

# A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard\*

## I. Introduction

A federal court's decision about whether to issue a preliminary injunction is one that is fraught with uncertainty and marred by a patchwork of differing standards and policy justifications.<sup>1</sup> The tests applied by the various federal circuit courts of appeals are diverse, with some requiring that all of the preliminary injunction factors meet a certain threshold<sup>2</sup> and others using a sliding scale approach that allows lesser showings on some factors when others are met more strongly.<sup>3</sup>

Some courts also consider the effect of a preliminary injunction on the status quo existing between the parties to the case.<sup>4</sup> Many courts note that the purpose of a preliminary injunction is to preserve the status quo existing between the parties.<sup>5</sup> Such statements of purpose, while notable, need not go beyond functioning as mere platitudes, throwaway lines in a judicial opinion that do not figure in the substantive test applied by the court.<sup>6</sup>

More interestingly, some federal circuit courts incorporate the status quo issue into their substantive preliminary injunction doctrine and require

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1. See, e.g., Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 840–41 (1989) (noting that the “lack of uniformity” among the courts has led to “confusion” and “havoc in litigation”); Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1015, 1032–48 (2012) (discussing the continued disagreement among the circuit courts of appeals about whether a “sliding scale” approach or “sequential,” elemental-style approach should be used and about whether a sliding scale is still permitted under current Supreme Court precedent).

2. See, e.g., Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1545–46 (2011) (outlining the Fourth Circuit doctrine, based upon that court’s reading of the U.S. Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), that preliminary injunction movants must meet all four traditional factors).

3. See, e.g., *id.* at 1538 (concluding that the Second, Ninth, and Seventh Circuits continue to use a sliding scale approach when evaluating preliminary injunctions).

4. Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 110 (2001).

5. Vaughn, *supra* note 1, at 849.

6. Cf. Lee, *supra* note 4, at 138 (discussing early American cases where the status quo was not offered as part of a test but merely as a statement of purpose or of what the status quo usually accomplishes).

a greater showing by movants seeking preliminary relief that alters the status quo.<sup>7</sup> For example, one court requires that movants prove not only that the court's normal preliminary injunction factors are met but also that these factors "weigh heavily and compellingly" in the movant's favor.<sup>8</sup> Another court requires that a movant "must show not only a likelihood, but a clear or substantial likelihood, of success on the merits[] where the injunction sought is mandatory—i.e., it will alter rather than maintain, the status quo."<sup>9</sup>

These heightened requirements for preliminary injunctions that alter the status quo have been much criticized.<sup>10</sup> Judge Richard Posner gave a particularly incisive critique in a recent Seventh Circuit opinion: "Preliminary relief is properly sought only to avert irreparable harm to the moving party. Whether and in what sense the grant of relief would change or preserve some previous state of affairs is neither here nor there. To worry these questions is merely to fuzz up the legal standard."<sup>11</sup> If consideration of the status quo merely fuzzes up the legal standard, why are some courts worrying themselves over it?

Former Judge Michael McConnell of the Tenth Circuit, concurring in *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*,<sup>12</sup> provided an interesting justification.<sup>13</sup> He wrote:

Disrupting the status quo may provide a benefit to one party, but only by depriving the other party of some right he previously enjoyed. Although the harm and the benefit may be of equivalent magnitude on paper, in reality, deprivation of a thing already

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7. *Id.* at 115–16.

8. *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001)).

9. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006) (internal quotation marks omitted).

10. *See, e.g.*, 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948, at 127 (3d ed. 2013) (asserting that it is "regrettable" when consideration of the status quo leads to the denial of a preliminary injunction when the "important conditions" have been met); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 546 (1978) ("Emphasis on preserving the status quo is a habit without a reason."); Vaughn, *supra* note 1, at 850 (arguing that the status quo "does not inform the deliberations for a preliminary injunction in any meaningful way").

11. *Chi. United Indus., Ltd. v. City of Chi.*, 445 F.3d 940, 944 (7th Cir. 2006) (citations omitted).

12. 389 F.3d 973 (10th Cir. 2004) (en banc) (per curiam), *aff'd sub nom.* *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

13. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 449 (4th ed. 2010) (discussing Judge McConnell's concurrence and his arguments in defense of the status quo-based heightened burden).

possessed is felt more acutely than lack of a benefit only hoped for.<sup>14</sup>

Judge McConnell went on to cite studies from the social sciences—in particular, the field of behavioral economics—to justify this assertion.<sup>15</sup> He discussed two well-established phenomena observed by researchers: “loss aversion” and the “endowment effect.”<sup>16</sup> Each of these phenomena supports McConnell’s basic point that losses loom larger than gains and that people value things to a greater degree when they already possess them.<sup>17</sup>

Setting aside Judge McConnell’s focus on litigants, there are two other possible, more judge-centric explanations for the preoccupation with the status quo in some federal courts. Each explanation also invokes the research and findings of behavioral economics and psychology. Earlier in his concurring opinion, Judge McConnell unconsciously nodded towards these two explanations when he stated:

Fundamentally, the reluctance to disturb the status quo prior to trial on the merits is an expression of judicial humility. As Judge Murphy points out, a court bears more direct moral responsibility for harms that result from its intervention than from its nonintervention, and more direct responsibility when it intervenes to change the status quo than when it intervenes to preserve it.<sup>18</sup>

Judge McConnell’s concern about the “moral responsibility” of the court for status quo-altering interventions calls to mind the same sort of loss aversion he applied to litigants. But this passage, and the behavior of other courts in being suspicious of preliminary injunctions that alter the status quo, may reveal that loss aversion is making an impact on judges themselves. In particular, a species of loss aversion termed “status quo bias”—one that has been repeatedly confirmed experimentally and in the field<sup>19</sup>—provides one ready explanation for this judicial practice that has puzzled and bothered commentators and judges for years.<sup>20</sup> Furthermore, Judge McConnell’s statements call to mind another psychological pattern: the heuristic that bad outcomes resulting from omissions are less morally blameworthy than bad outcomes resulting from commissions.<sup>21</sup> Such a

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14. *O Centro*, 389 F.3d at 1015–16 (McConnell, J., concurring).

15. *Id.* at 1016.

16. *Id.*

17. *See id.* (explaining the meaning of loss aversion and the endowment effect and citing studies that demonstrate their existence).

18. *Id.* at 1015.

19. *See infra* subpart III(B).

20. *See supra* notes 10–11 and accompanying text.

21. *See* Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 587 (2003) (defining “omission bias” as “the tendency of people to find more blameworthy bad results that stem from actions than bad results that stem

judicial “omission bias” may provide another behaviorally based explanation for what underlies the hesitance to grant status quo-altering preliminary injunctions.

In the pages that follow, I will bring to bear the rich experimental literature of behavioral law and economics (BLE) in an area where it has never to this point been comprehensively applied: the role of the status quo in federal judicial decision making with respect to preliminary injunctions.<sup>22</sup> In so doing, I will argue that BLE can *explain* why federal courts concern themselves with the status quo at the preliminary injunction stage. More importantly, however, and contrary to Judge McConnell’s view, I will demonstrate that BLE cannot *justify* invocation of the status quo in deciding whether to issue these injunctions. I will ultimately side with those courts and commentators that have explicitly rejected consideration of the status quo in deciding preliminary injunction motions.

