



# How Should the Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach?

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# How Should the Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach?

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The Supreme Court must address two unprecedented problems—the flood of nationwide preliminary injunctions issued by district courts and the extraordinary increase in the number of major actions that the Court takes on its emergency docket without briefing and without issuing an opinion that adequately explains the action. Neither of these closely related problems has its origin in the Judicial Branch. The roots of both lie primarily in the effects that the nation’s extreme political polarity is having on the Legislative and Executive Branches.

## I. Sources of the Problems

Political polarity has led to legislative impotence.<sup>2</sup> Decades ago, when a president saw the need to take major steps to address a problem, he proposed a legislative solution and engaged in hard bargaining with the leaders of both parties in the House and Senate. That bargaining process led to bipartisan compromises that were reflected in legislation. Thus, for instance, the Administrative Procedure Act and the Clean Air Act were enacted unanimously after lengthy negotiations between the white house and the leaders of both political parties in the House and Senate.

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<sup>2</sup> For detailed discussion of legislative impotence, see Richard Pierce, *The Combination of Chevron and Political Polarity Is Causing Awful Problems*, 70 *Duke L.J. Online* 91 (2021); Richard Pierce, *Delegation, Time and Congressional Capacity*, 105 *Iowa L. Rev. Online* 1 (2020).

Those days are gone. Bi-partisan legislation that is the product of negotiation and compromise is rare. When it is proposed by members it is usually opposed by the leaders of both parties. It occasionally emerges in contexts in which Congress can confer tangible benefits on every congressional district, e.g., the infrastructure statute that Congress enacted in 2021 paved the way for increased government spending in every congressional district. Bi-partisan legislation that addresses policy issues is impossible to enact. Any member of Congress of either party who urges or supports compromise is likely to be punished by party leaders and is likely to be defeated in a primary by an uncompromising adherent to the views of the base of their party.

Legislative impotence creates an environment in which a president of either party who sees a need to take major actions to address a problem gets the same advice from his political advisors on each occasion. They tell him that that it would be a waste of time and energy to propose a legislative approach to the problem. They give him that well-supported advice whether the problem is a massive influx of immigrants at the southern border, a banking crisis, a pandemic, or climate change. That leaves the president with a choice between two unattractive options—do nothing effective to address the problem or take unilateral action.

In many cases, the president believes that the problem is so serious that he must address it by taking unilateral action—either acting directly by issuing an Executive Order or acting indirectly by instructing the relevant agency to take the action that the president believes to be essential to address the problem. The president's legal advisors then tell him that the only statutory authority that he or an agency can use to support the unilateral actions required to address the problem effectively is a broadly worded statute that was enacted thirty to eighty years ago—long before Congress was even aware of the problem. The president's legal advisors

tell him that there is a significant risk that a court will block him from taking the action that he believes to be essential to address the problem effectively.

That well-supported legal advice makes the president's choice between doing nothing effective to address the problem or taking legally fragile unilateral action more difficult. In many cases, however, the president will decide that the problem is so serious that he will take his chances in court rather than allow the problem to persist and to grow because of the government's failure to act.

As soon as the president takes the unilateral action that he believes to be essential to address the problem, political polarity manifests itself in another form. The president's actions produce a firestorm of criticism from the leaders of the opposing party. One subset of those leaders—state attorney generals of the other party—immediately file a motion for issuance of a nationwide preliminary injunction that would bar the executive branch from taking the challenged action during the multi-year process required to obtain a final judicial resolution of the dispute.

In most cases, permissive jurisdiction and venue rules provide the state attorney generals the opportunity to choose which of hundreds of district judges will act on the motion for a preliminary injunction. They choose the district judge who is most likely to be sympathetic to their views and hostile to the views that are the basis for the executive action. A 2007 Supreme

Court precedent makes it easy for them to satisfy the requirement that a party that seeks to challenge an executive action must have standing to do so.<sup>3</sup>

The district judge usually grants the motion to issue a nationwide preliminary injunction. The judge is likely to take that action for several reasons. First, he strongly disagrees with the executive action and is sympathetic to the arguments made by the state attorney generals. That is why they chose his court as the forum in which to file their motion. Second, he is encouraged by the way that the Supreme Court has acted in similar cases. Those two factors have produced a massive increase in the number of nationwide preliminary injunctions issued by district courts. During the past decade the number of nationwide preliminary injunctions issued by district courts has increased from three per year to eighteen per year.<sup>4</sup>

In some cases, the Supreme Court has allowed nationwide preliminary injunctions to remain in effect without issuing any opinion in which it explained its decision in any way. In other cases, the Court has written a brief opinion that consists only of a few conclusory statements. If the Court accompanies its action with an opinion, the opinion never applies the four-factor test that the Court traditionally required lower courts to apply when they consider motions for preliminary injunctions or stays.

