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Thomas R. Lee

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Preliminary Injunctions and the Status Quo

Thomas R. Lee*

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Introduction

The federal courts of appeals are in substantial disarray on an issue of threshold importance to the issuance of preliminary injunctive relief. One set of circuits says that the traditional role of such relief is the preservation of the "status quo," and thus accords disfavored status to preliminary orders that are mandatory in form or that otherwise upset the status quo.¹ In these circuits, a party seeking a preliminary injunction must satisfy a heightened standard of proof requiring a clear and compelling showing of the propriety of such relief. Another set of circuits rejects this view. These circuits apply a uniform standard to all requests for preliminary relief.²

Despite the clear split of authority, the competing circuit opinions have made little effort to engage in any substantive dialogue on this issue. For the most part, each set of circuits has cited its own decisions in support of its own particular approach to the matter without any attempt at critical analysis of the competing position. This Article seeks to engage the debate that is currently lacking. It does so first by tracing the historical pedigree of the heightened standard and then by evaluating the role of the status quo under the predominant theoretical model offered to explain the role of preliminary relief. Ultimately, the Article concludes that the heightened standard is historically and theoretically unsound, and that the circuits that adopt a uniform standard have the better approach.

I. The Current Rift in the Circuit Courts

The Federal Rules of Civil Procedure do not prescribe a standard for the issuance of preliminary injunctions. Rule 65 addresses collateral requirements of notice, duration, form, and security, but leaves the threshold questions of whether and when a preliminary injunction should issue to the discretion of the courts in accordance with traditional principles of equity.³

1. See *infra* notes 18-55 and accompanying text.

2. See *infra* notes 56-72 and accompanying text.

3. FED. R. CIV. P. 65; see also *Vault Corp. v. Quaid Software, Ltd.*, 655 F. Supp. 750, 757 (E.D. La. 1987) (asserting that "[t]he grant or denial of a preliminary injunction rests in the

Despite the absence of a uniform rule on these threshold questions, the federal circuit courts are largely in agreement as to the substance of the standard that generally governs the issuance of a preliminary injunction. Although the precise verbal formulations often vary from circuit to circuit, it is generally agreed that the following factors are relevant:⁴ (1) the moving party's likelihood of success on the merits; (2) irreparable harm to the moving party if the preliminary injunction is improperly denied; (3) irreparable harm to the non-moving party if the preliminary injunction is improperly granted; and (4) the "public interest."⁵

discretion of the trial court"), *aff'd*, 847 F.2d 255 (5th Cir. 1988); CHARLES ALAN WRIGHT ET AL., 11A FEDERAL PRACTICE AND PROCEDURE § 2941 (2d ed. 1995) (asserting that "the substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by the rule and depend on traditional principles of equity jurisdiction"); Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 301 (1939) (indicating that Advisory Committee on rules "played quite safe and made very few changes in the existing practice" on preliminary injunctions). The notion that federal judicial power to issue a preliminary injunction derives from the inherent powers historically assumed by the courts of equity was reinforced by the Supreme Court's recent decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999) (declaring that district court lacked power to issue preliminary injunction freezing defendants' use of their unencumbered assets pending adjudication of rights to assets because historically such orders were not available from court of equity and thus were not within equitable powers conferred by Judiciary Act of 1789).

4. Previous critiques of the case law in this area lambasted the lower courts for their failure to agree on the number and substance of the relevant factors. See Linz Audain, *Of Posner, and Newton, and Twenty-First Century Law: An Economic and Statistical Analysis of the Posner Rule for Granting Preliminary Injunctions*, 23 LOY. L.A. L. REV. 1215, 1222 (1990) (asserting that "the federal courts use two, three, four and five-step standards without any apparent logic to their choice" and that "even their 'four-part' standards differ from each other"); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978) (decrying "dizzying diversity of formulations" in courts); Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 184 (1984) (lamenting "widespread disagreement among the courts of appeals regarding the applicable criteria"). Such criticism is overstated, at least as applied to the case law as it stands today. Perhaps as a result of this and other criticism, the federal circuits recently have come to agree that the "applicable criteria" are the four factors set forth below. And although the circuits sometimes differ in their articulation of the factors, the differences generally do not reflect substantive disagreement as to the proper areas of inquiry. See, e.g., *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 385 (7th Cir. 1984) (concluding that "apparent discord" in Seventh Circuit as to proper preliminary injunction standard is "mostly verbal" and expressing court's view that "[b]eneath the welter of apparently conflicting precedents" there is "agreement" on factors set forth above); WRIGHT ET AL., *supra* note 3, § 2948.3 (concluding that "[t]he courts use a bewildering variety of formulations of the need for showing some likelihood of success" but that "verbal differences do not seem to reflect substantive disagreement").

5. See, e.g., *Pitt News v. Fisher*, 215 F.3d 354, 365-66 (3d Cir. 2000) (indicating that district court must consider "(a) likelihood that plaintiff will prevail on merits of its claim at final hearing; (b) extent to which plaintiff is being irreparably harmed by conduct complained of; (c) extent to which defendant would suffer irreparable harm if preliminary injunction is