This Note will proceed as follows. Part II will present a brief summary of the standards governing the adjudication of motions for preliminary injunction in the various federal circuit courts of appeals. I will pay special attention to how the status quo affects these standards. Part III will introduce the field of behavioral law and economics and summarize the relevant phenomena: loss aversion, the endowment effect, status quo bias, and omission bias. Furthermore, I will present past experimental research that suggests that judges are not immune to the sorts of irrationalities fundamental to BLE. In Part IV, I will argue that while some of these BLE-based phenomena can explain courts’ invocation of the status quo in preliminary injunction decision making, none can justify it. I will go on to endorse the position held by many that the status quo has no place in this area of the law. I will briefly conclude in Part V.

## II. The Law of Preliminary Injunctions

In its recent decision in *Winter v. Natural Resources Defense Council, Inc.*,<sup>23</sup> the U.S. Supreme Court held that a “plaintiff seeking a preliminary

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from otherwise equivalent omissions”); Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1575 (2004) (arguing that the “omission bias reflects a moral heuristic”).

22. One scholar has to this point connected BLE and the issue of the status quo in preliminary injunctions. See Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 869 (2012) (noting that “courts are far more willing to issue preliminary injunctions that preserve the status quo than preliminary injunctions that disrupt or alter it” and arguing that this “tendency is compatible with loss aversion”). Nonetheless, Zamir’s article only notionally referred to the issue and did not explore the standards used by the relevant courts, in particular some courts’ employment of heightened standards of review for status quo-altering injunctions. Furthermore, he did not appraise the normative claim that courts should take seriously litigant loss aversion or consider the impact of the omission bias, either as a descriptive or normative matter. This Note is the first legal scholarship to both fully explore the law in this area and tie it to BLE research.

23. 555 U.S. 7 (2008).

injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>24</sup> This four-factor test generally aligns with the traditional one outlined by authorities in the field.<sup>25</sup> The apparently broad agreement glides above a murkier situation in which many commentators over the years have criticized the varied preliminary injunction standards applied by the federal courts.<sup>26</sup> Indeed, despite the Supreme Court’s weighing in with a four-factor test of its own in *Winter*, the issue of how to apply these factors is still greatly unsettled, with substantial dispute as to whether the traditional four factors function as independent elements or if they are better construed as operating on a sliding scale.<sup>27</sup>

Meanwhile, the Supreme Court has not resolved what role the status quo should play in preliminary injunction doctrine, prolonging a fundamental disagreement among the federal circuit courts of appeals.<sup>28</sup> Some of these courts refer to the status quo when deciding whether to issue preliminary injunctions.<sup>29</sup> They often do so in two contexts: first, in stating that the purpose of a preliminary injunction is to preserve the status quo<sup>30</sup> and, second, in providing that a heightened showing is required of movants who seek to alter the status quo through such an injunction.<sup>31</sup> The following discussion will focus on the second context.

#### A. *A Heightened Standard for Changes to the Status Quo*

Wright and Miller’s esteemed treatise *Federal Practice and Procedure* sets forth that the purpose of a preliminary injunction is “to protect [the] plaintiff from irreparable injury and to preserve the court’s power to render

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24. *Id.* at 20.

25. See Lee, *supra* note 4, at 111 & n.5 (summarizing the four factors as including, in prongs two and three, the irreparable harms to the plaintiff or defendant should the preliminary injunction be denied or granted respectively and collecting cases citing this framework); Vaughn, *supra* note 1, at 839 (providing four factors and apparently replacing the equities prong of the Supreme Court test with a “balance of harms” test with respect to the plaintiff and defendant); WRIGHT ET AL., *supra* note 10, at 122–24 (stating a similar formulation to Vaughn).

26. See, e.g., Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 539 (2003) (concluding that “in the absence of a definitive Supreme Court decision, the standards applied by the circuit courts of appeals are not consistent,” leading to “confusion for lawyers and judges and an unpredictable application by the courts”).

27. See Bates, *supra* note 2, at 1537–38 (summarizing the circuit split over how to interpret *Winter* between the Second, Seventh, and Ninth Circuits on the one hand and the Fourth Circuit on the other).

28. Cf. Lee, *supra* note 4 (stating that the federal circuit courts of appeals are in “substantial disarray” on how to treat the status quo issue).

29. *Id.*

30. See *infra* notes 34–35 and accompanying text.

31. See *infra* sections II(A)(1)–(3).

a meaningful decision after a trial on the merits.”<sup>32</sup> This comports with the statement of purpose handed down by the Supreme Court in *University of Texas v. Camenisch*<sup>33</sup>: “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”<sup>34</sup> The Court’s reference to “preserv[ing] the relative positions of the parties” seems to touch upon the status quo issue. Indeed, preservation of the status quo is a commonly identified purpose of preliminary injunctions.<sup>35</sup>

Some courts go beyond mere statements of purpose, however, and respond to the status quo by requiring a heightened burden of proof from movants seeking preliminary relief that alters the status quo. The Tenth, Ninth, and Second Circuits all require this heightened burden in some form.<sup>36</sup> Language about the disfavored nature of status quo-altering preliminary injunctions also crops up in stray opinions of courts in other circuits, leaving an odd and unpredictable patchwork.<sup>37</sup>

*1. Tenth Circuit and the Three Forms of Disfavored Relief.*—The Tenth Circuit held in *SCFC ILC, Inc. v. Visa USA, Inc.*<sup>38</sup> that three types of preliminary injunctions are disfavored by that court: (1) those that “disturb[] the status quo,” (2) those that are “mandatory as opposed to prohibitory,” and (3) those that give the movant “substantially all the relief” it is seeking.<sup>39</sup> When one of these types of relief is requested, the court held, a movant must show that the traditional four factors weigh “heavily and compellingly” in its favor.<sup>40</sup> The court justified its holding by stating that “[a] preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had.”<sup>41</sup> A later Tenth Circuit panel stated that the purpose of the heightened burden is to

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32. WRIGHT ET AL., *supra* note 10, § 2947, at 112.

33. 451 U.S. 390 (1981).

34. *Id.* at 395.

35. Vaughn, *supra* note 1, at 849.

36. *See* Lee, *supra* note 4, at 115–16 (indicating that these circuits have all adopted a “bifurcated preliminary injunction standard” that “imposes a heavier burden where the moving party seeks to upset the status quo”). Lee’s piece provided an essential jumping-off point for my discussion in this subpart, which has been supplemented by research from more recent cases.

37. *See infra* section II(A)(3).

38. 936 F.2d 1096 (10th Cir. 1991), *overruled in part on other grounds by* O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004) (en banc) (per curiam).

39. *Id.* at 1098–99.

40. *Id.*

41. *Id.* at 1099.