Until recently, the Court required the party who seeks a preliminary injunction or a stay to demonstrate that (1) issuance of the injunction or stay is in the public interest, (2) a decision

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<sup>3</sup> Massachusetts. v. EPA, 549 U.S. 497 (2007)

<sup>4</sup> Deputy Attorney General Jeffrey A. Rosen Delivers Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs, U.S. Dep't of Justice (Feb. 12, 2020).

not to enjoin or stay the action will cause irreparable harm, (3) that irreparable harm will exceed the irreparable harm that a decision to enjoin or stay the action will create, and (4) the moving party is likely to prevail on the merits of the dispute.<sup>5</sup> As recently as 2008, the Court reminded lower courts that stays and preliminary injunctions are extraordinary remedies.<sup>6</sup> The Court emphasized the importance of the four-factor test and urged lower courts to exercise caution before they enjoin or stay an agency action.

The Court's more recent opinions suggest that courts should ignore or discount the traditional requirements that the moving party must demonstrate that grant of the motion is in the public interest and that denial of the motion will cause more irreparable harm than grant of the motion. That leaves the judge's prediction of the likely outcome of the dispute on the merits as the only factor the judge needs to consider. The district judge usually predicts that the moving party will prevail on the merits. That is not at all surprising. The state attorney generals chose the judge because of their well-supported belief that he would agree with them on that issue.

The Supreme Court also signaled its receptivity to motions for nationwide preliminary injunctions to block executive actions when it took the unprecedented step of barring EPA from implementing the Clean Power Plan (CPP) in 2016 before any lower court had considered the merits of the plan and without issuing any opinion in which it explained its action.<sup>7</sup> That action

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<sup>5</sup> E.g., *Weinberger v. Romero-Barcela*, 456 U.S. 305, 311-12 (1982); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500 (1941).

<sup>6</sup> *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

<sup>7</sup> *West Virginia v. EPA*, 136 S.Ct. 1000 (2016).

almost certainly was triggered by the Court's realization that its decisions on the merits of executive actions come so long after the action was taken that they often have no effect.

The Justices got a rude awakening to that reality immediately after they issued their 2015 opinion in *Michigan v. EPA*.<sup>8</sup> The Court held that an EPA rule was invalid because EPA did not adequately consider the costs that the rule would impose on electric utilities. Immediately after the Court issued its opinion, the head of EPA announced that the Supreme Court's decision was irrelevant because the utilities that bore the costs of the rule had already taken the actions required by the rule.<sup>9</sup>

When the D.C. Circuit held an oral argument to decide what action it should take on remand from the Supreme Court opinion, the lawyer for the utilities corroborated the statement of the head of EPA. The utilities that had originally joined several states in challenging the rule urged the court not to vacate the rule because they had already complied with the rule and persuaded their state regulators to allow them to recover the costs of compliance in their rates. They expressed concern that their state regulators might change their minds and refuse to allow them to recover the costs of complying with the rule in their rates if the court vacated the rule. The D.C. Circuit then left in effect the rule that the Supreme Court had held to be unlawful.<sup>10</sup>

The Supreme Court has increased the likelihood that a district court will grant a motion to issue a nationwide preliminary injunction in another way as well. In 2000, the Court announced

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<sup>8</sup> 576 U.S. 743 (2015)..

<sup>9</sup> See Emily Holden, Jeffrey Tomich & Edward Klump, Mercury Regs Ruling Emboldens Clean Power Plan Critics, but Few Changes Seen for Utilities, E&E News (June 30, 2015).

<sup>10</sup> See Timothy Cama, Court Refuses to Overturn Air Pollution Rule Despite Supreme Court Defeat, The Hill (Dec. 15, 2015).

the major questions doctrine.<sup>11</sup> That doctrine bars the government from taking some “extraordinary” actions based on an old broadly worded statute. The Court greatly expanded the scope and effect of the major questions doctrine in four opinions that it issued in its 2021-2022 Term.<sup>12</sup> Three of those opinions were issued in the context of preliminary injunctions to block executive branch actions. Those opinions will further embolden district judges to grant motions for preliminary nationwide injunctions to block implementation of important executive actions.