issued; and (d) public interest"); *Entergy, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) (stating that relevant factors are "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest"); *Jeneric/Pentron, Inc. v. Dillon Co.*, 205 F.3d 1377, 1380 (Fed. Cir. 2000) (requiring movant to show "(1) a reasonable likelihood of success on the merits, (2) the prospect of irreparable harm, (3) a balance of the parties' hardships in favor of injunction, and (4) no potential injury to an important public interest"); *Ciena Corp. v. Jarrard*, 203 F.3d 312, 322 (4th Cir. 2000) (indicating that court must consider "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest"); *United States v. Power Eng'g Co.*, 191 F.3d 1224, 1230 (10th Cir. 1999) (indicating that preliminary injunction is proper where "the moving party shows: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) the threatened harm outweighs injury which the injunction may cause the opposing party; and (4) the injunction will not be adverse to the public interest"), *cert. denied*, 120 S. Ct. 1718 (2000); *Tefel v. Reno*, 180 F.3d 1286, 1295 (11th Cir. 1999) (stating that moving party must establish "(1) a substantial likelihood of success on the merits, (2) a threat of irreparable injury, (3) that its own injury would outweigh the injury to the nonmovant, and (4) that the injunction would not disserve the public interest"), *cert. denied*, 120 S. Ct. 1257 (2000); *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360 (D.C. Cir. 1999) (establishing that court must consider whether "(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will substantially injure the other party; and (4) the public interest will be furthered by an injunction"); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (stating that district court must consider "(1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest"), *cert. denied*, 526 U.S. 1087 (1999); *Platinum Home Mortgage Co. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 726 (7th Cir. 1998) (asserting that moving party must demonstrate that "(1) it has a reasonable likelihood of success on the merits of its claim; (2) no adequate remedy at law exists; (3) it will suffer irreparable harm if preliminary injunctive relief is denied; (4) the irreparable harm it will suffer without preliminary injunctive relief outweighs the irreparable harm the nonmoving party will suffer if the preliminary injunction is granted; and (5) the preliminary injunction will not harm the public interest"); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996) (indicating that "trial courts must consider (1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest"); *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995) (establishing that "a party seeking injunctive relief ordinarily must show: (a) that it will suffer irreparable harm in the absence of an injunction and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor"); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (explaining that moving party has burden of showing "a substantial likelihood of success on the merits; a substantial threat that the will suffer irreparable injury if the injunction is not issued; that the threatened injury to him outweighs any damage the injunction might cause to the non-movant; and that the injunction will not disserve the public interest"); *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) (establishing that moving party must show "(1) a combination of probable success on the merits

Two dominant standards have emerged for balancing these factors. Under the first, the moving party's burden is to show that it is likely to succeed on the merits and that it will suffer irreparable harm if the injunction is denied. Under the second, the moving party need only establish "serious questions going to the merits" if it can also demonstrate that the "balance of hardships" tips "decidedly" in its favor.⁶ In most circuits, these are alternative standards that represent two ends of a sliding scale or continuum; either showing will support preliminary relief, and a stronger showing on one factor may compensate for a weaker showing on the other.⁷

Although the Supreme Court's jurisprudence is relatively sparse in this area, its precedents are largely in line with the prevailing, general approach

and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor").

6. *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995).

7. See *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 160 (3d Cir. 2000) (recognizing that grant or denial requires "delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief"); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997) (indicating that "the degree of likelihood of success that need be shown to support a preliminary injunction varies inversely with the degree of injury the plaintiff might suffer"); *Cityfed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (explaining that preliminary injunction "may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury"); *Walmer v. United States Dept. of Defense*, 52 F.3d 851, 854 (10th Cir. 1995) (adopting "modified likelihood of success requirement" under which moving party may avoid establishing "substantial likelihood of success" by demonstrating that balance of hardships is in its favor and by showing "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation"); *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 779-80 (2d Cir. 1994) (finding that preliminary injunction may be granted upon demonstration of irreparable harm and either likelihood of success on merits or sufficiently serious questions going to merits to make them fair ground for litigation and balance of hardships tipping decidedly in moving party's favor); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (noting that two formulations are "alternative" tests, but that "even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits"); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992) (expressly identifying "sliding scale" approach, under which "the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side"); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) ("As the balance tips away from the plaintiff, a stronger showing on the merits is required."); *Vargas-Figueroa v. Saldana*, 826 F.2d 160, 162 (1st Cir. 1987) (recognizing district court's authority to "weigh" relative harms to parties "in light of the plaintiff's likelihood of eventual success on the merits"); *Apple Barrel Prods. Inc. v. Beard*, 730 F.2d 384, 389 n.11 (5th Cir. 1984) (recognizing that court is to consider sliding scale analysis when reviewing four factors for preliminary injunction); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (noting that "where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less").

mapped out above.⁸ The Court's first substantive decision in this area came in *Russell v. Farley*.⁹ In the course of upholding the federal courts' power to order damages under a security bond issued in connection with a preliminary injunction, the *Russell* Court referred in dicta to the "settled rule of the Court of Chancery, in acting on applications for injunctions," that preliminary relief depends on a comparison of the balance of the harms to the two parties.¹⁰ Under this rule, the court is "to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused."¹¹ *Russell* also contains the seeds of the modern courts' focus on the moving party's likelihood of success on the merits: "[I]f the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party."¹²

Thus, as early as *Russell*, the Supreme Court had adopted at least three of the four factors currently applied by the courts. (The final factor – the public interest – was added to the framework in the late 1930s.¹³) Moreover, *Russell*'s dicta also is consistent with the notion of a "sliding scale" – if the moving party's "legal right is doubtful," then the court should be more "reluctant" to enter the preliminary injunction. Contemporaneous treatises reinforced that the converse standard also applied: if the moving party's legal right was "plain and free from doubt," then preliminary relief would be more clearly appropriate.¹⁴

The modern Court's opinions are generally consistent with this approach. Although the Court occasionally has characterized the moving party's showing of success on the merits as a threshold element that must be established

8. See Wolf, *supra* note 4, at 174 (asserting that Supreme Court has "not established hard and fast rules" regarding issuance of preliminary injunctions and that, "[a]t best, the Supreme Court precedents serve as points of departure for federal appellate decisions which quickly move in other directions").

9. 105 U.S. 433 (1881). For a discussion of some earlier cases that touched on preliminary relief more generally, see Wolf, *supra* note 4, at 174-76.

10. *Russell v. Farley*, 105 U.S. 433, 438 (1881).

11. *Id.* (citing W. KERR, INJUNCTIONS IN EQUITY 209-10 (1871)).

12. *Id.*; see also Wolf, *supra* note 4, at 177-78 (asserting that "current standards for preliminary injunctions" at time *Russell* was decided indicated that "if the movant could demonstrate a clear legal right, 'plain and free from doubt,' the injunction would issue," whereas "if the legal right was in doubt, then the movant would have to show a balance of hardships in her favor" (quoting KERR, *supra* note 11, at 221-22)).