“minimize any injury that would not have occurred but for the court’s intervention.”<sup>42</sup>

The court went on to retreat from the “heavily and compellingly” standard, though not the heightened burden, in *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*.<sup>43</sup> The per curiam opinion, issued by the court sitting en banc, “jettison[ed]” the “heavily and compellingly” standard and instead required that requests for relief in the disfavored categories be “more closely scrutinized” in recognition of the “extraordinary” nature of the remedy.<sup>44</sup> To further tip the scales against the disfavored injunction types, the court stated that “a party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms, and may not rely on our modified likelihood-of-success-on-the-merits standard.”<sup>45</sup> Under the modified standard, a movant who can demonstrate that the irreparable harm, balance of harms, and public interest factors are in its favor need only show that there are serious and doubtful questions ripe for litigation to satisfy the first factor (likelihood of success on the merits).<sup>46</sup>

Despite the en banc court’s clear intention to “jettison” the “heavily and compellingly” standard, it appears to have been revived recently. In an opinion published in 2012, a Tenth Circuit panel stated that a movant seeking a disfavored preliminary injunction must meet the “heavily and compellingly” standard.<sup>47</sup> The case has since been cited by two other Tenth Circuit decisions for the same standard.<sup>48</sup>

*2. Second and Ninth Circuits and Mandatory Injunctions.*—The Second and Ninth Circuits adopt a slightly different—and less demanding—approach to the status quo. Both courts base their heightened burden on whether the injunction sought is mandatory as opposed to prohibitory, with mandatory injunctions being defined in part as those that will alter the status quo.<sup>49</sup> *Black’s Law Dictionary* defines a mandatory

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42. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009).

43. 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (per curiam), *aff’d sub nom.* *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

44. *Id.*

45. *Id.* at 976.

46. *Id.* at 1002 (Seymour, J., concurring in part and dissenting in part).

47. *Fundamental Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012).

48. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at \*1 (10th Cir. Dec. 20, 2012); *Lodgeworks, L.P. v. C.F. Jordan Constr., LLC*, 506 F. App’x 747, 751 n.3 (10th Cir. 2012).

49. *See Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004) (changing the standard of review when the “injunction sought is mandatory—i.e., it will alter, rather than maintain, the status quo”); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (stating

injunction as one which “orders an affirmative act or mandates a specified course of conduct.”<sup>50</sup> A prohibitory injunction, on the other hand, is defined as one “that forbids or restrains an act.”<sup>51</sup> The Second Circuit’s basic preliminary injunction standard requires that a movant show “(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party.”<sup>52</sup> When a mandatory injunction is sought, the movant must make a heightened showing under prong two that there is a “clear or substantial likelihood of success.”<sup>53</sup>

The Ninth Circuit requires those seeking mandatory preliminary injunctions to establish that “the facts and law clearly favor the moving party.”<sup>54</sup> District courts appear to give this standard serious consideration. For example, in *Korab v. McManaman*,<sup>55</sup> the court evaluated the plaintiffs’ motion for a preliminary injunction of implementation of a health program for certain lawful immigrant residents.<sup>56</sup> The plaintiffs’ motion turned in part on a claim that the program violated the Equal Protection Clause of the Fourteenth Amendment.<sup>57</sup> The court found that the plaintiffs’ constitutional claim had “some” likelihood of ultimate success on the merits but that the law did not appear to be “clearly” in their favor.<sup>58</sup> The court denied the motion, citing the plaintiffs’ failure to establish a “clear likelihood of success on the merits, irreparable harm to the class, or that the balance of the equities and/or public interest weigh in their favor.”<sup>59</sup>

As an aside, it is worth noting that basing a standard on the distinction between the mandatory or preliminary character of an injunction has a couple of obvious flaws. First, any injunction stated in mandatory terms can rather easily be reformulated in prohibitory language.<sup>60</sup> For example, a

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that prohibitory injunctions simply preserve the status quo whereas mandatory injunctions go “well beyond simply maintaining the status quo *pendente lite*” and are thus “particularly disfavored” (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980)) (internal quotation marks omitted)).

50. BLACK’S LAW DICTIONARY 855 (9th ed. 2009).

51. *Id.*

52. *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (quoting *Monseratte v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010)).

53. *Sunward Elecs.*, 362 F.3d at 24 (quoting *Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995)) (internal quotation marks omitted).

54. *Stanley*, 13 F.3d at 1320 (quoting *Anderson*, 612 F.2d at 1114).

55. 805 F. Supp. 2d 1027 (D. Haw. 2011).

56. *Id.* at 1029–30.

57. *Id.* at 1030.

58. *Id.* at 1040–41 (emphasis omitted).

59. *Id.* at 1042.

60. See *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1062 (1965) (arguing that any rule based on the distinction between mandatory and prohibitory injunctions is

mandatory injunction requiring a party to “perform your contractual obligations” can be changed to the prohibitory command “do not breach your contract.” Second, Professor John Leubsdorf has persuasively argued that distinguishing between prohibitory and mandatory injunctions does little to determine whether one or the other will preserve the status quo.<sup>61</sup> Professor Thomas Lee found that the Second Circuit has been rather candid in noting the difficulty of making this distinction.<sup>62</sup> These admissions notwithstanding, the mandatory–prohibitory distinction continues to prevail in the Second and Ninth Circuits.

3. *Incoherence in Other Circuits.*—Some other circuits have made reference to the status quo in ways that are unpredictable and largely incoherent.<sup>63</sup> The Fourth Circuit provides an apt example. In the recent case of *Pashby v. Delia*,<sup>64</sup> the court stated, “[A] preliminary injunction’s tendency to preserve the status quo determines whether it is prohibitory or mandatory.”<sup>65</sup> If mandatory and, therefore, status quo altering, the *Pashby* court stated it would apply a heightened standard of review.<sup>66</sup> The opinion cited a previous Fourth Circuit case which held, “Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.”<sup>67</sup> In apparent contradiction to *Pashby*, however, a different Fourth Circuit panel has held that mandatory injunctions and “preservation of the *status quo*” do not require any different legal test than that normally applied when evaluating motions for preliminary relief.<sup>68</sup>

The Third Circuit evinces a similar split of authority. One of that court’s opinions cited the Second Circuit for the rule that parties seeking

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“ridiculously easy to circumvent” and any mandatory injunction can be restated in prohibitory terms).

61. See Leubsdorf, *supra* note 10, at 535 (asserting that “whether an injunction is mandatory has nothing to do with whether it preserves the status quo”).

62. See Lee, *supra* note 4, at 119 (observing that the Second Circuit has acknowledged the “definitional ambiguities” in the mandatory–prohibitory distinction and has granted that the “proposed dichotomy” between these two types of injunctions “is illusory”).

63. See, e.g., *id.* at 122 & n.60 (noting that “in some instances, the same circuits that have suggested some ambiguous relevance of the status quo elsewhere have questioned the viability of a variable standard” and citing examples).

64. 709 F.3d 307 (4th Cir. 2013).

65. *Id.* at 320. Another recent Fourth Circuit panel echoed these sorts of status quo considerations. See *Perry v. Judd*, 471 F. App’x 219, 223–24 (4th Cir. 2012) (stating that mandatory preliminary injunctions are “disfavored” and review is “even more searching” than normal when one is sought (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003))).

66. *Pashby*, 709 F.3d at 320.

67. *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980), *quoted in Pashby*, 709 F.3d at 320.

68. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 360 (4th Cir. 1991) (quoting *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 814 (3d Cir. 1989)).

mandatory, status quo-altering preliminary injunctions “must meet a higher standard of showing irreparable harm in the absence of an injunction.”<sup>69</sup> Another opinion stated the opposite rule: “[W]e disagree that the preservation of the *status quo* operates as a separate test” and the legal standard is actually governed by the “traditional four-pronged test.”<sup>70</sup>

### C. *Judicial Disregard of the Status Quo*

Some courts and judges have, however, been clear in their disregard of the status quo. Referring to *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*,<sup>71</sup> Professor Lee noted that the Sixth Circuit “most explicitly has confronted and rejected the heightened burden adopted” by some courts.<sup>72</sup> In that case, the court held that there is “little consequential importance to the concept of the status quo” and that the “distinction between mandatory and prohibitory injunctive relief is not meaningful.”<sup>73</sup> The court explicitly rejected the Tenth Circuit “heavily and compellingly” test.<sup>74</sup> In the Seventh Circuit, Judge Richard Posner has also been clear in his rejection of the status quo test.<sup>75</sup> Judge Posner has persuasively stated the view that the true purpose of preliminary relief is to “avert irreparable harm to the moving party” and that consideration of the status quo does not assist the court in advancing this purpose.<sup>76</sup>

Against this backdrop of case law, one must ask: why are courts so divided on this point? Some courts hold tightly to status quo-based heightened standards. Other courts (and most commentators) discard such tests, sometimes deriding them as meritless and conceptually incoherent. Recalling Judge McConnell’s discussion in *O Centro*, I will now introduce the field of behavioral law and economics to determine if it can provide an explanation or a justification for those federal courts that require heightened showings when reviewing motions for status quo-altering preliminary injunctions.

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69. *Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 179 (3d Cir. 2008) (citing *Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 33–34 (2d Cir. 1995)).

70. *Ortho Pharm. Corp.*, 882 F.2d at 813 (internal quotation marks omitted).

71. 163 F.3d 341 (6th Cir. 1998).

72. Lee, *supra* note 4, at 123.

73. *United Food*, 163 F.3d at 348.

74. *Id.*

75. *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 383 (7th Cir. 1984) (discussing the ambiguity of the status quo concept and giving a dismissive treatment to the issue).

76. *Chi. United Indus., Ltd. v. City of Chi.*, 445 F.3d 940, 944 (7th Cir. 2006).

### III. Behavioral Law and Economics

Law and economics has been defined as the “systematic application of theories of rational choice to legal problems.”<sup>77</sup> The field seeks to “determine the implications of . . . rational maximizing behavior in and out of markets, and its legal implications for markets and other institutions.”<sup>78</sup> Generally speaking, the field assumes that individuals have a “stable set of preferences” and will “maximize their utility” by their actions, thus functioning as so-called “rational actor[s].”<sup>79</sup> Behavioral law and economics, on the other hand, analyzes law from the perspective of observed human behavior patterns rather than a hypothesized rational actor.<sup>80</sup> The research underlying BLE has repeatedly demonstrated a number of ways in which people deviate from the utility-maximizing picture of the rational actor provided by classical law and economics scholars.<sup>81</sup> I will elaborate a few key deviations that will be helpful to understanding the issue of the status quo and preliminary injunctions.

#### A. *Loss Aversion and the Endowment Effect*

A core component of the classical economic model is expected utility theory, which rests on two key assumptions: (1) a choice’s utility is based on the utility of its ultimate outcome and (2) the calculation of utility will be based on the final quantity of assets that result from the choice, regardless of whether a gain or loss occurred from the pre-choice state.<sup>82</sup> In short, the theory holds that preferences will not be affected by what a person possesses when they make a decision.<sup>83</sup> This tenet of choice theory—“reference independence”—was flatly contradicted by experiments conducted by Amos Tversky and Daniel Kahneman, who found that their results were better explained by a “reference-dependent” model.<sup>84</sup>

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77. Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 53 n.1 (1992).

78. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998).

79. *Id.* at 1473, 1476 (quoting GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976)).

80. *See id.* at 1476 (explaining that behavioral law and economics explores “the implications of actual (not hypothesized) human behavior for the law”).

81. *See id.* at 1476–77 (noting aspects of BLE that “draw into question” these classical economic ideas and represent “significant way[s] in which most people depart from the standard economic model”).

82. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263–64 (1979).

83. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1039 (1991).

84. *Id.* at 1046 (emphasis omitted).

Reference dependence “suggests that values are coded as gains and losses relative to a reference point.”<sup>85</sup>

Reference dependence manifests itself in the concept of “loss aversion,” which is defined by the simple axiom that “losses . . . loom larger than . . . gains.”<sup>86</sup> In other words, a loss produces greater disutility than the utility produced by an equally sized gain. For an example of loss aversion, consider its application to consumer choices. Loss aversion implies that a consumer would experience a larger reduction in happiness from a price increase of a good (over a certain reference price) than the increase in happiness he or she would experience because of a price decrease of equal magnitude.<sup>87</sup> In response, the consumer would cut back on purchases to a greater degree in the price-increase condition than he or she would boost his or her purchases in the price-decrease condition.<sup>88</sup> Studies of consumer choice have demonstrated such an effect in the markets for eggs and orange juice.<sup>89</sup>

An important corollary of loss aversion is the “endowment effect.” This term describes the phenomenon that “people tend to value goods more when they own them than when they do not.”<sup>90</sup> This effect was demonstrated by an experiment involving Cornell undergraduate students conducted by Daniel Kahneman, Jack Knetsch, and Richard Thaler.<sup>91</sup> Half of the students were given mugs, and a market was created.<sup>92</sup> Each holder of a mug could give up his or her property for a set market price, and, alternatively, each mug-less student could pay the market price and receive a mug.<sup>93</sup> Because the mugs were distributed without regard to the preferences of the subjects, classical economic theory assumes that the buyers and sellers would roughly meet at the market price and that about half of the mugs would be traded (because about half of the students should have liked mugs more than the other half of students).<sup>94</sup> In reality, the mug

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85. Dilip Soman, *Framing, Loss Aversion, and Mental Accounting*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 379, 383 (Derek J. Koehler & Nigel Harvey eds., 2004).

86. Tversky & Kahneman, *supra* note 83, at 1047.

87. Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, in ADVANCES IN BEHAVIORAL ECONOMICS 148, 152 (Colin F. Camerer et al. eds., 2004).

88. *Id.*

89. *Id.*

90. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003).

91. Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 194–95.

92. *Id.* at 195. A second experiment involving ballpoint pens was also conducted. *Id.* It had the same basic format and produced similar results. *Id.* at 195–96.

93. *Id.* at 195.

