, as to the recall election, the balance only slightly favored the plaintiffs.[80] The distinction is intriguing on two points. First, the panel pointed to no facts which support the distinction. Facts can be found that might support the distinction drawn between the initiatives and the recall,[81] but those facts were not recited by the panel. On its face, the panel identified a distinction

78. *Southwest Voter II*, 344 F.3d at 907.
79. *Id.* at 908.
80. *Id.*
81. For example, at the time of the panel decision, the Recall campaign and the campaign to succeed Governor Davis if the Recall was successful were well underway. The campaigns to support or oppose the two initiatives on the ballot had barely commenced. In addition, the proponent of the more contentious of two initiatives (Proposition 54, which would outlaw state collection of racial data) had conceded that the initiative would likely be defeated. Dan Morain, *Prop. 54 Sponsor Concedes Passage Is Now Unlikely*, L.A. TIMES, Sept. 7, 2003, at A1. The three judge panel alluded to the investment in the Recall election, but not in the context of balancing; it did so in assessing the public interest. *See infra* note 85 and accompanying text.

without identifying the reasons for the difference it found. Second, the slight favoring the panel found satisfies the traditional test, but not the hybrid test that requires that the balance sharply tip in the plaintiff's favor.[82] The lack of clarity in the panel opinion as to the pathway it is following—traditional test or hybrid test—is simply reinforced by the disconnect between the stated standards of review and the application of those standards in the body of the opinion. Is it the traditional test or the hybrid test that controls the result?

The final element the panel considered is the public interest. As I have noted elsewhere, I do not believe that the public interest element ever controls the decision to grant or deny injunctive relief.[83] That is not to minimize the importance of the public interest element, which I do not; rather, it is to emphasize the necessary, inherent malleability of the public interest concept. Like the proverbial "unruly horse" of lore, the public interest represents a doctrine that is open ended and instrumental.[84] I

82. The Ninth Circuit generally finds that the balance of hardships tips sharply when the plaintiff will sustain significant loss if the injunction is not granted, but the defendant will sustain minimal or no loss if it is granted. *See, e.g.*, Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983) (finding that balance of hardships tipped sharply in plaintiff's favor because INS was not having difficulty enforcing immigration laws under the temporary restraining order that preceded the preliminary injunction and INS could not be said to be harmed by being enjoined from constitutional violations. Plaintiff, on the other hand, could be harmed by potential violations of his Fourth Amendment rights.); Wilson v. Watt, 703 F.2d 395, 399 (9th Cir. 1983) (finding that balance of hardships tipped sharply in the plaintiffs'—Native Americans and Alaskan Native tribal organizations—favor when granting injunction would result in continuation of sustenance general assistance programs for 3400 Alaskan Native people and defendant Bureau of Indian Affairs had available authorized funds to continue the program). The ability of the court to ameliorate the cost of complying with the injunction may also be a factor in favor of finding that the balance of hardships tips sharply. *See, e.g.*, Taylor v. Honig, 910 F.2d 627, 633 (9th Cir. 1990):

> We find that under these circumstances, plaintiffs did establish a likelihood of success on the merits. Moreover, the facts of this case indicate that the balance of harm tipped sharply in favor of the plaintiffs. The Taylors' insurance coverage was about to expire on the eve of the court's grant of the preliminary injunction. The district court was faced with an emergency situation where a readily available appropriate placement was necessary to provide Todd with his educational and related needs. The district court expressly mitigated the potential harm to the School District by leaving for ultimate resolution the apportionment of costs between the various public agency defendants as well as leaving open the possibility of relocating Todd to California if an appropriate in-state placement could be found.

83. FISCHER, *supra* note 48, § 40[b][iv].

84. *Id.* § 4 (quoting Lord Justice Burrough's famous dictum from *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (1824)).

await the court decision that finds that granting or denying a preliminary injunction is not in the public interest, but does so anyway. Public interest analysis is beneficial in that it removes the court's biases, assumptions, attitudes, and values from the closet and puts them on the record. The public interest element, however, is generally so flexible and malleable that it provides little, if any, controls or checks on the direction a court will take—or perhaps, more accurately, wishes to take.

That reality was apparent in the three judge panel's decision, as it is apparent in every case of public import. The panel accepted that there was a legitimate, meaningful interest in having the recall election on its designated date, October 7, 2003: "California's very short schedule for recall voting exemplifies the significant public interest in a rapid resolution to a challenge to existing leadership. Candidates have already invested considerable sums in the election, as well as time and energy, in reliance on the recall date."[85]

On the other hand, the three judge panel found that those interests paled when compared with the interests in avoiding a violation of a citizen's right to equal protection, particularly when the concern, dilution of the vote due to the use of punch card technology, "would undermine the public's confidence in the outcome of the election."[86] Yet, how did the panel know whether public confidence would be affected by the use of punch card technology or that it outweighed the supposed public's interest in having the election on the designated date? There were no findings on the issues one way or the other; yet, the panel's decision proceeds as if the conclusions are self-evident. They are not; rather, they are highly contentious, as was evidenced by the reaction to the panel's decision enjoining the election. The problem here is that views regarding the public interest are necessarily values laden and largely nonfalsifiable. The panel provided no basis for proving or disproving its assertions. The panel's conclusions rested, in the end, on the subjective values of the judges on the panel as to the consequences (desirable or undesirable) of conducting an election with punch card technology.

I am not suggesting that the public interest has no role here; it does, but courts should not treat the public interest as an empirical fact. The public interest represents and reflects the court's view as to what result best advances the legitimate social goals presented by the dispute. I doubt that judges are so divorced from their values that they can (or should) decide cases in some sort of intellectual vacuum, pretended or actual. On the other hand, judges should take care to not transform or

85. *Southwest Voter II*, 344 F.3d at 909.
86. *Id*. at 910.

treat their personal values as objective, empirical facts external to the judge and therefore having independent validation. The rule of law is still implemented through human interaction, and for as long as that is the case, the biases, values, fears, and hopes of the human conduit will influence, shape, and mold the rules that are the law. Better that the judge identify the values the judge believes relevant and important to the decision than that those values should be unarticulated influences that hide and conceal the true bases for the decision.

VI. THE REHEARING EN BANC

The three judge panel rendered its decision on Monday, September 15, 2003. The panel stayed its decision enjoining the recall election for seven days to permit further review. It did not take that long. By the next day, the Ninth Circuit acted on its own. A request for en banc review was made *sua sponte* by a member of the court; a majority of nonrecused, regular, active judges of the Ninth Circuit agreed, and the case was ordered to be reheard.[87] The effect of this decision was to vacate the panel decision.[88] The matter was argued before the en banc panel on Monday, September 22, 2003. The next day, the en banc panel, in a per curiam opinion, unanimously affirmed Judge Wilson's decision denying plaintiffs' request to enjoin the recall election.[89] What did the en banc panel see that the three judge panel missed?