13. See *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939) (stating that it is "the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all including the public – whose interests the injunction may affect"); see also Wolf, *supra* note 4, at 180 (asserting that *Inland Steel* was first case in which Court "emphasized . . . the need to evaluate the impact of a preliminary injunction on the public interest").

14. Wolf, *supra* note 4, at 177-78 (quoting KERR, *supra* note 11, at 220).

without regard to the balance of hardships,¹⁵ more recent decisions reinforce the relevance of all four factors and suggest that they should be evaluated on a sliding scale.¹⁶

In the midst of general agreement¹⁷ as to the substance of the threshold preliminary injunction standard has arisen the sticking point that is the focus of this Article. The current debate in the federal courts is whether the moving party should face a stiffer burden where it seeks to alter the "status quo" than it does when it seeks merely to preserve it.

A. A Heightened Burden: The Tenth, Ninth, and Second Circuits

Recent decisions in three of the Circuit Courts of Appeals have flouted this prevailing wisdom.¹⁸ The Tenth, Ninth, and Second Circuits all have

15. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (explaining that plaintiff must show that without preliminary injunction "he will suffer irreparable injury and also that he is likely to prevail on the merits"); *Sampson v. Murray*, 415 U.S. 61, 90, n.63 (1974) (deciding that district court was entitled to resolve issue of likelihood of success, but that issue did not discharge court from finding that irreparable injury will occur); *Ex parte Young*, 209 U.S. 123, 166-67 (1908) (stating that preliminary injunctions should not issue to restrain enforcement of state statutes unless case is "reasonably free from doubt" and injunction will prevent "great and irreparable injury"); see also *Wolf*, *supra* note 4, at 178-79 (discussing *Young* and other 20th-century decisions in which Court arguably ignored balance of hardships as factor).

16. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) (explaining that "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" and that "particular regard should be given to the public interest"); *id.* at 545 (using likelihood of success on merits as basis for evaluating "balance of harms" to parties); see also *Hilton v. Braunskill*, 481 U.S. 770, 776-78 (1987) (adopting balancing approach in analogous context of deciding whether successful habeas corpus petitioners should be released pending government's appeal).

17. The degree of consensus should not be overstated. The courts have not offered a unified, coherent vision of the proper standard on preliminary injunctions. See Leubsdorf, *supra* note 4, at 526 (concluding that "[t]he various standards articulated by courts and treatises rest on no coherent theory about the purpose of preliminary relief"); Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 841 (1989) (asserting that "lack of uniformity" as to proper standard has "caused havoc in litigation"); *id.* at 846 & n.33 (suggesting that Supreme Court's failure to articulate clear standard has left lower courts "free to employ a dizzying array of standards" and that commentators agree that "the time has come for a uniform standard and that the Supreme Court should address this question"). With a few exceptions noted below, the courts have failed to explain the logic of their choice of the relevant factors, much less to explain what this logic says about the proper interplay between the four factors. Not surprisingly, then, the courts "use a bewildering variety of formulations" to express the threshold standard. See *WRIGHT ET AL.*, *supra* note 3, § 2948.3, at 184 (discussing various formulations of "likelihood of success" factor). For the most part, however, the "verbal differences" between the various formulations in the circuits are semantic and "do not seem to reflect substantive disagreement." *Id.* at 187-88.

18. Other circuits occasionally have suggested that the status quo is relevant, but those circuits have failed to articulate the precise effect on the moving party's burden of an injunction that seeks to alter the status quo. See *infra* notes 56-59.

adopted a bifurcated preliminary injunction standard. This standard imposes a heavier burden where the moving party seeks to upset the status quo.

1. The Tenth Circuit

The Tenth Circuit adopted a variable standard in *SCFC ILC, Inc. v. VISA USA, Inc.*¹⁹ In that case, plaintiff SCFC sought a preliminary injunction requiring defendant Visa to process SCFC's subsidiary's order for 1.5 million Visa credit cards.²⁰ Visa had rejected the order upon learning that the subsidiary had been acquired by SCFC, which in turn was wholly owned by the issuer of the "Discover" credit card (Sears).²¹

The district court granted SCFC's motion, but the Tenth Circuit reversed. According to the Tenth Circuit, the district court failed to take account of the fact that the preliminary relief sought by SCFC "would clearly have altered the status quo" in that at the time of the court's intervention plaintiff "was without the new cards, and Visa was continuing to refuse to approve the order."²² Because the Tenth Circuit thought that such an injunction required the movant to "show that on balance, the four factors weigh heavily and compellingly in his favor," and because the district court proceeded without the additional thumb on the scale that this standard prescribes, the court vacated the district court's preliminary injunction.²³

In applying this heightened standard, the Tenth Circuit concluded that SCFC had failed to establish "a substantial likelihood that it will succeed on the merits" since the issues were "complex" and would require "significant development before th[e] court could posit a meaningful prediction as to the strength of [SCFC's] claims and the eventual outcome on the merits."²⁴ Moreover, the court concluded that SCFC had failed to establish that it would suffer irreparable harm without the injunction, because the only evidence was its own "business speculation" that competitors would "undercut its program by offering the same product first" if SCFC were precluded from the mar-

19. 936 F.2d 1096 (10th Cir. 1991).

20. *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1097-98 (10th Cir. 1991).

21. *Id.* at 1098.

22. *Id.* at 1099.

23. *Id.* The Tenth Circuit has applied this heightened standard in subsequent cases. *See United States v. Power Eng'g Co.*, 191 F.3d 1224, 1235 (10th Cir. 1999) (affirming district court's entry of "mandatory" preliminary injunction requiring defendant to comply with "financial assurance" regulations adopted by the Colorado Department of Public Health and Environment), *cert. denied*, 120 S. Ct. 1718 (2000); *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1542 (10th Cir. 1994) (emphasizing that "[m]andatory preliminary injunctions impose 'an even heavier burden [on the movant] of showing that the four factors listed above weigh heavily and compellingly in movant's favor'" (quoting *SCFC ILC*, 936 F.2d at 1098)).