94. *Id.* at 195–96.

holders demanded roughly two times more money than the prospective buyers were willing to pay.<sup>95</sup> As a consequence, the number of trades was less than half the expected amount.<sup>96</sup>

Evaluating experiments like this, one pair of commentators has noted that the power of the endowment effect is demonstrated by its appearance in situations ranging from the transfer of “banal” goods like mugs and pens to the valuation of public goods like parks and wildlife.<sup>97</sup> The effect has been called “undoubtedly the most significant single finding from behavioral economics for legal analysis to date.”<sup>98</sup> As just one example of its impact, the hugely influential Coase theorem—which holds that the “assignment of a legal entitlement by the state will not affect the ultimate ownership of that entitlement” because people will bargain for that entitlement should they want it—is called into question by the endowment effect.<sup>99</sup> The observed distance between buying and selling prices caused by the endowment effect might make the law’s placement of an entitlement quite sticky.<sup>100</sup>

### B. *Status Quo Bias*

Status quo bias is a phenomenon showing that people’s choices are affected by consideration of whether a course of action will involve a departure from the status quo.<sup>101</sup> The bias is heightened when a person is presented with more choices and reduced when a person’s preferences are more clearly held.<sup>102</sup>

The effect was first named and demonstrated in a paper by William Samuelson and Richard Zeckhauser.<sup>103</sup> The two men conducted a series of experiments involving students at the Boston University School of Management and the Kennedy School of Government at Harvard University.<sup>104</sup> They presented the subjects with questionnaires asking them

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95. *Id.* at 196.

96. *Id.*

97. Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1552 (1998).

98. Korobkin, *supra* note 90, at 1229.

99. *See id.* at 1231–32 (noting that if there is a divergence between the amount one is willing to pay for an entitlement and the amount one will accept to sell said entitlement, then “the Coase Theorem [is] incorrect, or at least incomplete”).

100. *See id.* (expounding that an implication of the endowment effect is that “the broad range of legal prescriptions based on Coase’s insight requires reevaluation”).

101. *See* Kahneman et al., *supra* note 91, at 197–98 (explaining that the bias, as an implication of loss aversion, emerges “because the disadvantages of leaving [the status quo] loom larger than advantages”).

102. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

103. *Id.*

104. *Id.* at 14.

to make a series of decisions.<sup>105</sup> In the neutral condition, the decision options were presented as new alternatives.<sup>106</sup> In the experimental condition, the first option was designated the status quo.<sup>107</sup> Samuelson and Zeckhauser's results indicated a robust change in response rate between the neutral and experimental conditions. When an option was in the status quo position, it received the most selections; in the neutral condition, the same option received fewer; and in the position of being an alternative to the designated status quo, it received even fewer.<sup>108</sup> The data also showed that relatively unpopular options received the greatest boost from appearing in the status quo position,<sup>109</sup> suggesting that the status quo bias can do substantial work when preferences are less strongly held.

Status quo bias can have major effects in the realm of public policy. Take the case of Pennsylvania's and New Jersey's automobile insurance reforms. Each state gave drivers a choice about their car insurance: they could either keep the unfettered right to sue in tort for accidents—and pay more for their policy—or have their right to sue restricted and pay less in premiums.<sup>110</sup> The two states presented this choice differently in an important respect: New Jersey made the restricted-right-to-sue-but-cheaper-policy option the default—with the corresponding requirement that the driver essentially buy the expanded right to sue—while Pennsylvania made the full right to sue a default.<sup>111</sup> The empirical evidence appears to show the impact of the status quo bias: 75% of Pennsylvanians kept their right to sue while only 20% of New Jersey drivers were willing to leave the status quo and pick the exact same option.<sup>112</sup>

### C. *Omission Bias*

Omission bias refers to “the tendency to judge harmful acts as worse than equally harmful omissions.”<sup>113</sup> It has been experimentally demonstrated in numerous papers.<sup>114</sup> For example, one experiment

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105. *Id.* at 12, 14.

106. *Id.* at 12–13.

107. *Id.*

108. *Id.* at 14.

109. *Id.* at 19.

110. Kahneman et al., *supra* note 91, at 199.

111. Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 48 (1993).

112. *See id.* (asserting that this example “illustrates that framing can have sizable economic consequences”).

113. Prentice & Koehler, *supra* note 21, at 593.

114. *E.g.*, Jonathan Baron & Ilana Ritov, *Omission Bias, Individual Differences, and Normality*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 74, 83–84 (2004); Johanna H. Kordes-de Vaal, *Intention and the Omission Bias: Omissions Perceived as Nondecisions*, 93 ACTA PSYCHOLOGICA 161, 169 (1996); Ilana Ritov & Jonathan Baron, *Status-*

involved a questionnaire completed by fifty-seven University of Pennsylvania students.<sup>115</sup> One of the questions presented a fictional scenario where two tennis competitors share a prematch meal and one of the players knows that the house salad dressing will upset his competitor's stomach.<sup>116</sup> The respondents were asked to rate the wrongfulness of a series of different courses of conduct, including situations where (1) the player allows his competitor to order the bad dressing by saying nothing about the potential for sickness and (2) the player actively seeks to influence the competitor's decision in favor of the house dressing.<sup>117</sup> Sixty-five percent of those surveyed rated the omissions in this scenario as less bad than corresponding commissions.<sup>118</sup>

There are a number of explanations for the presence of this bias. One is based on a "norm-theory account" proposed by Kahneman and Miller.<sup>119</sup> Under this theory, "omissions tend to be considered as the norm, and commissions tend to be compared to what would have happened if nothing had been done."<sup>120</sup> As a result, omissions are seen as neutral whether they result in positive or negative outcomes.<sup>121</sup> The response to commissions, on the other hand, correlates with the nature of the outcome.<sup>122</sup> The aversion to harmful commissions leads to peculiar interactions with the decision whether to act. Professors Prentice and Koehler, surveying research in this field, concluded, "People are so averse to injuring others actively, that they will remain passive even when they know that more people will probably be hurt by their passivity."<sup>123</sup>

Omission bias seems justifiable as a rule of thumb in some cases. For example, bad outcomes from omissions are less likely to demonstrate specific intent to do harm than commissions because the general intent to act at all is absent.<sup>124</sup> Taken a step further, one would assume that a person with intent to do harm will more often cause harm (and go to the effort needed to cause it) than those who have no intent one way or the other. In light of the value it sometimes provides, Professor Sunstein has characterized the omission bias as a "moral heuristic," which he defines as

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*Quo and Omission Biases*, 5 J. RISK & UNCERTAINTY 49, 59–60 (1992) [hereinafter Ritov & Baron, *Status-Quo and Omission Biases*].

115. Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 82 (1991).

116. *Id.*

117. *Id.* at 82–83.

118. *Id.* at 84.