The en banc panel never addressed the merits of the plaintiffs' equal protection or voting rights claims. *Bush v. Gore* was cited only twice in the en banc decision, and in neither instance was the reference to the holding or meaning of the decision; rather, the en banc panel's focus was on the appropriate standard of review. The en banc panel cited and recited many of the same precedents on this point as the three judge panel, but the devil is in the details—i.e., the application—and that was the case here.

The en banc panel held that "the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim."[90] As to the Voting Rights Act claim, the en banc panel held that while the

87. *Southwest Voter III*, 344 F.3d 913 (9th Cir. 2003) (Schroeder, C.J.), *aff'd*, 344 F.3d 914 (9th Cir. 2003) (en banc).
88. *Id.*; *see also* FED. R. APP. P. 35-1 to 35-3 advisory committee's notes 3 & 5.
89. *See Southwest Voter IV*, 344 F.3d at 914.
90. *Id.* at 918.

"plaintiffs have shown a possibility of success on the merits, we cannot say at this stage that they have shown a strong likelihood. . . . We therefore must determine whether the district court abused its discretion in weighing the hardships and considering the public interest."[91] The en banc panel's findings and juxtapositioning of concepts raise interesting questions.

The en banc panel addressed the equal protection and voting rights claims differently. As to the equal protection claim, the issue was not the likelihood of success on the merits, but whether the district court abused it discretion in finding that the plaintiffs had not shown the probability of success on the merits. The en banc panel defined the threshold as clear probability. This formulation is close to the strong likelihood language of the traditional test for preliminary injunctive relief, but a higher threshold than the alternative test of likelihood of success combined with a possibility of irreparable harm that the Ninth Circuit constantly reiterates as a basic test for granting preliminary injunctive relief.[92] The en banc panel did not state why it applied the clear probability threshold rather than a lesser likelihood threshold. More importantly, the en banc panel did not address the success on the merits element as a pure law or mixed law and fact issue, which would have required a de novo or a clearly erroneous standard of review; rather, the en banc panel simply asked whether the district court abused its discretion. The en banc panel opined that the fact that the three judge panel had unanimously concluded that the plaintiffs' equal protection claim had merit was itself evidence that "the argument is one over which reasonable jurists may differ[!]"[93] How a unanimous panel opinion shows or evidences a difference of opinion is a mystery. Perhaps the en banc panel was implicitly referencing the disagreement between the three judge panel and the district court, but if that is so, every case of disagreement represents a matter over which reasonable minds may differ. If a reasonable difference of opinion precludes a finding of abuse of discretion, then few district court decisions granting or denying preliminary injunctive relief will be reversed on appeal.

The en banc panel did reference *Bush v. Gore*'s statement that "[t]he

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91. *Id.* at 919.

92. This juxtapositioning of different adjectives before the phrase likelihood of success is neither uncommon nor confined to the Ninth Circuit. *See, e.g.*, Ill. Council on Long Term Care v. Bradley, 957 F.2d 305, 307 (7th Cir. 1992) (stating that the plaintiff's likelihood of success must be at least "better than negligible"); Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978) (stating that Ninth Circuit precedent require the "irreducible minimum" of a "fair chance of success on the merits"); TMT N. Am., Inc. v. Magic Touch GmbH, 124 F.3d 876, 881 (7th Cir. 1997) (requiring "some likelihood of prevailing on the merits").

93. *See Southwest Voter IV*, 344 F.3d at 918.

question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[94] Perhaps the "reasonable minds may differ" language was used to contrast the three judge panel's position with the statement from *Bush v. Gore* to suggest that the panel's opinion, while perhaps a reasonable interpretation of *Bush v. Gore*, was not compelled by *Bush v. Gore*. Under this view, there was no reason to prefer the three judge panel's position as to the applicability of *Bush v. Gore* to the California recall election over Judge Wilson's. All other things being equal, first in time was first in right; reversing or vacating Judge Wilson's call would simply encourage and abet judicial second guessing, which the en banc panel would not do.

Bush v. Gore dealt specifically with a court supervised recount of an already conducted election that had been certified as complete by state election officials. The precise question before the Supreme Court in *Bush v. Gore* was whether the recount procedures ordered and authorized by the Florida Supreme Court for conducting the recount violated the equal protection clause.[95] There is language in *Bush v. Gore* that supports the position taken by the three judge panel, but *Bush v. Gore* is, on its facts, different from the California Recall case in that the latter claims the very use of certain voting technologies, such as prescored punch card systems, violate the equal protection clause.[96]

It is not the purpose of this Article to debate whether *Bush v. Gore* should be read as applying to the use of voting technology that may have

94. *Id.* (citing Bush v. Gore, 531 U.S. 98, 109 (2000)).

95. 531 U.S. at 105.

96. Justices Souter and Breyer, who both agreed that the recount procedure ordered by the Florida Supreme Court violated the equal protection clause, *see supra* notes 4–6 and accompanying text, suggested that the use of punch card voting systems may violate the equal protection clause:

> As Justice Stevens points out, the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair.

Bush, 531 U.S. at 147 (citations omitted). In another part of the dissent, however, they seemingly contradicted that suggestion. *Id.* at 134 ("[T]he Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness . . . .") (Souter, J., dissenting).

an unacceptable level of voter disenfranchisement due to product defect or deficiency.[97] It is, however, surprising that the en banc panel thought it was not its place to discuss the applicability of *Bush v. Gore* in any way. The mere fact that the Supreme Court professed in *Bush v. Gore* that it was not considering the use of different voting systems within a state was sufficient for the en banc panel to immunize from any searching appellate scrutiny a district court opinion applying the legal reasoning of *Bush v. Gore* to a fact pattern that is only different in degree, not in kind, from the actual case before the Court in *Bush v. Gore*. Should one expect all cases of judicial disagreement to receive such gentle treatment? If all eleven judges on the en banc panel thought Judge Wilson reached the wrong legal conclusions, should they defer to Judge Wilson's call because it was first? The en banc panel proceeds as if the legal merits of the equal protection claim are inconsequential or, at best, marginally relevant. That is a surprising position for an appellate court to take and one the Ninth Circuit has eschewed in other cases involving equal protection claims.[98]

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97. At least one federal court has found that a triable issue exists as to whether the use of punch card voting technology violates the equal protection clause, but that decision was not made in the context of enjoining an impending election. *See* Black v. McGuffage, 209 F. Supp. 2d 889, 897–99 (N.D. Ill. 2002); *contra* Graham v. Reid, 779 N.E.2d 391, 395–96 (Ill. App. Ct. 2002) (rejecting, by way of dicta, argument that selective use of punch card voting technology in some, but not all voting precincts within a state, would raise an equal protection problem under *Bush v. Gore*); *see generally* Binimow, *supra* note 25, at 425–32.

98. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (reversing preliminary injunction issued by district court that enjoined enforcement of Proposition 209, a state constitutional ballot initiative approved by California voters that barred the use of race or gender preferences—i.e., affirmative action). The court recited the same litany of precedents in *Wilson* as the en banc panel would later cite in *Southwest Voter*. The difference in *Wilson* is that the court did assess the district court's legal analysis even though the court professed not to do so:

> Plaintiffs contend, as an initial matter, that we have no authority to review the "underlying merits" of the preliminary injunction that the district court entered. Plaintiffs are correct to the extent that we will not reverse a preliminary injunction just because we would have arrived at a different result if we had applied the law to the facts of the case. Where, as here, however, the issue is whether the district court "misapprehended the law with respect to the underlying issues in litigation," we assuredly may assess whether the district court got the law right.
>
> The parties to this appeal dispute whether the district court relied on an erroneous legal standard, not whether the district court wrongly applied the right legal standard to the facts of the case. Where the issue is whether the district court got the law right in the first place, we do not defer review and thereby allow lawsuits to proceed on potentially erroneous legal premises.

Id. at 701 n.9 (citations omitted). The Ninth Circuit has also reversed the district court's denial of preliminary injunctive relief when the court thought the lower court misread and misapplied the appropriate legal tests. *See* Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003) (finding that "[individuals seeking to use marijuana for medicinal pain relief, pursuant to California's Compassionate Use Act, CAL. HEALTH & SAFETY CODE §

On the Voting Rights claim, the en banc panel said that the plaintiffs had made a stronger showing than they did on the equal protection claim, but it was still insufficient to warrant preliminary injunctive relief.[99] The en banc panel stated that there were significant disputes in the record that went to whether the plaintiffs had demonstrated a sufficient disparity between white and nonwhite voting to establish a violation of section 2 of the Voting Rights Act.[100] The en banc panel did not elaborate on the dispute; it did not identify the dispute as one of law, or fact, or mixed law and fact; it did not assess the strength (or weakness) of the Voting Rights claim. The en banc panel did not expressly state that it was applying the abuse of discretion standard at this point of its opinion, although this may have been implicitly assumed by the en banc panel from its prior analysis.

If the en banc panel is applying a deferential abuse of discretion standard to the merits of the plaintiffs' Voting Rights claim, that approach raises the same concerns as expressed above with respect to the equal protection claim. It is the nature of the adversary system that a record will contain evidence that is disputed. It is not the fact of dispute, but the quality and strength of the evidence supporting each party's contention that is critical to a determination of likelihood of success. The en banc panel never identified the strengths or weakness of either side's case. Its opinion projects an image or inference that the evidence is equipoise between the two sides,[101] but the opinion never explains how or why this

11362.5 (West Supp. 2004),] have demonstrated a strong likelihood of success on their claim that, as applied to them, the [Controlled Substances Act, 21 U.S.C. §§ 801–904 (2000),] is an unconstitutional exercise of Congress' Commerce Clause authority"), *cert. granted*, 124 S. Ct. 2909 (2004). Distinguishing between stating and applying legal standards can be easily asserted, but difficult to police, for accurate application. *See* Elvis Presley Enters. v. Passport Video, 349 F.3d 622 (9th Cir. 2003) (majority and dissent disagreeing, in the context of reviewing district court's grant of preliminary injunctive relief, whether use of copyrighted material constituted fair use), *amended by* 2004 U.S. App. LEXIS 1850 (9th Cir. 2004).

99. *See Southwest Voter IV*, 344 F.3d at 918–19.

100. 42 U.S.C. § 1973(a) (2000).

101. This is, of course, my reading of the en banc panel's "significant dispute in the record" language when set against its conclusion that the plaintiffs had not shown a strong likelihood of success. Language in prior Ninth Circuit decisions stating that only a fair chance of success on the merits is required, Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), was not cited by the en banc panel. Nor did the en banc panel cite *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993) (affirming entry of preliminary injunction when plaintiff showed serious questions of law in area covered by First Amendment and balance of hardships to plaintiff outweighed hardships to defendant).

is the case. For example, the opinion does not argue that witness credibility was critical; thus, deference to the district judge was warranted.

It is the essence of discretion that it represents the exercise of considered, sound judgment. It is no doubt difficult to identify and articulate a determination that discretion has been properly or improperly exercised. Identifying the evidence in the record that supports or undermines the discretion-based decision is, however, a common method of justifying an appellate decision confirming or rejecting a lower court's discretion-based decision making.[102] That was not done here. The en banc panel made only a general assertion that the evidence was disputed; this carried the implicit concession that the district court's decision was sufficiently correct to withstand appellate correction.

As an abstract proposition, it may be correct to uphold a lower court's decision when that decision is as likely to be right as it is to be wrong.[103] It would be surprising to assume that this principle applies to cases of significant public importance, such as the California Recall case, but it appears that was done here. The en banc panel never decided whether Judge Wilson was right; they simply said, without explanation or discussion, that he was not clearly wrong. One wonders whether the same standard would have been applied had Judge Wilson issued a preliminary injunction enjoining the holding of the California Recall election until March 4, 2004.[104] Would the en banc panel have applied the same deferential standard? Does judicial reluctance to enjoin elections

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102. This is process-based decisionmaking as championed by Professors Hart and Sacks. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143 (1994). This notion of reasoned determination or, as phrased by Hart and Sacks, reasoned elaboration, is implemented in practice by a trial judge setting forth a statement of reasons in support of the discretion-based decision. *See id.* Affirmances due to the presence of, or remands due to the absence of such a statement, are common. Thus, the reviewing court can exercise control over the district court by insisting that the district court apply correct evaluative considerations, *see* Mannino v. Int'l Mfg. Co., 650 F.2d 846, 849 (6th Cir. 1981), and that the district court state the reasons for its decision, *see* Conafay v. Wyeth Labs., 793 F.2d 350, 353–54 (D.C. Cir. 1986); Hurn v. Retirement Trust Fund of the Plumbing, Heating & Piping Indus., 648 F.2d 1252, 1254 (9th Cir. 1981).

103. I have made this argument myself, in support of some discretion based decisionmaking. *See* James M. Fischer, *Discretion and Politics: Ruminations on the Recent Presidential Election and the Role of Discretion in the Florida Presidential Election Recount*, 69 U. CIN. L. REV. 807, 823–31 (2001).

104. There is the temptation to invoke the principle—not cited by either the three judge or en banc panels—that stricter review is appropriate when the district court decision amounts to a final decision on the merits. Romer v. Green Point Sav. Bank, 27 F.3d 12, 16 (2d Cir. 1994) (stating that decisions regarding a preliminary injunction are subject to "greater scrutiny" when they "effectively award victory in the litigation"). In the context of an impending election, however, that test cuts both ways unless it is augmented by the status quo test—i.e., the approach that injunctions that alter the status quo are subject to enhanced proof requirements and reviewed more searchingly. *See infra* note 110.

mean that there is a soft test when the district court denies a request to enjoin an election, but a harsh test when the election is enjoined? More ominously, perhaps, is there one standard of review (soft) when the reviewing court agrees with the lower court's ruling and another standard of review (harsh) when the reviewing court disagrees with the lower court's ruling? I do not doubt that reviewing courts can find or ignore error when they wish to do so, but the idea that separate standards of review would be consciously tied to a result-oriented jurisprudence to conceal the true bases for the reviewing court decision would be troubling; yet, such a conclusion is easily reached when the two panel opinions are evaluated side by side, particularly given the en banc panel's paucity of reasons for affirming the district court's denial of injunctive relief.