24. *SCFC ILC*, 936 F.2d at 1101.

ket.²⁵ Finally, the Tenth Circuit found that Visa itself would suffer irreparable harm if enjoined to issue the Visa cards in that the goodwill associated with the Visa trademark would have been misappropriated by SCFC, and that there was no evidence of "any credible significant harm to the public that would be caused by a delay" in issuance of the cards by SCFC.²⁶

2. The Ninth Circuit

The Ninth Circuit has adopted a similar approach. Consider *Stanley v. University of Southern California*.²⁷ The plaintiff in *Stanley* was the former head coach of the women's basketball team at the University of Southern California (USC). She sought a preliminary injunction "compelling USC to install [her] as the head coach of the women's basketball team and to pay her \$28,000 a year more than she received when her employment contract expired."²⁸ The district court denied plaintiff's motion, and the Ninth Circuit affirmed. The court first suggested that the proper standard on a motion for preliminary injunction depends on whether the relief sought is a "prohibitory injunction," which "preserves the status quo," or a "mandatory injunction," which "goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored."²⁹ In the latter category of cases, the Ninth Circuit held that "the district court should deny such relief 'unless the facts and law clearly favor the moving party.'³⁰ Because the relief sought by the plaintiff "would have forced USC to hire a person at a substantially higher rate of pay than she had received prior to the expiration of her employment contract," the court found that the motion sought to change the status quo and thus "was subject to a higher degree of scrutiny because such relief is particularly disfavored under the law of this circuit."³¹

Under this heightened standard, the Ninth Circuit held that the plaintiff was not entitled to a preliminary injunction. The plaintiff had "failed to present facts clearly showing that USC was guilty of sex discrimination in its negotiations for a new employment contract" since the "thrust" of her claim was her position that "she [was] entitled, as a matter of law, 'to make the same salary as was paid to the Head Men's Basketball Coach at USC,'" and since "[n]one of the authorities she ha[d] cited support[ed] this theory."³² More-

25. *Id.* at 1100.

26. *Id.* at 1101.

27. 13 F.3d 1313 (9th Cir. 1994).

28. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

29. *Id.* (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

30. *Id.*

31. *Id.*

32. *Id.* at 1321.

over, although plaintiff had "presented sufficient facts from which it could be inferred that she suffered emotional distress, loss of business opportunity, and injury to her reputation," the court concluded that there was no proof of any causal nexus between this harm and any wrongful conduct of USC, and in any event "[t]he record support[ed] the district court's finding that USC would suffer some hardship if the preliminary injunction issued."³³

3. *The Second Circuit*

Finally, the Second Circuit adhered to the status quo standard in its decision in *Tom Doherty Associates, Inc. v. Saban Entertainment*.³⁴ The plaintiff in *Tom Doherty* was a book publisher that had entered into an exclusive contract to publish and promote children's books based on defendant Saban Entertainment's library of children's television programming. When Saban's "Power Rangers" property "became a huge success – almost an obsession – with children," the contract's "exclusive rights provisions" became "an albatross rather than a necessary inducement" for the plaintiff publisher.³⁵ Accordingly, Saban adopted a restrictive interpretation of such exclusive rights provisions, entered into additional licensing agreements with other publishing houses, and found itself the target of the plaintiff's motion for a preliminary injunction requiring Saban to abide by its exclusive deal with the plaintiff and to terminate its publishing contracts with plaintiff's competitors.³⁶

The district court granted plaintiff's motion. The Second Circuit reversed. In so doing, it indicated that the party moving for a preliminary injunction must "meet a higher standard where: (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits."³⁷ Specifically, the court explained that "a mandatory injunction should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious

33. *Id.* at 1324-25. Other recent Ninth Circuit decisions applying this standard include *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234-36 (9th Cir. 1999) (affirming district court's preliminary injunction against enforcement of annual limit on suspensions of deportation imposed under Illegal Immigration Reform and Immigrant Responsibility Act of 1996) and *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (affirming preliminary injunction requiring defendant pharmaceutical company to provide experimental medication designed for treatment of chronic fatigue syndrome under contract that provided that medication would be provided to those who participated in trial so long as certain conditions were met).

34. 60 F.3d 27 (2d Cir. 1995).

35. *Tom Doherty Assocs., Inc. v. Saban Entm't*, 60 F.3d 27, 31 (2d Cir. 1995) (noting that "huge success" of Power Rangers was established by "the record" and that "there is no danger of this panel resorting to personal experience" on this matter).

36. *Id.* at 32.

37. *Id.* at 33-34.

damage will result from a denial of preliminary relief."³⁸ In other words, a party seeking to upset the status quo must "demonstrate a greater likelihood of success."³⁹

Unlike the Tenth and Ninth Circuits, the Second Circuit has suggested that this standard is tainted by some definitional ambiguities. In the Second Circuit's view, "[d]etermining whether the status quo is to be maintained or upset has led to distinctions that are 'more semantic[] than substantive.'"⁴⁰ For example, the Second Circuit has suggested that the proposed dichotomy between prohibitory and mandatory injunctions is illusory, in that "[a]n injunction that prohibits a party from refusing to permit some act may, as a practical matter, alter the status quo," and "many mandatory injunctions can be stated in seemingly prohibitory terms."⁴¹ In the specific context of breach of contract cases, the Second Circuit has posited that "[a] plaintiff's view of the status quo is the situation that would prevail if its version of the contract were performed," while "[a] defendant's view of the status quo is its continued failure to perform as the plaintiff desires."⁴²

Despite these confessions, the Second Circuit has adhered to the variable status quo standard. The *Tom Doherty* decision applied "the heightened standard of a clear or substantial showing of a likelihood of success."⁴³ This standard was deemed applicable because the injunction sought by the plaintiff "might be considered mandatory" in that it "arguably alter[ed] the status quo by doing more than is required by the Agreement" between the parties.⁴⁴ Specifically, the Second Circuit noted that the preliminary injunction entered by the district court required Saban to allow the publisher to license one "juvenile story book" involving the Power Rangers, whereas the contract itself merely gave the publisher "a right of first refusal if Saban decided to license

38. *Id.* at 34 (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

39. *Id.*

40. *Id.* (quoting *Abdul Wali*, 754 F.2d at 1025).