The scope and effect of the new version of the major questions doctrine is far from clear, but every important executive action is now a candidate for rejection through application of the major questions doctrine. District judges who are skeptical about the legality of any important executive action can rely on the major questions doctrine to support their decisions to grant motions for nationwide preliminary injunctions. State attorney generals will use forum shopping to select judges with ideological inclinations that predispose them to rely on the major questions doctrine to grant the motions.

District judges began to use the major questions doctrine for that purpose immediately after the Supreme Court issued its opinions that expanded the scope and effect of the doctrine. Thus, for instance, a district judge immediately relied on the major questions doctrine to enjoin EPA from acting in response to President Biden’s directive to estimate the social cost of the carbon.<sup>13</sup> Combustion of carbon produces emissions of carbon dioxide—the most important cause of climate change. Once EPA estimates the social cost of carbon, it and other agencies can

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<sup>11</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>12</sup> *National Federation of Businesses v. Department of Labor*, 142 S. Ct. 661 (2022); *Biden v. Missouri*, 142 S.Ct. 647 (2022); *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); *Ala. Ass’n of Realtors v. Dep’t of Health & Human Resources*, 141 S.Ct. 2485 (2021). See Mila Sohoni, *The Major Questions Quartet*, 136 *Harv. L. Rev.* 262 (2022).

<sup>13</sup> *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022).

decide whether to use that estimate in the process of estimating the cost and benefits of any action that will reduce emissions of carbon dioxide.

The district court decision was absurdly premature. The Executive Order that the court enjoined did not come close to satisfying the doctrines of finality and ripeness that are prerequisites for judicial review. At the time the district court prohibited EPA from estimating the social cost of carbon, neither EPA nor any other agency had taken any action that would give such an estimate any legal effect. The Fifth Circuit reversed the district court's decision 33 days later, but the preliminary injunction had already had an extremely disruptive effect on a wide variety of ongoing regulatory actions by the time it was reversed.<sup>14</sup>

Political polarity has also created conditions in which judges see a need to act immediately to stop the implementation of an executive branch action that they believe to be unlawful rather than to wait until courts can address the merits of the case. By the time the courts can consider the merits of an executive action that has immediate effects, the dispute about the legality of the action often becomes moot because of an intervening election. The newly elected president often withdraws or reverses the action taken by the prior administration. Thus, for instance, EPA in the Trump Administration replaced the Clean Power Plan (CPP) that had been issued by EPA during the Obama Administration with a plan that was inconsistent with the CPP before the courts could address the merits of the CPP,<sup>15</sup> and President Biden announced that he would not continue to use the funds that President Trump had reallocated from other uses to build the

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<sup>14</sup> Louisiana v. Biden, 2022 WL 866282 (5<sup>th</sup> Cir. 2022).

<sup>15</sup> See facts recited in West Virginia v. EPA, 142 S.Ct. 2587. See also Richard Pierce, The Supreme Court Should Eliminate Its Lawless Shadow Docket, 74 Ad. L. Rev. 1, 6-10 (2022)..

border wall before the courts could address the merits of the dispute about the legality of President Trump's action.<sup>16</sup>

When a district court temporarily bars the executive branch from implementing a major action, the government almost invariably files a motion for an emergency stay of the injunction at the Supreme Court. The Court must then decide whether to grant or deny the motion and whether to issue an opinion in which it explains its decision. The number of cases in which the Court must decide whether to allow a nationwide preliminary injunction to remain in effect has soared in recent years. The Court now must make many such decisions every Term. Thus, for instance, the Trump administration sought emergency relief from preliminary injunctions forty-one times in four years, while the government sought emergency relief only eight times in the prior sixteen years.<sup>17</sup>

Many of the decisions that the Court makes on its emergency docket have significant long-term effects. In many cases, the effects are permanent. Thus, for instance, the Court's decision to stay the preliminary injunction that barred President Trump from reallocating funds from other purposes to build a wall on the southern border enabled the Trump Administration to spend most of the reallocated funds to build the wall,<sup>18</sup> and the Court's decision to uphold the temporary injunction that barred OSHA in the Biden Administration from implementing its covid vaccine mandate outlasted the pandemic that was the reason for the mandate.<sup>19</sup>

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<sup>16</sup> Joseph Biden, Proclamation on the Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction (Jan. 26, 2021).