After concluding that the plaintiffs had not met the success on the merits threshold as to either the equal protection or Voting Rights Act claims, the en banc panel proceeded to address the balance of hardships and public interest elements of the test(s) for preliminary injunctive relief. The court did not expressly tie this part of the opinion to a particular test for granting preliminary injunctive relief. Balance of hardships is the companion to the "raises serious questions" alternative of the hybrid test. The en banc panel did not explicitly state or find the questions raised by the case were serious, but can the answer be otherwise? The use of voting technology that creates a greater chance that minority votes would be lost due to technological deficiency than that nonminority votes would be lost raises a claim that is of fundamental concern to the Voting Rights Act. The en banc panel conceded that plaintiffs had made a stronger showing as to the Voting Rights Act claim.[105] It would be at odds with the hybrid test for the court to

105. The en banc panel correctly noted that the Voting Rights Act violation threshold is not high:

> Plaintiffs have made a stronger showing on their Voting Rights Act claim. In a nutshell, plaintiffs argue that the alleged disparate impact of punch-card ballots on minority voters violated Section 2 of the Act. Plaintiffs allege that minority voters disproportionately reside in punch-card counties and that, even within those counties, punch-card machines discard minority votes at a higher rate. To establish a Section 2 violation, plaintiffs need only demonstrate "a causal connection between the challenged voting practice and [a] prohibited discriminatory result." There is significant dispute in the record, however, as to the degree and significance of the disparity. Thus, although plaintiffs have shown a possibility of success on the merits, we cannot say that at this stage they have shown a strong likelihood.

summarily dismiss the claim for preliminary injunctive relief based on the success on the merits element, as it did, when the claim raised serious issues without the en banc panel first considering balance of hardships. Serious issues coupled with the balance of hardships sharply favoring the plaintiffs would have satisfied the second alternative of the hybrid test; however, the en banc panel bypassed this approach. The en banc panel implicitly found that the balance of hardships did not favor the plaintiffs, so it would be unfair to criticize the court on a tangential point.

The en banc panel, contrary to the three judge panel, combined the hardship and public interest elements.[106] Unlike the success on the merits element, this question received some attention from the en banc panel. The en banc panel fundamentally disagreed with the three judge panel's position on the relative cost of postponing the recall election from October 7, 2003 to March 4, 2004. The three judge panel saw only minor cost and inconvenience associated with a postponement of the election.[107] The en banc panel recharacterized the issue as the enjoining of an election that had already commenced.[108] The en banc panel emphasized the state's financial investment in the election and the hundreds of thousands of absentee ballots that had already been cast.[109] The en banc panel saw the ongoing electoral process culminating in the October 7, 2003 election as the status quo, thus implicitly suggesting that a change—i.e., enjoining the election—required a stronger showing than an injunction seeking to maintain the status quo—i.e., hold the election as scheduled.[110]

The three judge panel and the en banc panel also fundamentally disagreed on the issue regarding the benefits of postponement of the election. The three judge panel saw postponement as creating the real benefit that votes would not be lost, thus preserving both the value of

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Southwest Voter IV, 344 F.3d 914, 918–19 (citations omitted).

106. *Id.* at 919.

107. *Southwest Voter II*, 344 F.3d 882, 909–10 (9th Cir. 2003), *vacated*, 944 F.3d 913 (9th Cir. 2003), *aff'd*, 944 F.3d at 914; *see supra* notes 83–86 and accompanying text.

108. *Southwest Voter IV*, 344 F.3d at 919.

109. *Id.*

110. It is common for courts to state that a preliminary injunction is designed to maintain the status and when the effect of the injunction is to alter the status quo, a heightened burden of proof is applied. *See, e.g.*, Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). This position has been adopted by Ninth Circuit decisions. *See* Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (citations omitted), *aff'd in part*, 178 F.3d 1069 (9th Cir. 1999): "A prohibitory injunction preserves the status quo. A mandatory injunction 'goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored.' When a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and law clearly favor the moving party.'"

each person's vote and protection against dilution of the vote;[111] absent postponement, votes would be lost. For the en banc panel, the benefits of postponement were speculative. Even if there were lost votes, it was uncertain that those lost votes would influence the outcome of the election.[112] It was not the loss of an individual vote that was crucial; rather, the critical issue was whether lost votes would be outcome determinative. Given the number of lost votes that were potentially at play (approximately 40,000), no one could predict, at the pre-election point in time, whether those lost votes would be decisive.

The en banc panel did not elaborate on this point of lost votes, but the focus on outcome determination is intriguing. The margin of victory might be greater than the number of projected lost votes; thus, even if all the lost votes went for the defeated position or candidate, it could not be determined before the election whether the lost votes would change the outcome. Even if the margin of victory was within the percentage of lost votes, it may still be unclear whether the lost votes will be outcome determinative without knowing ahead of time the distribution of lost votes on the issues and candidates on the ballot. If, for example, the distribution of lost votes mirrored the distribution of actual votes, the impact of the lost votes on the election would be zero.[113] This does not preclude a pre-election challenge; rather, it requires a targeted showing that the threatened injury—election outcome turning on lost votes—is sufficiently ripe to warrant judicial intervention to rectify the threatened harm. What degree and kind of potential injury should a court require before it will consider injunctive relief to prevent that injury from occurring? This requirement could be demonstrated by comparing the

111. *Southwest Voter II*, 344 F.3d at 910, 912.
112. *Southwest Voter IV*, 344 F.3d at 919–20.
113. In the famous case of *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967), the court ordered a new election due to pervasive racial intimidation of registered African-American voters even though the court acknowledged that had *all* African-American voters cast their votes for the defeated candidate the result would not have changed. In the first election, Southwell defeated Bell, an African-American, and several white opponents by a vote of 2001 to 780. *Id.* at 660 n.2 & n.3. Bell received 332 votes. *Id.* The number of registered African-American voters was 1223, of which 403 voted. *Id.* at 660 n.3. The court believed it was possible that in a free, untainted election, the results might be different. *Id.* at 662, 664. They weren't. When the second election was held, the margin of victory was about the same as in the first election. Alan Anderson, *Local Black History Chronology*, Sumter County, Georgia Genealogy, *at* http://www.sumtercountyhistory.com/history/BlackHx.htm (last updated May 27, 2004) (reporting that when the court-ordered new election was held in June, 1967, Southwell defeated Bell 2184 to 538).

projected lost votes with the historic margins of victory for the election contests at issue or current projections regarding the election contests. While these approaches are admittedly inexact, the test is not certainty, but reasonable proof based on available evidence. Election contests are perilously difficult to predict, but that acknowledged fact should not render courts powerless to act. A court may act based on a reasoned forecast of the likelihood of threatened harm. Polls and surveys are frequently used by our legal system to make predictions of what if—i.e., what would have happened if the wrongful act had not occurred.[114] There are no compelling reasons why those same approaches could not be used here in pre-election challenges to determine the likelihood that future harm would influence the outcome of the election.