41. *Id.* at 34 (citing *Abdul Wali*, 754 F.2d at 1026 (noting that injunction requiring prison officials to deliver to prisoners published report discussing prison conditions was actually "prohibitory in nature" because it prevented prison officials from interfering with delivery of documents sent to prisoners by third party)). See also *SEC v. Unifund SAL*, 910 F.2d 1028, 1040 (2d Cir. 1990) (noting that injunction prohibiting two foreign securities purchasers from violating securities laws in future is "prohibitory in form," but that it "accomplishes significantly more than preservation of the status quo"); *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133-34 (2d Cir. 1997) (stating that injunction prohibiting NCAA "from interfering with [plaintiff] Phillip's ability to receive aid and play basketball" is "more appropriately viewed as prohibitory, because, by its terms, it restrains the NCAA from acting affirmatively to interfere with Fairfield's decision to award plaintiff a scholarship and to allow him to play basketball").

42. *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995).

43. *Id.* at 35.

44. *Id.*

such works."⁴⁵ As if to emphasize its discomfort with the status quo standard, however, the court also offered an alternative basis for its application of a heightened burden: that the "injunction thus gives [the publisher] rights that cannot be undone" in that the license in question "will continue to allow [the publisher] to publish the one work in question even if Saban ultimately prevails" on the merits.⁴⁶

The Second Circuit held that the publisher had carried its heightened burden in *Tom Doherty*.⁴⁷ The court found the publisher's interpretation of the contract "virtually indisputable," so that the publisher had shown "a clear or substantial likelihood of success on the merits."⁴⁸

More recently, the Second Circuit applied the status quo standard in its decision in *Phillip v. Fairfield University*.⁴⁹ In that case, plaintiff Darren Phillip had been offered a scholarship to play basketball at Fairfield University, but subsequently was declared ineligible under the NCAA's academic guidelines because he had failed to complete thirteen "core" high school courses required by the NCAA. After Fairfield's request for a waiver of this requirement was denied by the NCAA, Phillip filed suit for breach of the covenant of good faith and fair dealing and sought a preliminary injunction prohibiting the NCAA from interfering with his opportunity to play basketball for Fairfield. The district court granted this injunction, "reasoning principally that Phillip both would suffer irreparable harm if the injunction were denied and was likely to prevail on his argument that the NCAA breached its duty to Phillip by arbitrarily refusing to grant him a waiver of its eligibility requirements."⁵⁰

The Second Circuit remanded the case on the ground that the district court's assessment of Phillip's likelihood of success was based on a misunderstanding of Connecticut law,⁵¹ but not before expressing its agreement with the district court that the injunction sought by Phillip was most "appropriately viewed as prohibitory," and thus not subject to the heightened standard.⁵²

45. *Id.* In entering this injunction, the district court explained that it:

[C]onsidered this relief to be necessary because Saban ha[d] licensed others to publish children's books based on the Power Rangers without affording [the publisher] a right of first refusal, and, the tastes of children being fleeting, [the publisher] must be given a chance to publish now lest commercially effective relief be unavailable after a trial.

Id.

46. *Id.*

47. *Id.* at 37.

48. *Id.* at 35, 37.

49. 118 F.3d 131 (2d Cir. 1997).

50. *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir. 1997).

51. *Id.* at 135.

52. *Id.* at 134.

Specifically, the Second Circuit explained that the injunction's prohibitory nature was evident in its "terms":

[I]t restrains the NCAA from acting affirmatively to interfere with Fairfield's decision to award plaintiff a scholarship and to allow him to play basketball. Put differently, by prohibiting the NCAA from further interfering with Phillip's ability to receive aid and play basketball, the injunction permitted Fairfield and Phillip to continue the relationship to which they had agreed – that between student-athlete and university.⁵³

Although the court reiterated its concession that the distinction at issue "is not without ambiguities,"⁵⁴ it also articulated its conclusion in terms of the "status quo," explaining that "as a practical matter, the district court's order preserved the status quo" in the sense that "Phillip's status as a college student at Fairfield was . . . preserved by the injunction" because his ability to attend school there depended on the "financial aid" made available by "the court's order."⁵⁵

B. A Uniform Standard: The Third, Fifth, and Sixth Circuits

In many of the circuits outside the Second, Ninth, and Tenth, the state of the status quo standard has been somewhat unclear. Many circuit court decisions have offered the proposition that the preservation of the status quo is the "purpose" of preliminary relief.⁵⁶ Others generally have articulated the view that mandatory injunctive relief that upsets the status quo is "disfavored"⁵⁷ and should be "cautiously viewed and sparingly used."⁵⁸ Beyond these

53. *Id.*

54. *Id.* at 133 (quoting *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995)).

55. *Id.* at 134.

56. *See, e.g.,* *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) ("The primary function of a preliminary injunction is to preserve the status quo until, upon a final hearing, a court may grant full, effective relief."); *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) ("The purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly and fully investigated" (quoting *Meiselman v. Paramount Film Distrib. Corp.*, 180 F.2d 94, 97 (4th Cir. 1950))); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (noting that "the purpose of granting interim injunctive relief" is to "maintain the status quo pending a final determination of the merits of the suit").

57. *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987) (suggesting that "First Circuit authority does no more than suggest that courts disfavor injunctions that disturb, rather than preserve, the status quo"); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (holding that "[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored").

58. *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978), *rev'd*, 615 F.2d 749 (7th Cir. 1980); *see also* *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) (suggesting that district

general cautionary tones, however, these courts have offered little in the way of any specific indication whether the status quo should have any substantive effect on the availability of relief.⁵⁹ In fact, 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.⁶⁰

Other courts have rejected the notion of a variable standard by their definition of the status quo. The Third Circuit has suggested, for example, that the status quo standard is merely a "summary explanation of the need to protect the integrity of the applicable dispute resolution process."⁶¹ Thus, according to the Third Circuit, the four standard factors embraced in all circuits adequately capture the goal of preserving the status quo: to enable the trial court "to attempt to minimize the probable harm to legally protected interests between the time that the motion for a preliminary injunction is filed and the time of the final hearing."⁶² The Fifth Circuit has adopted a similar approach – albeit in a

court's authority "to issue a preliminary injunction, especially a mandatory one should be sparingly exercised"); *Celebrity, Inc. v. Trina, Inc.*, 264 F.2d 956, 958 (1st Cir. 1959) (suggesting that there is "less reluctance to issue a preliminary injunction merely prohibitory in form that is aimed at preserving the status quo").