<sup>17</sup> Stephen Vladeck, The Supreme Court Needs to Show Its Work, *The Atlantic* (Mar. 10, 2021).

<sup>18</sup> *Trump v. Sierra Club*, 140 S.Ct. 1 (2020).

<sup>19</sup> *NFIB v. DOL*, 142 S.Ct. 662.

In many cases the Court either provides no opinion in which it explains why it granted or denied the motion to stay or it provides an opinion in which it ignores three of the four factors that the Court has required lower courts to consider when it acts on a motion for stay. The decision to act without writing an opinion that addresses the issues that are raised by a motion to stay a preliminary injunction is understandable, given the number of cases the Court must now decide on its emergency docket and the time required to write a well-reasoned opinion that addresses the many complicated issues that are usually raised in a motion for stay. That decision has significant adverse effects, however.

## **II. The Adverse Effects of Nationwide Injunctions and Supreme Court Decisions Without Adequate Opinions**

The problems created by the common practice of issuing nationwide preliminary injunctions and the problems created by the Supreme Court's practice of deciding whether to stay those injunctions without issuing an opinion that explains the Court's action adequately are closely related. The adverse effects of nationwide preliminary injunctions that ban the government from implementing actions taken by the executive branch are obvious. It seems inappropriate to allow a single district judge who has been selected by the moving party because of the likelihood that he is opposed to an action to stop the executive branch from implementing an important action.

The adverse effects of the Supreme Court's practice of deciding whether to stay a preliminary nationwide injunction without adequately explaining its decision are more

complicated. The first adverse effect is on the Court’s reputation. The Court’s standing with the public is at its lowest point in history.<sup>20</sup>

Some of the reasons for the Court’s poor reputation are beyond its power to avoid or to correct. Thus, for instance, the Court played no role in the decision of then-majority leader McConnell to refuse to consider President Obama’s nominee for a seat on the Supreme Court. Other reasons—like the unpopularity of the Court’s decision to overrule *Roe v. Wade*—could only be avoided if some Justices sacrifice their sincere beliefs with respect to an important legal issue in the interest of preserving the Court’s standing with the public. That is a high price to pay.

The Court’s practice of making important decisions without issuing a complete opinion is a self-inflicted wound, however. I cannot improve on Justice Barrett’s description of the critical relationship between opinions and the Court’s reputation. On April 4, 2022, she made an important speech in which she referred to the increasing tendency of the public to think of the Justices as politicians in robes who make political decisions that are poorly disguised as legal decisions. She urged members of the public who believe that the Court made a political decision to “read the opinion.”<sup>21</sup> By reading the Court’s opinion explaining the basis for a decision, any member of the public should be able to determine whether the opinion was based on politics or law. Unfortunately, a few days after she made that important speech, Justice Barrett joined the majority in making an important decision in which it upheld a nationwide preliminary injunction that barred the executive branch from implementing a major decision without issuing an opinion,

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<sup>20</sup> See Jeffrey Jones., Confidence in the U.S. Supreme Court Sinks to Historic Low, Gallup Politics (June 23, 2022).

<sup>21</sup> The Reagan Foundation, Recording of the Remarks of Justice Barrett at the Reagan Library (April 4, 2022).

thereby inviting the public to draw the inference that the decision was motivated by politics rather than law.<sup>22</sup>

Comparative law scholars identify the duty to engage in reasoned decision making as a core component of due process in every legal system.<sup>23</sup> The Court has long emphasized the importance of reasoned decision making in every other context.<sup>24</sup> It does not tolerate unreasoned decision making by other courts or by agencies. Even in the context of a decision that an agency must make quickly to respond to an emergency the Court demands that the agency explain its decision in detail.<sup>25</sup> The Court should not engage in the same behavior that it refuses to tolerate in other institutions.

If the Supreme Court blocks or declines to block an executive branch action without writing an opinion that adequately explains its decision, no one has any way of knowing why the Court acted as it did. That lack of knowledge makes it impossible for the president, agencies, or lower courts to know how to do their jobs in ways that are consistent with the rule of law. The president and agencies have no way of knowing what they can and cannot do, and lower courts have no way of knowing how to review executive branch actions that raise some of the many issues that might or might not have been the basis for the Court's action.

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<sup>22</sup> *Louisiana v. American Rivers*, 142 S.Ct. 1347 (2022). See Richard Pierce, Justice Barrett Says “Read the Opinion”—Justice Kagan Says “Where Is the Opinion?” Notice and Comment (Apr. 12, 2022).