VII. A NEW APPROACH: BACK TO THE FUTURE

The conflicting views of the three judge panel and en banc panel—as to (1) the propriety of Judge Wilson's decision denying a preliminary injunction to enjoin the California Recall election and (2) the proper attitude and standard by which review of that decision should be made—illustrate the absence of meaningful legal standards in this area. Courts articulate multifactor tests and alternative tests, but the distinctions between the tests are hardly honored; they may, in fact, be dishonored. Tests that liberalize the availability of preliminary injunctive relief can be largely ignored or marginalized when the court is disinclined to grant injunctive relief. The same approach can be used when the test restricts the availability of preliminary injunctive relief, but the court is inclined to grant relief. On appeal, the same dual system is in place and available for use: soft review for affirmance, harsh review for reversal. It may be that this reality always lurks in the shadow of the law, but here the problem is magnified because the duality has been incorporated into the very fabric of the rules and principles courts purport to apply. Unfortunately, because each approach carries a respectable pedigree of precedent, each conclusion can be justified and the actual lawlessness in this area can be camouflaged under a patina of authorities. Flexibility has its advantages, but a disguised flexibility has it dangers. How might we make the situation better?

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114. The use of customer surveys to prove damages, i.e., diverted sales, is common. *See, e.g.*, Schutt Mfg. Co. v. Riddell, Inc., 673 F.2d 202, 206–07 (7th Cir. 1982); U-Haul Int'l, Inc. v. Jartran, Inc., 601 F. Supp. 1140, 1149 (D. Ariz. 1984); *aff'd in part, modified in part, rev'd in part on other grounds*, 793 F.2d 1034 (9th Cir. 1986). The Supreme Court has accepted the use of opinion polls and surveys to establish constitutional fact. *See* Meese v. Keene, 481 U.S. 465, 473–74 (1987). *See generally* M.C. Dransfield, Annotation, *Admissibility and Weight of Surveys or Polls of Public or Consumers' Opinion, Recognition, Preference, or the Like*, 76 A.L.R.2d 619 (1961).

The first order of business should be to abolish multiple tests. The use within a single jurisdiction of a variety of tests for preliminary injunctive relief breeds uncertainty and confusion as to when each test, or version of the test, should be used. This has been the case in the Ninth Circuit. Appellate decisions reflect a confusing melange of the various tests, and it is often impossible to identify which test, or version of a test, supports the decision ultimately reached. A first order of business should be an en banc decision establishing a single test for preliminary injunctions and a single standard of review.

Second, the hybrid tests are too insubstantial to justify granting preliminary injunctive relief. All versions of the hybrid test downplay or minimize the importance of success on the merits. An injunction remains, however, a potent legal remedy. Recent scholarship that questions the supplemental role of equity and the traditional view that equitable relief is extraordinary may have contributed to a judicial mindset to relax the standards for granting injunctive relief, but that concession must be carefully applied to interim injunctive relief.[115] The strongest case for granting pretrial injunctive relief is when the court is convinced it would award the same relief at the conclusion of plenary proceedings. As that level of conviction is lessened, it may be counterbalanced by other factors, such as balance of hardships and public policy or interest. In no case, however, should a pretrial injunction issue unless the court is persuaded that, more likely than not, the plaintiff will succeed on the merits. Public interest and balance of hardships can no more compensate for an inadequate case on the merits at the pretrial stage than they can compensate for a deficient case at trial. We would be appalled, and properly so, were a court to find after a plenary trial on the merits that plaintiff's case failed, but the injunction will issue nonetheless because the plaintiff will suffer irreparable injury if it is not or the plaintiff raises serious issues and the balance of hardships favors the plaintiff. A case that lacks substantial legal merit is not a foundation upon which an injunction can be granted, and an insufficient foundation at the pretrial stage cannot be imagined away by emphasizing collateral factors, such as irreparable injury, the raising of serious issues, balance of hardships,

115. Professor Laycock's work in this area is perhaps the most notable. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990). Professor Laycock, however, also recognized that irreparable injury had a role to play in the context of preliminary injunctive relief, although he would prefer language other than "irreparable injury." *Id.* at 728.

or the public interest. Courts, even Ninth Circuit courts, often state that some "irreducible minimum" showing of success on the merits is required, but some of those minimums are suspect,[116] and occasionally courts even disregard satisfying the minimum.[117]

Third, when considering a motion for a preliminary injunction, the district court is often confronted with a truncated record.[118] From that record, the court must make determinations that address the merits of the claim, irreparable injury (the ability of the court to redress at trial any harm the plaintiff may sustain if the injunction is denied), the raising of serious issues, the balance of hardships, and the public interest. Each of these elements will present a challenge, but those elements that require the court to speculate as to the existence or nonexistence of future facts—i.e., the irreparable injury and balance of hardships elements—present additional points of uncertainty that caution against high confidence in relying on these factors in order to improve the accuracy of decisions. In addition, the balance of hardships and public interest elements present issues that often will be influenced by a court's general values and principles. That is not to say that the resolution of legal issues is not influenced by a court's general values and principles; they are. We know that, both intuitively and empirically.[119] The types of questions a court confronts when considering balance of hardships and the public interest are, however, more open ended and subjective than is the case with rules and principles of law. What legal standard guides a court in determining the primacy between holding an election as scheduled as opposed to holding an election when the technology in place will facilitate a greater confidence that each vote is counted and counted

116. *See* cases cited *supra* note 92.

117. *See* cases cited *supra* note 42.

118. *But see* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 389 (7th Cir. 1984) (noting that "[m]any preliminary-injunction hearings take as long as the average federal trial, which lasts only three days"). How many hearings fit this bill is, at best, an educated guess.