59. See *Textron*, 836 F.2d at 10 (refusing to articulate specific "stricter standard" but suggesting that courts should "disfavor" injunctions that disturb status quo); *Ferry-Morse*, 729 F.2d at 593 (acknowledging defendant's argument that "the granting of preliminary injunctions is not favored unless the right to such relief is clearly established," but nevertheless finding that "this [is] a case where mandatory relief could properly be found to be necessary to prevent irreparable harm to plaintiff"); *Wetzel*, 635 F.2d at 286 (offering unhelpful standard that mandatory relief that alters status quo "normally should be granted only in those circumstances when the exigencies of the situation demand such relief").

60. Several Fourth Circuit decisions point in opposite directions. Compare *Wetzel*, 635 F.2d at 286 (suggesting that mandatory relief that alters status quo should be "sparingly exercised") with *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 360 (4th Cir. 1991) (concluding that "[t]he phrase, 'preservation of the status quo' . . . does not symbolize an additional separate test," and that "the line between prohibiting the specific enforcement of a statute and mandating another approach to enforcement is often blurry," and citing *Wetzel* for proposition that standard four-factor test would apply even if injunction were "classified as 'mandatory'"). See also *Tiffany v. Forbes Custom Boats, Inc.*, No. 91-3001, 1992 U.S. App. LEXIS 6268, at *22 (4th Cir. Apr. 6, 1992) (unpublished per curiam opinion) (citing *SCFC ILC* for proposition that a "request for mandatory relief" is "subjected to a more exacting standard of review"). Fifth Circuit decisions are similarly at odds with each other. Compare *Canal Auth. of Fla v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (rejecting notion that there is "any particular magic in the phrase 'status quo'" and deciding that "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo") with *Martinez*, 544 F.2d at 1243 ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party."). For a discussion of the *Martinez* case in historical perspective, see *infra* notes 196-211 and accompanying text.

61. *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 814 (3d Cir. 1989).

62. *Id.* (quoting *Constructors Assoc. of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978)).

decision that is flatly inconsistent with subsequent Fifth Circuit authority.⁶³ Under the first Fifth Circuit decision, the "status quo" is relevant only where "the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy."⁶⁴

The approach of the Third and Fifth Circuits consciously focuses on the "irreparable harm" that might be suffered by the respective parties, not on some preconceived definition of the status quo. "If the existing 'status quo' is currently causing one of the parties irreparable injury and thereby threatens to nullify" the integrity of the process, "then it is necessary to alter the situation to prevent the injury."⁶⁵

The Sixth Circuit is the court that most explicitly has confronted and rejected the heightened burden adopted in the Second, Ninth, and Tenth Circuits. Most recently, in *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*,⁶⁶ the Sixth Circuit confirmed its position 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."⁶⁷ In so holding, the court expressly rejected "the Tenth Circuit's 'heavy and compelling' standard" and held "that the traditional preliminary injunction standard – the balancing of equities – applies to motions for mandatory preliminary injunctive relief as well as motions for prohibitory preliminary injunctive relief."⁶⁸

Under this standard, the Sixth Circuit affirmed the district court's entry of a preliminary injunction requiring the defendant state transportation agency to accept plaintiff's "proposed wrap-around bus advertisement."⁶⁹ Defendant had rejected the ad as "too controversial and not aesthetically pleasing,"⁷⁰ and

63. See *supra* note 60.

64. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

65. *Ortho Pharm.*, 882 F.2d at 814. The Fifth Circuit's repudiation of the status quo standard is even more explicit. In *Canal Authority*, the Fifth Circuit rejected the notion that there was "any particular magic in the phrase 'status quo,'" stating that "[t]he focus must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Authority*, 489 F.2d at 576. According to the Fifth Circuit, although "[t]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits," this purpose is "not always" furthered "by preservation of the status quo." *Id.*

66. 163 F.3d 341 (1998).

67. See *United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (citing *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978) (rejecting notion of "any particular magic in the phrase 'status quo,'" and recognizing that "if the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury").

68. *United Food & Commercial Workers Union*, 163 F.3d at 348.

69. *Id.* at 346.

70. *Id.*

the plaintiff union sued on the theory that "the rejection of the ad violated its First Amendment rights."⁷¹ The Sixth Circuit upheld the preliminary injunction without pausing to characterize it as mandatory or prohibitory or to define the status quo. Instead, the court simply concluded that the plaintiff was likely to succeed on the merits and that the balance of hardships favored the plaintiff because "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."⁷²

II. The "Status Quo" Revisited

The circuit split that is the subject of this Article is easily defined: one set of circuits concludes that the "status quo" is a critical factor in determining the appropriate preliminary injunction standard, while another holds that it is utterly irrelevant.⁷³ Although the essence of the conflict is relatively clear on the face of the courts' opinions, the analytical substance of the debate has been quite opaque. None of the circuits have offered much in the way of a theoretical framework for addressing the question. Both sides tend to cite their own prior holdings,⁷⁴ snippets of dicta (such as the general notion that the purpose of preliminary relief is to preserve the status quo),⁷⁵ and *ipse dixit* conclusions.

This Article proposes a twofold theoretical framework to fill this void. First, the Article traces the historical pedigree of the equity courts' consideration of the "status quo." Second, the Article analyzes the relevance of the status quo under the predominant analytical framework offered to explain the role of preliminary injunctions.