<sup>23</sup> See, e.g., the six-part symposium described in *Administrative Law in Comparative Perspective*, *The Regulatory Review* (Oct. 32, 2022); Susan Rose-Ackerman, *Democracy and Executive Power: Policymaking in the United States, the United Kingdom, and France* (2021); Giacinto della Cananea, *Due Process of Law Beyond the State* (2016).

<sup>24</sup> See Benjamin Edelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *Yale L. J.* 1748 (2021); Richard Pierce, *Reason Trumps Pretext*, *The Regulatory Review* (July 30, 2020).

<sup>25</sup> See cases discussed in Kristin Hickman & Richard Pierce, *Administrative Law Treatise* §5.10 96<sup>th</sup> ed. 2019); See also Kristin Hickman & Mark Thomson, *Open Minds and Harmless Errors*, 101 *Corn. L. Rev.* 261 (2014).

Three cases illustrate the adverse effects of Supreme Court decisions that allow some executive branch actions to be implemented while blocking implementation of other executive branch actions without providing adequate explanations for its decisions.

In *Trump v. Sierra Club*,<sup>26</sup> a five-Justice majority stayed the injunction that would have barred President Trump from relying on his power to declare a national emergency to reallocate \$2.5 billion in funds that were appropriated for other purposes to fund a wall across the southern border after Congress had refused to provide the funding for the wall that he had requested. The majority stated only that the government had made a sufficient showing that Sierra Club and the other petitioners had “no cause of action to obtain review.” It did not provide any explanation for that conclusion. Justice Breyer wrote a dissenting opinion in which he noted that the majority had not even referred to the requirement that a party who requests a stay must show that the irreparable harm caused by denial of the motion for stay exceeds the irreparable harm caused by grant of the stay or that grant of the stay is in the public interest.

President Trump spent the reallocated funds on construction of the wall. The district court then dismissed the case as moot after President Biden announced that he would not spend any reallocated funds on construction of the wall and the government announced that it would no longer defend the reallocation of funds in court.

As a result of the Court’s action, we will never know why the majority made no reference to irreparable harm or the public interest when it granted the stay, why it concluded that the petitioners probably had no cause of action, why it did not invoke the major questions doctrine

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<sup>26</sup> 140 S.Ct. 1.

to bar the president from taking this unprecedented action, or what, if any, limits exist on the president's power to reallocate appropriated funds after Congress refuses the president's request to appropriate funds for a project. Those are all important questions that Congress, presidents, and lower courts will have to answer on their own in future cases with no guidance from the Court.

The second illustrative case is *National Federation of Independent Businesses v. Department of Labor*.<sup>27</sup> A six-Justice majority relied on the major questions doctrine as the basis for a stay of the emergency rule that required all employers to require that their employees either obtain a vaccination against covid or submit to regular testing to determine whether they have covid. The majority stated reasons for its prediction that the petitioners were likely to prevail on the merits, but it referred to the other three factors only in brief dismissive passages. It disposed of the public interest criterion with a brief conclusory sentence: "The equities do not justify withholding relief." Its only reference to the need to compare the irreparable harm caused by a grant of the stay with the irreparable harm caused by grant of the stay was perfunctory and dismissive: "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes." That is a non sequitur in the context of an order issued by unelected Justices that overruled a decision made by the politically accountable president. This opinion heightens the suspicion that the Court has abandoned the four factor test for deciding whether to issue a stay that it emphasized as recently as 2008.

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<sup>27</sup> 142 S.Ct. 661 (2022).

The third illustrative case is *West Virginia v. EPA*.<sup>28</sup> That is the case in which a five-Justice majority stayed the Clean Power Plan (CPP) without issuing any opinion. The parties who requested the stay made six arguments in support of their motion. In the absence of an opinion, it was impossible to know which of the six arguments persuaded the Court to issue the stay. We finally got the answer to that important question six years later when the Court devised a way of overcoming the reality that the case had become moot and wrote an opinion in which it invoked the major questions doctrine as the basis for its holding that EPA lacked the authority to adopt the CPP.<sup>29</sup>

During the six-year delay between the Supreme Court's decision to stay the CPP and its opinion that explained that decision, the president, agencies, and lower courts had no way of knowing why the Court stayed the CPP. The D.C. Circuit illustrated one of the costs of that lack of knowledge when it rejected the replacement for the CPP that EPA attempted to implement during the Trump administration.<sup>30</sup> EPA acknowledged that its replacement would be far less effective in mitigating climate change than the CPP. It based its decision to replace the CPP with a less effective rule solely on its conclusion that the CPP was invalid. The D.C. Circuit rejected all six of the arguments that EPA made in support of that conclusion and concluded that EPA had the authority to issue the CPP.