119. CASS R. SUNSTEIN ET AL., IDEOLOGICAL VOTING ON FEDERAL COURTS OF APPEALS: A PRELIMINARY INVESTIGATION 1 (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No. 03-9, 2003), *at* http://papers.ssrn.com/abstract=442480 (last visited Nov. 24, 2004) (concluding that panel composition based on political ideology of the appointing president, used as a proxy for the individual judge's ideology, has a significant impact on outcomes in some areas of the law, such as campaign finance and discrimination). As noted by the authors: "An important implication is that panel composition has a strong effect on likely outcomes, thus creating extremely serious problems for the rule of law." *Id.* at executive summary. I doubt that many are surprised by the conclusion, but the study begins the task of building the empirical case for our intuitive beliefs. *See also* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1461 (2003) (arguing that among the four predominant paradigms of judicial decisionmaking—i.e., legal, ideological, strategic, and litigant driven—only the first two, legal and ideological, have predictive value).

correctly?[120] Courts, and by that I mean the judges who staff these courts, will invariably have different opinions regarding these points—opinions that are unlikely to be meaningfully constrained or controlled by rule, principle, or precedent. Courts will, of course, be influenced by these values as we all are influenced by our deeply held values. It is dangerous, however, to enshrine these subjective values as elements of a test that can be marshaled and organized to overcome a finding that the plaintiff is likely to fail on the merits of the claim. Balance of hardships and public interest are necessarily part of an evaluation of the availability of pretrial injunctive relief, but the role of these elements should be reduced and cabined, owing to their inherent imprecision and capacity for manipulation.[121]

Fourth, appellate courts should clarify what standard of review they are using when they review a district court decision granting or denying a preliminary injunction. It is plainly wrong to state that the standard is abuse of discretion when at times that standard includes components that subject portions of the decision being reviewed to de novo or clear error review. To say, as the courts consistently do, that a district court abuses its discretion if it incorrectly interprets an underlying legal principle is to speak nonsense. De novo review of legal determinations is different from abuse of discretion deference to a district court. Similarly, stating in some cases that the district court's interpretation of legal principles will be reviewed de novo, but the district court's determination of the likelihood of success on the merits will be reviewed for abuse of discretion creates a distinction that can neither be convincingly made,

120. As it turns out, the hopeful expectations of the three judge panel in new electronic voting technologies may have been misplaced or, at least, premature. Lately, there have been significant questions raised about the security and reliability of electronic voting systems that are being contracted for to replace punch card voting technology. The primary concern has been the absence of a voter verified paper trail that could independently verify the accuracy of the electronic machine voting calculations. *See* Jeanne S. Zaino & Jeffrey T. Zaino, *The Changing Landscape of Election Day Disputes*, 59 DISP. RESOL. J. 11, 17–18 (Aug.–Oct. 2004), *available at* WL 59–OCT DRJ 11. It is, at present, an open question whether the public will be more confident with the use of electronic voting technologies than they were with punch card voting technologies. The greater accuracy of the former is offset by the physical embodiment of the vote provided by the latter.

121. Put more simply, I suppose that I agree more with Professor Lichtman's concerns over the ability of courts to evaluate competently at the pretrial stage the balance of harms, Lichtman, *supra* note 36, than with Professor Davis's concerns over the courts' ability to identify with appropriate confidence the correct legal result. Davis, *supra* note 35, at 368–69.

nor consistently adhered to. The dichotomy between correct and accurate identification of the underlying legal principles (de novo review) and the correct and accurate application of the underlying legal principles to the facts of the case (abuse of discretion review) is a distinction that will not be honored. Any legal principle can be assigned to either the correctly identified or correctly applied category. The ability to verbally construct distinct categories is not the same as creating a set of categories that actually achieves differentiation in fact.[122] A court that believes the district court got it wrong can easily assign the issue to de novo review; the converse also holds true. The distinction between rules of law as stated and as applied is porous and does not actually identify two distinct types.

If the district court gets the law wrong, the reviewing court should state the law correctly. The appellate court is in as good a position as, if not better than, the district court to state the correct rule. The idea that deference is owed because the matter sounds in equity is an unfortunate vestige of an ancient regime that should have been cashiered long ago. Equity is not a separate legal system. The concession that equitable principles may permit flex in the joints is not a concession that decisions in equity by district courts are necessarily superior to those made by appellate courts. With the merger of law and equity, there is no longer any reason to assert that a legal decision made by a judge in connection with a damages claim must be reviewed de novo, but that same legal determination made by the same judge in connection with an equitable remedy must be reviewed for abuse of discretion. The standard of review should be the same for each decision. In some cases, the legal error will be de minimis in that it will not affect the result. In other cases, it will be outcome determinative. In this latter setting, the reviewing court can remand or decide the issue as the interests of justice demand.

With regard to the district court's finding of facts, the standard of review is the clearly erroneous test. The loss of factual support for the district court's ruling will counsel for a greater use of remand rather than decisionmaking by the appellate court. Fact finding has historically

122. *See* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 677 (1989) ("There are three possible methods of categorization: classification by tradition, classification by facts, and classification by principles. In practice, a classification system is likely to merge elements of all three."). Characterization may be controlling when there are conflicting, parallel lines of authority. *See, e.g.*, Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) ("We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."), *aff'd*, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). Of course, different courts may disagree as to which line of authorities is most appropriate for the case at hand. That, in my opinion, is a detriment, not a benefit.

been the province of trial courts and trial courts are institutionally equipped for the task. Appellate courts may be justifiably hesitant to decide cases when fact finding is erroneous, incomplete, or both.[123]

This raises the question whether there is any legitimate role for abuse of discretion. It is not apparent to me that there is a need for the abuse of discretion standard in decisions regarding the granting or denying of preliminary injunctive relief. This is not to disparage the use of abuse of discretion for many pretrial decisions, but preliminary injunctive relief is meaningfully different from supervising discovery or trial preparation. If this were not the case, the legal system would not make decisions regarding preliminary injunctions immediately appealable and subject the decisions to the requirement that findings of fact and conclusions of law be prepared. Of course, as Holmes famously noted, "a page of history is worth a volume of logic."[124] At the risk of overvaluing my own sense of logic, let me sketch out a limited role for abuse of discretion that is consistent with its historical ties to decisionmaking in equity, yet also consistent with the demands of the modern world.

Deciding whether to grant or deny a request for preliminary injunctive relief requires a balancing of several factors. That balancing is undertaken initially by the district court, which is closest to the case and in the best position to engage in a sustained dialogue with the parties. Once a reviewing court concludes that the district court got the law and facts right *and* that it is more likely than not that the plaintiff will prevail on the merits, there is room to give the district court some discretion when engaging in the balancing of the additional factors that would go into the final decision to grant or deny a preliminary injunction. As a practical matter regarding the balancing of hardships, the appellate court is usually not in any better position than the district court to make the call.

123. I do recognize that the line between clearly erroneous and abuse of discretion is hard to define and maintain in practice. Fischer, *supra* note 103, at 829 n.77. The same can be said for the distinction between law and fact. *See generally* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

124. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (rejecting claim that estate tax was invalid on the ground that it was not an apportioned direct tax as required by the constitution because, as an historical fact, taxes of this type have always been treated as a duty or excise, not as a tax). Holmes meant this to have a predictive justification, not a normative base. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (stating that a knowledge of history helps us understand why and how a rule has come to be and what its dimensions are, but "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV").

In such a setting, review may entail little more than second guessing.[125]

To say that the district court should have some discretion is not to state the level of discretion that should be afforded. A reviewing court should key the level of discretion to the reviewing court's findings to (1) the likelihood of success and (2) whether the result reached by the district court is consistent with the finding.[126] The greatest deference should be afforded when the district court granted the injunction and the likelihood of success was great or, conversely, denied injunctive relief and the likelihood of success was at the irreducible minimum necessary to support granting a preliminary injunction.[127] The least deference should be granted when the district court granted the injunction and the likelihood of success was at the irreducible minimum or, conversely, denied a preliminary injunction when the likelihood of success was great. Deference can be calibrated to reach points between these two extremes.