A. Historical Foundations of the Preliminary Injunction Standard

The Supreme Court's recent decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*⁷⁶ reinforces the role of history in framing the scope of equitable power in the federal courts.⁷⁷ In that case, American investment funds had purchased unsecured, guaranteed notes from a Mexican holding company.⁷⁸ When the holding company defaulted on the notes, the

71. *Id.* at 347.

72. *Id.* at 362-63 (quoting *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989)).

73. See *supra* note 7 and accompanying text (discussing two dominant standards that have emerged regarding preliminary injunction factors).

74. See discussion *infra* notes 192-95, 224-27 (noting Ninth, Tenth, and Second Circuit's tendency to cite their own holdings).

75. See *supra* note 59.

76. 527 U.S. 308 (1999).

77. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

78. *Id.* at 310.

investment funds accelerated the principal, filed suit for breach of contract, and sought a preliminary injunction against the holding company's transfer of unencumbered assets pending the adjudication of the rights to those assets.⁷⁹ The district court granted the investment funds' motion for preliminary injunction on the theory that such an order was necessary to prevent the frustration of a judgment against the holding company in the event of its insolvency.⁸⁰ The Second Circuit affirmed, but the Supreme Court reversed on a five to four vote.⁸¹

The Court's decision turned primarily on its understanding of the historical equitable power as it existed in the eighteenth century.⁸² Because "[t]he Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits . . . in equity,'" the Court began with the premise that "the 'jurisdiction' thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."⁸³ Under its view of the historical practice of the courts, the preliminary injunction entered in *Grupo Mexicano* was inappropriate because it was inconsistent with the historical "general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property."⁸⁴

Thus, *Grupo Mexicano* indicates that history is a crucial guidepost in evaluating the scope of federal equitable power. If the "principles of the system of judicial remedies" administered by the English Court of Chancery assigned doctrinal significance to the "status quo," then the bifurcated standard adopted in the Second, Ninth, and Tenth Circuits may be in line with the historical equitable jurisdiction conferred on the federal courts.

Despite the crucial role of history, the courts have made little effort to trace the historical pedigree of the judicial treatment of the status quo. If they had done so, they would have found that the courts' discussion of the status quo finds its roots in the nineteenth century courts of Chancery, but that the

79. *Id.* at 311-312.

80. *Id.* at 312.

81. *Id.* at 309.

82. *Id.* at 318-319.

83. *Id.* at 318 (quoting Judiciary Act of 1789, 1 Stat. 78, § 11; *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939)).

84. *Id.* at 321. The dissent accepted the propriety of the majority's historical inquiry, but complained that the majority's analysis "relie[d] on an unjustifiably static conception of equity jurisdiction." *Id.* at 336 (Ginsburg, J., dissenting). In the dissent's view, the Court had "never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor," but instead always had "valued the adaptable character of federal equitable power." *Id.*

status quo was not given any independent doctrinal significance during this period.⁸⁵ Similarly, Chancery courts in the same era began to advert to a distinction between mandatory and prohibitory injunctions, but again they did not ascribe any controlling doctrinal significance to the distinction.⁸⁶ As described in detail below, judicial adoption of a bifurcated preliminary injunction standard has only the shallowest of historical roots, and thus cannot be justified on historical grounds.

1. *The Status Quo in the Courts of Chancery*

Advocates of the bifurcated standard would have a difficult time tracing the roots of the status quo criterion to the eighteenth-century Court of Chancery. In fact, historical commentators generally have agreed that the modern notion of a special standard for preliminary injunctions did not take hold until well into the nineteenth century.⁸⁷ Before that era, "the interlocutory injunction was not yet regarded as an extraordinary decree requiring special justification," and "[t]he cases concentrated on the availability of injunctive relief, not [on] whether it should be preliminary or final."⁸⁸

The seeds of the modern notion of a special standard for preliminary injunctions were sown in the seventeenth and eighteenth centuries. During this era, the Court of Chancery began to speak in terms of irreparable harms and of an assessment of the outcome on the merits. In *Tonson v. Walker*,⁸⁹ for example, the Lord Chancellor proceeded on the premise that "if the case is doubtful, that may be a ground to grant an injunction until the matter can be considered at the hearing."⁹⁰ In other cases, the Chancellor expressly began to speak of balancing hardships, concluding in one case that an interlocutory injunction "was very proper to stay [defendants] from doing an act, which if it turned out they had no right to do, would be irreparable,"⁹¹ while refusing in another to enjoin defendants because "in case the right should be found

85. See *infra* notes 93-138 and accompanying text (discussing Chancery courts' use of 'status quo').

86. See *infra* notes 141-66 and accompanying text.

87. See Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles from the Past Offer Any Guidelines to Decisionmakers in the Future?*, 36 ALA. L. REV. 1, 5 (1984) ("Not until the nineteenth century did courts begin to formulate standards for granting or denying preliminary injunctions."); Leubsdorf, *supra* note 4, at 527-28 (concluding that "[t]he idea that there should be a single standard for all preliminary injunction cases emerged in nineteenth-century England").

88. See Leubsdorf, *supra* note 4, at 528.

89. 36 Eng. Rep. 1017 (Ch. 1752).

90. *Tonson v. Walker*, 36 Eng. Rep. 1017, 1020 (Ch. 1752).

91. *Mogg v. Mogg*, 21 Eng. Rep. 432 (Ch. 1786).

with them, they would by such prohibition receive a prejudice that he could not compensate nor make good to them."⁹²

By the nineteenth century, the Court of Chancery first began to speak of the role of preliminary injunctions in preserving the "status quo."⁹³ The court's seminal use of this phrase seems to have appeared in *Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co.*⁹⁴ In that case, the plaintiff Great Western Railway Co. entered into a contract to purchase the defendant railway upon its completion.⁹⁵ The contract provided that all parties would concur in an application to Parliament to secure any necessary powers to carry the agreement into effect.⁹⁶ Before the contract was fulfilled, defendant began to construct its railway in a manner inconsistent with the contract and took steps toward selling the railway to a third party.⁹⁷ Great Western sued for specific performance and sought a preliminary injunction against the defendant's disposition of its railway; the Court of Chancery affirmed the issuance of such injunctive relief.⁹⁸ In so doing, Lord Cottenham articulated the purpose of preliminary relief in terms familiar to the modern ear:

It is certain that the Court will in many cases interfere and *preserve property in statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having means of forming, any opinion as to such rights. . . . It is true that the Court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will *preserve the property* until such question can be regularly disposed of.⁹⁹

92. See *Hills v. Univ. of Oxford*, 27 Eng. Rep. 1194 (Ch. 1750) (refusing to grant interlocutory injunction against defendants' publication of bibles).