The Supreme Court's decision in *West Virginia v. EPA* made it clear that the D.C. Circuit was wrong, but the D.C. Circuit had no way of knowing that the Supreme Court majority had

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<sup>28</sup> 136 S.Ct. 1000.

<sup>29</sup> *West Virginia v. EPA*, 142 S.Ct. 2587.

<sup>30</sup> *American Lung Assoc. v. EPA*, 985 F. 3d 914 (D.C. Cir. 2020).

stayed the CPP because of its application of the major questions doctrine. The Court's unexplained and unprecedented decision to stay the CPP preceded its announcement of the new much stronger version of the major questions doctrine by six years. For all the D.C. Circuit knew, the Court had stayed the CPP for a reason that was no longer relevant, e.g., that the moving parties had shown that a decision not to stay the CPP would cause more irreparable harm than a decision to stay the CPP.

Unless something major changes, the related problems of numerous nationwide preliminary injunctions that block the federal government from taking any significant action to address a new problem based on the views of a single biased district judge and Supreme Court decisions to stay or not to stay those injunctions without adequately explaining each decision will continue for the indefinite future. They are a product of conditions that are unlikely to change. They are as likely to arise in Republican administrations as in Democratic administrations. They are inconsistent with a core requirement of due process and they create practical problems for the Supreme Court, for lower courts, for presidents, for agencies, and ultimately for the country. The Court needs to find ways of managing this situation.

### **III. Potential Ways of Reducing the Costs of the Problems**

There are many potential ways of attempting to reduce the costs of the related problems of the large number of nationwide preliminary injunctions issued by district courts and Supreme Court decisions to grant or deny motions to stay preliminary injunctions without adequately explaining the decision. Some are promising but beyond the Court's control and unlikely to happen in a timely manner. By the time they are implemented and have their desired effects, we

will already have experienced costs in the form of severe adverse effects on the Court's reputation and on the ability of the president, agencies, and lower courts to make decisions based on a clear legal framework provided by the Court.

Thus, for instance, we could reduce the adverse effects of extreme political polarity on the legislative process by replacing party-based primaries with open primaries. Over time that would have the effect of changing the composition of Congress to make it more representative of the views of the people. It would also change the incentives of members of Congress by eliminating the constant threat of being primaried if you depart from the views of the extremists who dominate party-based primaries.

Those changes would allow Congress to return to the business of compromising to enact bi-partisan legislation. That, in turn, would gradually decrease the need for presidents to test the boundaries of the power of the executive branch to address unexpected problems by taking unilateral actions based on old broadly worded statutes. I remain convinced that such a change in the methods that we use to choose candidates for office is essential to the long-term survival of our form of government,<sup>31</sup> but it is beyond the power of the Court, and it would not have its desired effect for many years.

Similarly, we could change the jurisdiction and venue provisions of statutes that authorize courts to review agency actions. That is another promising route to beneficial change. We could reduce substantially the number of nationwide preliminary injunctions and have greater confidence that the injunctions that are issued are well-founded by authorizing only courts

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<sup>31</sup> See Richard Pierce, *Legislative Impotence—An Existential Threat*, The Federalist Society (2021).

comprised of three judges who are chosen at random to issue such an injunction. That kind of beneficial change is also beyond the power of the Court, however, and Congress is unlikely to implement it in the conditions of legislative impotence that have been created by extreme political polarization.

The Court could address the problems by taking the step that two Justices have urged. It could hold that a district court does not have the power to issue a nationwide injunction.<sup>32</sup> There are two problems with that method of addressing the problems, however. First, it would be contrary to the law. Professor Sohoni has argued persuasively that the Administrative Procedure Act empowers a district court to issue a nationwide injunction.<sup>33</sup> The absence of support for the views expressed by the two Justices from the other seven Justices suggests that they share her view of the law.