To say that deference should be given also does not inform us what it means to give deference under an abuse of discretion standard. At the minimum, deference requires that discretion was exercised in fact by the district court. The findings of fact, conclusions of law, and any accompanying statement of reasons for the decision by the district court should reflect that the district court considered the evidence and the law in reaching the decision—i.e., that sound judgment was rendered.

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125. Fischer, *supra* note 103, at 827–28 (footnotes omitted):

> There must be something in addition to mere rule indeterminacy that encourages reviewing tribunals to exercise deference. That something else is the perception that the reviewing court is in no better position than the trial court to identify the correct result. In effect, strict review would amount to mere second guessing for the sake of second guessing, and such conduct is inefficient and socially unproductive. The suggestion made in the cases that the trial judge is in a "better" position to make the call and thus deference to the call is appropriate is misleading. Deference is afforded not because the trial judge is better positioned, but because the reviewing court is not better positioned to make the call. Each court could be equally adept at making the call; yet, unless the reviewing court was better positioned to make the call, deference is exhibited to the first decision-maker. As between two equally adept decision-makers, and assuming no added benefit such as a more accurate or better decision after review, first in time to decide should be preferred since it is more efficient without cost to accuracy. Discretion may thus be seen as a means of cutting off inquiries into why a decision-maker elected to apply one of several competing rules. The fact that a hierarchically superior decision-maker has been unable to articulate and adopt a single rule suggests caution in reviewing the decision of another who has applied one of the permitted rules to resolve the dispute.

126. The insight that abuse of discretion is not a uniform standard has been captured by many courts and commentators. *See id.* at 840–43 (collecting decisions and commentary); *see also supra* note 58.

127. If the likelihood of success was below the irreducible minimum (more likely than not), the preliminary injunction should be denied.

Would it be helpful if the abuse of discretion standard could be reformatted as a test that coheres with more commonly accepted and understood tests, such as manifest error? On the contrary, the comfort of a more familiar test would be largely illusory. A deferential standard, such as abuse of discretion, is, at root, a process-oriented test rather than a result-oriented test. The concern is over how the court decided, not what the court decided. Any insistence that an abuse of discretion standard be retained must accept that inherent limitation. Using abuse of discretion to determine the correctness of the result is a misuse of the test. The test measures whether we are sufficiently satisfied with the process by which the decision maker reached the result. If courts want to test the correctness of the result reached, they should do so directly and not through subterfuge.

There is, of course, the objection that tying the grant or denial of preliminary injunctive relief to the likelihood of success on the merits will restrict the availability of preliminary injunctive relief and, in turn, undermine the availability of final injunctive relief because the defendant's freedom to act during the pretrial period will operate to moot many disputes. There is obvious strength and appeal to the argument, particularly when it is combined with the observation that the balancing of hardships test gives explicit consideration to the relative costs and benefits of granting or denying preliminary injunctive relief and reserves grants of relief to situations when the balance favors the plaintiff, at times strongly so. Should a preliminary injunction be denied when granting the injunction would be immensely beneficial to the plaintiff and relatively costless to the defendant?[128] The argument in favor of relaxing the test for granting injunctive relief can also be augmented by the availability of injunction bonds that protect the defendant from the cost of erroneous issuance. If the defendant can be insulated from harm associated with the grant of preliminary injunctive relief, why force a plaintiff to bear the costs associated with denial of injunctive relief?

The problem with these arguments are that they are more hypothetical than real. The use of injunction bonds that meaningfully protect a defendant from the costs of wrongfully issued preliminary injunctions is practically nonexistent in the context of public interest and public law litigation that is the focus of this Article. Injunction bonds are either

128. *See supra* note 83 (collecting cases where court found that the balance of hardships tipped sharply in the plaintiff's favor because granting the injunction would not cause the defendant harm).

dispensed with or set at such low amounts so as to provide no meaningful protection.[129] Even if an injunction bond can protect a defendant from the deleterious consequences of a wrongfully issued injunction, equity has not traditionally been receptive to the no harm argument as a positive ground for issuing an injunction. An injunction is a significant intrusion into a defendant's personal liberty and it is right to require that the plaintiff demonstrate a clear legal entitlement to relief before the remedy will issue. It is not enough that the defendant will not be harmed—what is required is that the plaintiff will be wrongfully harmed if the injunction is not granted. Ameliorating the harm a defendant would sustain if the injunction is wrongfully issued should not substitute and serve as a surrogate for the plaintiff's required proof of entitlement.[130]

Balancing of hardships suffers from similar deficiencies that nullify reliance on it as a substitute for a showing of legal entitlement on the merits. It might be useful to first distinguish cases when preliminary injunctive relief would alter the status quo from cases when the status quo would be maintained.[131] There is an intuitive appeal to favoring

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129. While Rule 65 of the Federal Rules of Civil Procedure treats injunction bonds as mandatory, the command is often either ignored or evaded by setting the bond at a minimal amount. FED. R. CIV. P. 65(c); *see also* cases cited *supra* note 54. *See generally* Erin Connors Morton, Note, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L.J. 1863 (1995).

130. Goodwin v. N.Y., New Haven & Hartford R.R. Co., 43 Conn. 494, 500 (1876) ("Restraining the action of an individual or a corporation by injunction is an extraordinary power, always to be exercised with caution, never without the most satisfactory reasons."). The same is said by modern courts. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982):

> It goes without saying that an injunction is an equitable remedy. It "is not a remedy which issues as of course," [Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 337–38 (1933),] or "to restrain an act the injurious consequences of which are merely trifling." [Consol. Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 (1900).] An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." [Cavanaugh v. Looney, 248 U.S. 453, 456 (1919).]

Id. at 311–12; Intel Corp. v. ULSI Sys. Tech., Inc., 995 F.2d 1566, 1568 (Fed. Cir. 1993) ("We have cautioned, however, that a preliminary injunction is a drastic and extraordinary remedy that is not to be routinely granted."). On the other hand, the latter half of the twentieth century witnessed a dramatic increase in the use of injunctions, particularly in the area of public law. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 997 (1965). The critical task today is to find and maintain an appropriate balance that recognizes and respects the utility of injunctive relief and its potentially severe and drastic consequences. *See also* Polymer Techs., Inc. v. Bridwell, 103 F.3d 970, 977 (Fed. Cir. 1996) ("[S]tatements that a preliminary injunction is a drastic and extraordinary remedy do not imply that it must be rare or practically unattainable, only that it is not granted as a matter of right; it must be thoroughly justified.").