119. Ritov & Baron, *Status-Quo and Omission Biases*, *supra* note 114, at 60.

120. *Id.*

121. *Id.*

122. *Id.*

123. Prentice & Koehler, *supra* note 21, at 592.

124. See Spranca et al., *supra* note 115, at 76.

“moral shortcuts, or rules of thumb, that work well most of the time, but that also systematically misfire.”<sup>125</sup> This systematic misfiring can be seen in experiments where subjects found harmful commissions more blameworthy than omissions despite the fact that intent and knowledge of the actors (or nonactors as the scenario dictated) were held constant.<sup>126</sup> With no distinctions in knowledge or intent, the omission–commission distinction should lose all relevance in evaluating whether a party was blameworthy.<sup>127</sup>

*D. Experimental and Survey Demonstrations of Heuristics and Biases in Judges*

A series of law review articles hypothesize that judges are subject to the same biases and heuristics that appear in the average person’s thinking. Using experimental research involving actual judges, these articles provide evidence that judges are afflicted by the same bounded rationality observed by behavioral psychologists in the general population.<sup>128</sup>

One article, for example, surveyed 167 federal magistrate judges with a questionnaire that sought to draw out the presence of five particular heuristics and biases.<sup>129</sup> The authors found that the surveyed judges were susceptible to all five of these deviations from perfect rationality.<sup>130</sup> Furthermore, they compared their research with experimental findings in broader populations and found that judges were equally as susceptible as laypeople to three of those deviations (with judges being slightly less susceptible than other decision makers to framing and the representativeness heuristic).<sup>131</sup> The authors were appropriately cautious in noting that the presence of these biases in judges’ thinking in the experimental setting did not necessarily mean that the biases would affect their courtroom decision making.<sup>132</sup> Nonetheless, the authors found

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125. Sunstein, *supra* note 21, at 1558, 1575; see also Frances Howard-Snyder, *Doing vs. Allowing Harm*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/win2011/entries/doing-allowing/> (last modified Dec. 20, 2011) (concluding that there is a group of situations where the distinction between doing and allowing harm leads to a “conflict between theory and intuition[.]”).

126. Spranca et al., *supra* note 115, at 101–02.

127. Howard-Snyder, *supra* note 125 (arguing “that there is no decisive reason to say that any of these distinctions is morally significant, as long, that is, as we remember that intention plays no part in the distinction between doing and allowing harm”).

128. See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001) (concluding that their “study demonstrates that judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them vulnerable to cognitive illusions that can produce poor judgments”).

129. *Id.* at 786–87.

130. *Id.* at 816.

131. *Id.*

132. *Id.* at 819.

anecdotal support for the functional importance of these heuristics and biases in the content of certain legal doctrine either created or applied by judges.<sup>133</sup>

Heuristics and biases can also potentially explain judicial behaviors observable in the real world. Professors Guthrie and George have studied a phenomenon in the federal circuit courts of appeals that they term the “affirmance effect.”<sup>134</sup> In short, their research has found that these courts have affirmed decisions up for review at a high and steadily rising rate.<sup>135</sup> For example, the October 2002 term saw the circuit courts affirm 91% of rulings, a number much higher than that shown by the U.S. Supreme Court, which hears far fewer cases.<sup>136</sup> The professors present a series of possible explanations for this fact.<sup>137</sup> Among these, they note the possible influence of the status quo bias and the omission bias.<sup>138</sup> Given the experimental findings discussed above, it is not an unreasonable connection to make that appellate judges are being influenced by the same heuristics and biases that were shown to influence trial judges.

Another article surveyed a number of areas of the common law where the courts appear to be crafting doctrine in a way that reflects a differential treatment of gains and losses. Such areas of law include adverse possession, limitations on lost-profits damages, and the disparate treatment of completed gifts and unenforceable gratuitous promises.<sup>139</sup> The authors term this differing treatment of gains and losses the “valuation disparity.”<sup>140</sup> The difference in terminology notwithstanding, the authors explicitly link their discussion to the research underlying behavioral economics and the concepts of loss aversion and the endowment effect.<sup>141</sup> Because the common law develops as an “intuitive, non-empirical interpretation of community mores and individual preferences,” the authors argue that it is not surprising to find federal judges developing legal doctrine in reflection

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133. *See id.* at 821 (arguing that heuristics and biases are present in courts’ application of the doctrine of *res ipsa loquitur* in tort and the prudent-investor rule in trustee liability cases).

134. *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 358 (2005) (quoting Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 150 (2002)).

135. *See id.* at 360 (indicating an affirmance rate of 72% in 1945 and of 91% in 2003).

136. *Id.* at 359 & n.13.

137. *See id.* at 358 (providing explanations drawn from political science and the rational-actor model on the one hand and behavioral economics and the model of bounded rationality on the other).

138. *Id.* at 377–80.

139. David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 OSGOODE HALL L.J. 737, 751–53, 757–59 (1992).

140. *Id.* at 737.

141. *Id.* at 743–45.

of the “valuation disparity.”<sup>142</sup> As I will argue in the next Part, it is similarly unsurprising to find federal judges relying upon the heuristics and biases explained by behavioral economics while developing doctrine in the judge-controlled area of preliminary injunction law.

#### IV. Can BLE Explain or Justify the Judicial Preoccupation with the Status Quo in Federal Preliminary Injunction Doctrine?

With the law of preliminary injunctions and the research underlying BLE in mind, I will proceed to ask two fundamental questions. First, do heuristics and biases explain why some federal courts are preoccupied with the status quo when considering motions for preliminary injunctions? Second, if BLE explains this issue, are heightened burdens for status quo-altering preliminary injunctions justified by BLE theories? I will explore these questions by first looking at the possibility that judges are behaving sensitively in response to loss aversion of litigants. I will next discuss whether judges are instead exhibiting bounded rationality themselves and being influenced in their thinking by the status quo bias and the omission bias.

##### A. *Litigant Loss Aversion*

In the introduction to this Note, I mentioned Judge McConnell’s explanation of the Tenth Circuit’s doctrine with respect to status quo-altering injunctions.<sup>143</sup> He stated that the court’s heightened burden was a reasonable response to the loss aversion of nonmovants, who would feel more acutely the loss of the status quo than the movants would feel the gain from its alteration.<sup>144</sup>

As a matter of the psychology of judges, there is no particular way to measure whether or not loss aversion is actually a factor working upon the subconscious of judges. It is worth noting that federal judges are not explicitly invoking this rationale to justify the issuance or denial of preliminary injunctions in *any* context. A search of all federal cases on Westlaw revealed that Judge McConnell’s concurrence was the only case in the entire database which used the words “loss aversion” or “behavioral law and economics” (or similar phrases) in concurrence with the phrase “preliminary injunction.”<sup>145</sup> Nonetheless, I cannot prove that judges are not

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142. *Id.* at 749.

143. *See supra* text accompanying notes 12–17.

144. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1015–16 (10th Cir. 2004) (McConnell, J., concurring), *aff’d sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

145. This assertion is based on a WestlawNext search conducted on February 12, 2014. I searched for “preliminary injunction” in all federal cases and then searched within the results for any of the following terms: “behavioral law and economics,” “behavioral psychology,”

considering this issue outside of the four corners of their written opinions, and so it may indeed provide some sort of explanation.