Second, such an action would be more likely to compound the problems than to reduce them. It is easy to predict the results of such an action by looking at the situation that was created by the confusing combination of inconsistent opinions that the Court issued in *Rapanos v. U.S.* in 2006.<sup>34</sup> Courts adopted inconsistent interpretations of the law that was created by the 4-1-4 division among the Justices and issued inconsistent injunctions that required EPA and the Corps of Engineers to implement definitions of the critically important jurisdictional term “waters of the United States” that differed significantly from one region to another.<sup>35</sup>

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<sup>32</sup> See *Dep’t of Homeland Security v. New York*, 140 S.Ct. 599 (concurring opinion of Justices and Gorsuch).

<sup>33</sup> Mila Sohoni, *The Power to Vacate a Rule*, 88 G.W. L. Rev. 1121 (2020).

<sup>34</sup> 547 U.S. 715 (2006).

<sup>35</sup> See Kristen Clark, *Navigating Through the Confusion in the Wake of Rapanos*, 19 Wm. & Mary Envtl. L. & Policy Rev. 295 (2014).

The Court could address the problems by overruling the 2007 precedent that provides state attorney generals with an easy path to obtaining an injunction by conferring standing on states when any federal action has an adverse effect on a state's sovereign interests.<sup>36</sup> If the Court coupled such a decision with other decisions that reduce the ability of any party to satisfy the standing requirement in the context of attempts to challenge executive branch actions, it would significantly reduce the number of cases in which district courts can enjoin federal actions. That, in turn, would reduce the number of cases in which the Court would need to decide whether to stay such an injunction.

If the Court had to make only a few decisions granting or denying stays of temporary injunctions each Term, it would be in a better position to allocate its scarce resources in a way that enables it to write an opinion in each such case in which it explains in detail why it made each decision. Unfortunately, however, such a narrowing of standing doctrine would create a situation in which the president could take actions that clearly exceed his power without any concern that a court might interfere with his lawless conduct.

With standing unavailable to petitioners who suffer injuries that are shared by the many,<sup>37</sup> the contexts of spending and taxation would provide any president many opportunities to engage in outrageous violations of law and of constitutional norms. A president could reallocate billions of dollars from appropriations made for other purposes, spend billions of dollars that were never appropriated, forgive unlimited amounts of debt to the government, or decline to collect capital gains taxes, with no fear that a court could keep him within the

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<sup>36</sup> Massachusetts v. EPA, 549 U.S. 497 (2007).

<sup>37</sup> See, e.g., Frothingham v. Mellon, 262 U.S. 447 (1923).

constitutional and statutory boundaries on his power. Each of those actions is a realistic possibility in the future. Powerful Democratic politicians have urged President Biden to use his emergency powers to spend over a trillion dollars in unappropriated funds to mitigate climate change and to forgive over a trillion dollars in student loans, while Professor Adler has suggested that the next Republican president might refuse to collect capital gains taxes. The Court should not limit standing to review the actions of the executive branch in ways that invite presidents to take irresponsible and lawless actions.

The most promising way in which the Court can reduce the costs of these two related problems is to issue an opinion in which it establishes clear boundaries on the power of a district court to issue a preliminary injunction or a stay that has the effect of prohibiting the executive branch to take an action. The opinion should emphasize that preliminary injunctions and stays of executive branch actions are extraordinary remedies that should only be used in extraordinary circumstances. The opinion should include a clarification of the major questions doctrine that discourages courts from using the doctrine as the basis for a preliminary injunction except in extreme cases. The Court needs to establish clear boundaries on both the application of the major questions doctrine and on the use of preliminary injunctions to ban the executive branch from acting until a court can address the merits of the action based on a complete record, briefing, and a well-reasoned opinion.

That action would significantly reduce the number of cases in which district courts issue preliminary injunctions and provide a legal framework in which circuit courts could reverse many district court decisions to grant preliminary injunctions. Those two effects of the opinion would reduce the number of cases in which the Court must decide whether to grant or deny a stay of a

preliminary injunction. The opinion also would provide a legal framework that the Court could use as the starting point for each opinion in which it grants or denies such a stay. The Court could then allocate its scarce resources to the important task of writing a detailed opinion in each of the few cases in which it grants or denies a stay.

An opinion in which the Court announces and creates clear boundaries on the circumstances in which a district court can issue a preliminary injunction would help to restore the Court's reputation as a politically neutral source of law, significantly reduce the risk that a single district court judge who was chosen because of his near certain inclination to block an executive branch action would be able to act on the basis of his ideological priors, and render it much easier for the executive branch and lower courts to apply the law in their decision making processes.