131. Cases where the preliminary injunction would alter the status quo traditionally are evaluated under a more rigorous test, such as that favored here. *See* cases cited *supra* note 111.

injunctions that prevent a defendant from mooting a case and denying a plaintiff effective legal redress; yet, we must be careful not to overestimate the benefits of intuition. A defendant who uses the absence of a preliminary injunction to engage in conduct that increases the cost and difficulty of providing effective injunctive relief runs the substantial risk that he will be denied the opportunity to claim those hardships if the plaintiff demonstrates that her rights were violated and that she has sustained irreparable injury. Deliberate action taken with awareness of a plaintiff's potential legal entitlement that is harmed by the deliberate action normally denies the defendant the right to claim that particular hardship as a defense.[132] The plaintiff may thus receive appropriate injunctive relief requiring the defendant to undo the harm the interim action has caused. In cases when that is impossible or unrealistic—as are election contests when the prospect of repeated elections is unattractive legally and practically and interim action (or inaction) would likely moot the claim—the court retains the option of expediting the plenary trial on the merits.[133] This procedural remedy is woefully underutilized; yet, it provides a means of protecting the interests of both parties by reducing the likelihood that the interim result will be wrong. Of course, expedited trials are not a panacea, but they provide a workable alternative in those cases where the risk of mootness, with the consequent frustration of meaningful relief to the plaintiff, is real.

VIII. PRELIMINARY INJUNCTIONS AND ELECTIONS

The timeframe for conducting elections will confine most requests for equitable relief to preliminary injunctions. The election cycle is too short to permit, for the most part, extended litigation. This time factor is both an argument in favor of preliminary injunctive relief—delay will moot the case and prevent plaintiffs from securing just relief—and a danger; an injunction, once entered, will, if deferentially reviewed, determine the conducting of the election. Which will dominate: (1) the preliminary injunction rightfully used to assure that rights relating to the conducting of the election are respected; or, (2) the preliminary injunction used merely as another tactical, partisan tool in the election contest? In addressing

132. FISCHER, *supra* note 48, §§ 40[b][iii], 45[b].

133. FED. R. CIV. P. 65(a)(2) (providing that hearing on motion for a preliminary injunction may be transformed into a trial on the merits). Subsection (a)(2) was added in 1966 and the Advisory Comment specifically notes that "consolidation can be usefully availed of in many cases." *Id.* at advisory committee's note.

this question, I advance a limited argument here about the use of temporary injunctions on election procedures. I do not address larger issues regarding the proper role the judiciary should assume *vis à vis* the electoral process.[134]

It is increasingly recognized that litigation has become an integral part of election strategy.[135] It would be unrealistic to expect election litigation to evolve and grow any differently from general litigation. In that setting, litigation is undertaken not just to vindicate rights, but also, and often, as part of a larger strategy. In this context, litigation can be valued as much, if not more, for the confusion it sows and the distraction it provides to the opponent than the victory on the merits that is unlikely to be forthcoming.[136]

As we examine the political terrain of the emerging twenty-first century, does it appear that political disputes have become more gentle or genteel? The opposite is dramatically the case. Party realignment with liberal republicans and southern conservative democrats becoming endangered, if not nearly extinct, has coalesced each party into a more homogeneous entity.[137] With greater frequency, party leadership responds to a base that sees the opposition as the enemy rather than merely adversaries or opponents. Independent voters may urge bipartisanship, but committed members of each party seem to prefer a take no prisoners approach. In this setting, will the legal process remain, if it still is, a sanctum of order and rational argument where legal claims are brought and resolved, but strategic litigation is alien? I doubt this will happen or is even now the case—a view shared by others.[138]

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134. *Compare* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (arguing in favor of judicial oversight and supervision of electoral processes to prevent political self-entrenchment policies); *with* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (arguing that judicial intervention should be the exception, not the rule).

135. Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 152 U. PA. L. REV. (forthcoming 2004) (describing and discussing the use of election lawsuits as "political weapons").

136. Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values*, 59 BROOK. L. REV. 931, 943–44 (1993) (discussing trend of using litigation as a means independent of the relief sought in the particular case and noting inability (or unwillingness) of lawyers to serve the traditional gatekeeping function of deflecting such litigation); *cf.* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 883–84 (1990) (discussing gatekeeper role).

137. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, THE 2004 POLITICAL LANDSCAPE: EVENLY DIVIDED AND INCREASINGLY POLARIZED (Nov. 5, 2003), *available at* http://people-press.org/reports/display.php3?ReportID=196 (last visited Nov. 24, 2004) (noting increasing partisan gap between major political parties as each party becomes more polarized around an ideological core).

138. Garrett, *supra* note 135, at n.1 (noting that other political commentators share the view that election litigation is increasingly strategic rather than legal); *see also* Jonathan Groner, *Girding for Another* Bush v. Gore, LEGAL TIMES, Mar. 1, 2004, at 1 (noting that both major political parties are assembling lawyer teams to insure that the 2004

If the threat of election litigation as strategy or political weapon is real, courts must be careful that they do not encourage this behavior by legal doctrine that sets low thresholds for success. The hybrid test for preliminary injunctive relief provides just that type of undesirable encouragement for strategic litigation. Reducing the burden for success, much like reducing costs of entry, encourages resort to litigation. Lowering the requirement for success on the merits encourages litigation challenges to established election procedures at a point in time (proximate to the election) when change is most costly and uncertainty is most disruptive. Limiting injunctive relief to claims that present a strong or near certainty of ultimate success will help avoid those adverse consequences.

IX. CONCLUSION

There appear to be two views as to the appropriate level of scrutiny that should be given to decisions granting or denying preliminary injunctions. One view is that preliminary injunctions are no big deal. This seems to me to be the *Sports Form* view, for the court emphasized that an erroneous decision on *its* part at *this* stage would have less significant consequences than an erroneous decision on review of a permanent injunction: "[O]ur disposition of this appeal will affect the rights of the parties only until the district court renders judgment on the merits of the case, at which time the losing party may again appeal."[139]

On the other hand, there is the contrary, and more common,[140] view that preliminary injunctions are a big deal. This is the view of Judge Posner in *Roland Machinery Co.*:

> "[T]he granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." The exercise of a power so far-reaching ought to be subject to effective, and not merely perfunctory, appellate review. "Congress would scarcely have made orders granting or refusing temporary injunctions an exception to the general requirement of finality . . . if it intended appellate courts to be mere rubber-stamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason."[141]

Presidential and Congressional elections are conducted in a manner protective of each Party's interest).

139. *See* Sports Form, Inc. v. United Press Int'l, 686 F.2d 750, 753 (9th Cir. 1982).

140. *See* cases cited *supra* note 130.

141. *See* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 389 (7th Cir. 1984) (citations omitted).

I do not suggest that adherents of either view apply it consistently, but the presence of each view necessarily alerts us to the difficulties in adopting a uniform rule. Courts may prefer the flexibility of inconsistent approaches rather than the constraints of a uniform rule. While a uniform rule would be desirable, my instincts inform me that flexibility will win the day and bring with it the hazard of continued electoral uncertainty.