Judge McConnell's rationale, however, provides minimal justification for the heightened burden applied by the Tenth Circuit and other courts. Professor Laycock has convincingly argued that the status quo in a case is often very difficult to define, with both parties able to legitimately lay claim to their desired outcome being the status quo.<sup>146</sup> For example, as Professor Laycock points out, there was a muddled status quo determination in the very case where Judge McConnell made his litigant-loss-aversion argument.<sup>147</sup> On the one hand, the appellants in *O Centro* could lay claim to the status quo being their long-time use of the banned substance *hoasca* during religious ceremonies (that being the "last . . . uncontested" state of affairs).<sup>148</sup> On the other, the government could say its subsequent banning of appellants' importation and use of *hoasca* under the Controlled Substances Act (CSA) was the actual status quo (that being the state of affairs in existence at the time of the court's decision).<sup>149</sup> Thus, as Judge Seymour wrote in his separate opinion, there are "two plausible status quos, each of them important."<sup>150</sup> Indeed, the appellants' use of *hoasca* was a longer-held entitlement and, as such, would reasonably be due greater weight when considering the problem of litigant loss aversion.<sup>151</sup> Ultimately, a majority of the en banc court concluded that the government's enforcement of the CSA was the status quo, causing the appellants to be subjected to a heightened burden.<sup>152</sup> Judge McConnell himself joined in this decision.<sup>153</sup>

This example illustrates that what one might define as the "status quo" in a litigation can at times be legitimately claimed by both sides in the same case. In such a situation, the loss-aversion-conscious court will have the basically impossible task of deciding which party is more subject to the endowment effect and loss aversion and, as a result, which decision will cause greater psychic harm (thus requiring greater judicial caution). In this scenario, Judge McConnell's BLE-based argument—which Professor

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"behavioral economics," "loss aversion," "prospect theory," "omission bias," and "endowment effect."

146. Brief of Douglas Laycock as Amicus Curiae in Support of Respondents at 22–23, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084) [hereinafter Laycock Brief].

147. *Id.*

148. *O Centro*, 389 F.3d at 1006–07 (Seymour, J., concurring in part and dissenting in part).

149. *Id.* at 1007.

150. *Id.*

151. See Laycock Brief, *supra* note 146.

152. *O Centro*, 389 F.3d at 980–81 (Murphy, J., concurring in part and dissenting in part).

153. *Id.* at 976.

Laycock aptly defines to be an inquiry into irreparable harm by proxy<sup>154</sup>—breaks down. Faced with a quandary like *O Centro*, a court is no more likely to get the balance of irreparable harms right by using the status quo as a proxy determinant of that balance than if it simply grappled with the question directly. Indeed, a majority of the *O Centro* court found the government's enforcement of the CSA to be the status quo when, as a matter of intuition, one could persuasively argue that the appellants' ceremonial use of *hoasca* was more potently endowed with value, with the loss of its use posing a greater risk of irreparable harm. Consideration of the status quo, on this basis, looks to be essentially valueless and unjustified.

*B. Bounded Rationality and Judges*

As detailed above, experimental research and studies of judicial opinions have shown that judges may be subject to the same heuristics and biases as other decision makers.<sup>155</sup> Applying that research here, two biases, the status quo bias and the omission bias, seem to fit nicely with the circumstances surrounding a heightened burden for status quo-altering preliminary injunctions. These biases may be working to alter the thinking of federal judges who are deciding and reviewing motions for preliminary injunctions.

*1. Status Quo Bias.*—Status quo bias involves the alteration of decision making when one option is presented as the default, or status quo.<sup>156</sup> It has been demonstrated experimentally and by research into real life outcomes, as in the case of the Pennsylvania and New Jersey auto insurance reforms.<sup>157</sup>

A key factor leads me to conclude that status quo bias may have an operative effect on federal judges' consideration of motions for preliminary relief. Status quo bias has greater significance in situations where a decision maker's preferences on an issue are less strongly held.<sup>158</sup> For example, the average person surely has little reason to know whether it is better to have a cheaper auto insurance policy and the restricted right to sue or the opposite. The right to sue is abstract, and its necessity is uncertain and (presumably) temporally distant. Thus, one would expect that the

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154. Laycock Brief, *supra* note 146, at 22.

155. See *supra* subpart III(D).

156. See *supra* note 101 and accompanying text.

157. See *supra* notes 103–12 and accompanying text.

158. See *supra* note 109 and accompanying text.

status quo bias would have a substantial effect, and field research appears to bear out that it did in the auto insurance example.<sup>159</sup>

Now consider the trial judge. A trial judge hears many cases and presumably has no particular attachment to any one of them (indeed the judge must be impartial in his or her decision making).<sup>160</sup> In close cases where the facts and law do not allow the judge to have a strongly held preference as between plaintiff and defendant, it is reasonable to think that a judge might be affected by the status quo bias, just as happens to the average decision maker when faced with difficult decisions involving uncertain options and loosely held preferences. Indeed, Professors Guthrie and George's exploration of the "affirmance effect" in federal appellate courts provides anecdotal support that status quo bias plays a part in judicial thinking.<sup>161</sup>

If one is to grant that the status quo bias provides an explanation for why the status quo is part of preliminary injunction doctrine in some federal courts, the next question is whether that bias justifies its inclusion. The answer must surely be no. A substantial change in decision outcomes, if a decision maker were behaving rationally, should result from the preference for one option or another arising from those options' actual characteristics (outside of the decisional context). The fact that one option's designation as the status quo can cause an immediate and substantial increase in popularity with no change in its underlying quality is profoundly irrational. An example of this irrationality comes from experimental research, which has shown that the status quo bias has a particularly pronounced effect on those decision options that are most unpopular when otherwise not designated as the status quo.<sup>162</sup>

Bringing these threads together, I believe a heightened burden for status quo-altering preliminary injunctions arises from and ultimately exacerbates the status quo bias (by focusing the judge's attention on one decision option as the designated "status quo"). Thus, the bias dissociates the judge's decision from the underlying merits of the two parties' positions and gives one party an undue boost as a result of occupying the status quo position.

2. *Omission Bias*.—Omission bias manifests itself in the behavior of some decision makers when they evaluate commissions as more blameworthy than omissions, even when omissions and commissions

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159. See *supra* notes 110–12 and accompanying text.

160. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2011).

161. See *supra* notes 134–38 and accompanying text.

162. See *supra* note 109 and accompanying text.

produce the same outcome.<sup>163</sup> This bias can be justified in some instances as a useful rule of thumb for determining when actors possess bad intent and are therefore more likely to act wrongly again.<sup>164</sup>

There are many reasons to believe that omission bias is playing a role in the decision making of judges. Judge McConnell's opinion in *O Centro* argues that the reluctance to disturb the status quo is an expression of "judicial humility" and of a recognition that the "court bears more direct moral responsibility for harms that result from its intervention than from its nonintervention, and more direct responsibility when it intervenes to change the status quo than when it intervenes to preserve it."<sup>165</sup> This discussion of the increased moral culpability from intervening at the preliminary injunction stage is couched in the precise terms of the omission bias. Another Tenth Circuit opinion, this time by Judge Kelly, echoed the same sentiment, stating that a heightened burden had the purpose of "minimiz[ing] any injury that would not have occurred but for the court's intervention."<sup>166</sup>

Aside from this anecdotal confirmation, one can look to the scholarship on the "affirmance effect" in the federal circuit courts of appeals for further evidence of omission bias at work.<sup>167</sup> While I discussed that material earlier in the context of the status quo bias, one could also see how actively overruling a lower court and being wrong in doing so might appear worse to an appellate judge than simply allowing a possibly flawed disposition to stand. Consider also the notion that affirmance is a "neutral" condition and that reversal is not. With affirmance being "neutral," only reversal would cause the judge's feelings about the disposition to correlate with the positive or negative nature of the outcome.<sup>168</sup>

Setting aside the issue of whether omission bias explains the phenomenon, it does not justify judges' caution about granting status quo-altering injunctions. My argument proceeds analogically from one advanced by Professors Vermeule and Sunstein. They argued in a recent article that the distinction between acts and omissions is not morally relevant with respect to governments.<sup>169</sup> The act-omission distinction

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163. See *supra* subpart III(C).

164. See *supra* notes 124–26 and accompanying text.

165. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1015 (10th Cir. 2004) (McConnell, J., concurring), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

166. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009).

167. See *supra* notes 134–38 and accompanying text.

168. See *supra* notes 119–22 and accompanying text (summarizing the "norm" explanation of the omission bias).

169. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 720–24 (2005).

breaks down in this context because “unlike individuals, governments always and necessarily face a choice between or among possible policies for regulating third parties.”<sup>170</sup> Furthermore, “government is in the business of creating permissions and prohibitions. When it explicitly or implicitly authorizes private action, it is not omitting to do anything or refusing to act.”<sup>171</sup>

This appraisal of the moral position of government necessarily applies to the individuals who carry out its mission as agents.<sup>172</sup> I now extend Sunstein and Vermeule’s argument to judges faced with a motion for a preliminary injunction. A judge’s decision to grant or deny such a motion will necessarily alter the balance of entitlements and hardships between the parties.<sup>173</sup> Furthermore, a judge’s disposition of the motion will determine how weakly or strongly similar conduct by other individuals is deterred.<sup>174</sup> Thus, whatever moral salience the act–omission distinction has for the average person, it is absent in the judicial context. In light of this absence, the primary justification for the omission bias’s existence evaporates, and one is left with irrational behavior based on a heuristic. Ultimately, omission bias provides little justification for the courts’ heightened burden when evaluating status quo-altering injunctions.

### C. *Better to Reject Consideration of the Status Quo*

The better course is to take the path endorsed by the Sixth Circuit and Judge Posner and simply ignore the status quo.

Wright and Miller have noted that invocation of the status quo is “unobjectionable when used simply to articulate the desire to prevent defendant from changing the existing situation to plaintiff’s irreparable detriment.”<sup>175</sup> Indeed, the historical roots of the status quo in preliminary injunction decisions go back to the English Court of Chancery in the

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170. *Id.* at 721.

171. *Id.*

172. *See id.* at 724 (arguing that natural persons form the staff of government but that, nonetheless, it is “irresponsible, indeed incoherent,” for them to “invok[e] the natural person’s liberty not to ‘act’”).

173. *Cf.* *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1015–16 (10th Cir. 2004) (McConnell, J., concurring), *aff’d sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) (“Disrupting the status quo [by granting or denying a motion for an injunction] may provide a benefit to one party, but only by depriving the other party of some right he previously enjoyed.”).

174. *Cf. Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (limiting the duration of prior restraint in advance of final judicial review under an obscenity law to the “preservation of the status quo for the shortest fixed period compatible with sound judicial resolution” in part to “minimize the deterrent effect of an interim and possibly erroneous denial” of the right to screen the film in question).

175. WRIGHT ET AL., *supra* note 10, at 125.

nineteenth century, where the chancellor brought up the status quo not as part of any independent test, but simply as a means to “describe the usual effect of preliminary injunctive relief” (i.e., the avoidance of irreparable injury to the movant).<sup>176</sup> This primarily descriptive use of the status quo phrase appears to have been the prevailing practice among nineteenth century American courts as well.<sup>177</sup>

Wright and Miller have also argued that, in courts employing a status quo test, the test can serve as “a harmless makeweight” when sufficient independent grounds exist for denying the injunction according to the traditional irreparable harm analysis.<sup>178</sup> It is not always so harmless however. Professor Laycock has noted the mischief that the status quo can do when it is given independent doctrinal force. First, he points out that in situations where irreparable harm will be caused by the continuation of the status quo, the traditional irreparable injury analysis is at odds with the status quo test, and the status quo burden must be overcome in order to do justice.<sup>179</sup> In these cases, the “status quo test is clearly an obstacle to justice rather than an aid.”<sup>180</sup> Laycock notes a second key problem: the status quo is “highly manipulable,” and thus, giving it doctrinal force leads to substantial argument between parties attempting to define this slippery concept.<sup>181</sup> Arguing about the status quo therefore has major downsides from the perspective of judicial efficiency. Parties are required to bear the expense of arguing about the status quo in addition to the cost associated with making their case according to the traditional four factors.<sup>182</sup> This outcome shows that the status quo focus is having a perverse effect, as one of its justifications is that it serves as a rule of thumb that can reduce litigation costs by easing the decision process for parties and judges.<sup>183</sup>

## V. Conclusion

The test for whether to grant preliminary relief in the federal courts need not, as a conceptual matter, incorporate the status quo. Numerous academics and judges have rejected its application as unnecessary at best and pernicious at worst. Behavioral law and economics provides a potential means to explain why some courts appear wedded to a heightened burden in cases of status quo-altering preliminary injunctions. In particular, the status quo bias and the omission bias help to explain why the doctrine in these

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176. See Lee, *supra* note 4, at 132–33.

177. *Id.* at 138.

178. WRIGHT ET AL., *supra* note 10, at 127.

179. Laycock Brief, *supra* note 146, at 20.

180. *Id.*

181. *Id.* at 20–22.

182. Lee, *supra* note 4, at 163–64.

183. *Id.* at 164 n.296.

courts has an undue preference for choosing an option framed as the status quo and for avoiding judicial commissions in situations of uncertainty.

The possible BLE-based justifications for this preference are unsuccessful. First, litigant loss aversion should not play a particularly large role in judges' thinking because the status quo as interpreted by the courts is often unclear and potentially involves a return to some state of affairs that has already since passed. Furthermore, the party that the court ultimately deems to be in the status quo position as a legal matter may not be the one with the more powerfully "endowed" entitlement, thus leading to a potential subversion of the very litigant-focused rationale that was supposed to justify the test in the first place.

Second, status quo bias provides no justification on its face, as that bias operates to change decision making purely based on an artifact of the decision process, not on anything about the choices themselves. Finally, to the extent that the omission bias has any basis as a useful rule of thumb, it is not appropriate to apply it to the actions of judges. When a judge elects not to intervene, he or she is making a decision that necessarily has an impact upon the parties before the court. Judicial "omissions" are not even omissions in the truest sense, and they certainly do not bear the same moral characteristics as omissions by ordinary people.

Going forward, I believe two courses of action are called for. First, those federal courts that continue to promulgate a heightened burden for status quo-altering preliminary injunctions should cease doing so and move toward the status quo-agnostic view expounded by most academics and many courts. Second, researchers may find it fruitful to put the BLE theories I have applied to this context into experimental form, possibly by surveying federal district judges in such a way as to elicit their views about mandatory and status quo-altering injunctions. Only through such experimental research can it be more rigorously demonstrated that bounded rationality is infecting this particular area of the law. If such a demonstration were made, it would further strengthen the case that this particular facet of the law—a barnacle attached to the law of remedies—should be scrubbed away.

—*James Powers*