93. See Leubsdorf, *supra* note 4, at 534 (noting that "[e]mphasis on preserving the status quo as a main goal of preliminary relief did not emerge until late in the nineteenth century").

94. 41 Eng. Rep. 1074 (Ch. 1848). Professor Leubsdorf traces the substance of the status quo standard to *Blakemore v. Glamorganshire Canal Navigation*, 39 Eng. Rep. 639, 650-51 (Ch. 1832), and the precise use of the phrase "status quo" to *Shrewsbury & Chester Railway v. Shrewsbury & Birmingham Railway Co.*, 61 Eng. Rep. 159, 165 (V.C. 1851). Leubsdorf, *supra* note 4, at 534-35. From these cases and from a synthesis in William Kerr's treatise, Professor Leubsdorf draws the conclusion that the eighteenth-century courts had given a "new and unwarranted emphasis" to the "preservation of the status quo." *Id.* at 536. As explained in detail below, this is where I part company with Professor Leubsdorf. In my view, history does not support the notion that the status quo performed any doctrinal function in the eighteenth-century cases, nor does it support the broader conclusion that "recent criticism of looking to the status quo departs from a tradition as old as Kerr's treatise." *Id.* at 539.

95. *Great W. Ry. Co. v. Birmingham & Oxford Junction Ry. Co.*, 41 Eng. Rep. 1074, 1074 (Ch. 1848).

96. *Id.*

97. *Id.*

98. *Id.* at 1075.

99. *Id.* at 1076 (emphasis added).

Chancery's articulation of the goal of preserving the status quo next appeared in the analogous case of *Shrewsbury & Chester Railway Co. v. Shrewsbury & Birmingham Railway Co.*¹⁰⁰ In *Shrewsbury*, the plaintiff Shrewsbury and Chester Railway Co. (Chester) had entered into an agreement with the defendant Shrewsbury and Birmingham Railway Co. (Birmingham) under which both companies were to have the right (terminable upon three years' notice) to use the other's rail lines, and which jointly permitted both companies to provide "through traffic" along their joint line.¹⁰¹ Birmingham's shareholders soon became "anxious to get rid of this arrangement," and they convened a special meeting to approve an agreement to lease their rail line to the London & North-Western Company.¹⁰² On the eve of that meeting, Chester filed suit for specific performance and sought a preliminary injunction against the proposed agreement.¹⁰³ Vice Chancellor Cranworth refused to enter the injunction, but first extended Lord Cottenham's discussion of the role of preliminary relief in preserving the status quo: "This Court . . . will, where the necessity of the case requires it, interfere by injunction during litigation, not only to preserve property *in statu quo*, but sometimes also to prevent the Defendant from affecting it by contracts or conveyances, or other acts."¹⁰⁴

These early articulations of the goal of preserving the status quo were soon synthesized in William Kerr's influential treatise on the *Law and Practice of Injunctions in Equity*.¹⁰⁵ Kerr's treatment of "interlocutory" injunctions spans several chapters, but the discussion in Chapter II summarized the general goal of such injunctions in terms of the status quo:

The effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the mean time *in statu quo*.¹⁰⁶

Superficially, Chancery's early articulations of the goal of preserving the status quo might seem to lend historical support for the standard adopted in

100. 61 Eng. Rep. 159 (V.C. 1851).

101. *Shrewsbury & Chester Ry. Co. v. Shrewsbury & Birmingham Ry. Co.*, 61 Eng. Rep. 159, 163 (V.C. 1851).

102. *Id.* at 163-64.

103. *Id.* at 164.

104. *Id.* at 165.

105. WILLIAM KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY (1867).

106. *Id.* at 11-12.

the Second, Ninth, and Tenth Circuits. If the original understanding of the role of preliminary relief is that of preserving the status quo, then perhaps an order that does not fulfill this purpose should be subjected to a more stringent standard. At least one modern commentator has argued that history seems to bolster the modern fixation on the status quo. In his widely cited *Harvard Law Review* piece, Professor John Leubsdorf concluded – based largely on the above-cited authorities – that the nineteenth-century courts had given a "new and unwarranted emphasis" to the "preservation of the status quo,"¹⁰⁷ and that "recent criticism of looking to the status quo departs from a tradition as old as Kerr's treatise."¹⁰⁸

Professor Leubsdorf's conclusions should not be taken lightly. As described in detail below,¹⁰⁹ the economic model proposed in his 1978 article was illuminating and enormously influential. But with all due respect for his pathbreaking model, Professor Leubsdorf's historical discussion – which was offered merely as a preface to the substantive economic analysis – fails to capture the essence of the nineteenth century treatment of the status quo.

The nineteenth century Chancery cases do not accord any doctrinal significance to the status quo, much less establish a bifurcated standard that requires a stronger showing in cases where the moving party seeks to change the status quo. At most, the above-cited cases offer an uncontroversial description of the usual *effect* of preliminary injunctive relief: they state that the court "will in many cases interfere and *preserve property in statu quo* during the pendency of a suit,"¹¹⁰ and that it "will . . . interfere by injunction during litigation, not only to preserve property *in statu quo*, but sometimes also to prevent the Defendant from affecting it by contracts or conveyances, or other acts."¹¹¹

Professor Leubsdorf identifies Kerr's treatise as an important turning point, and suggests that it gave the status quo "a new and unwarranted emphasis."¹¹² Kerr's "emphasis," however, is no more than a generalization as to the

107. Leubsdorf, *supra* note 4, at 536.

108. *Id.*

109. See *infra* notes 243-61 and accompanying text (discussing Professor Leubsdorf's economic model).

110. *Great W. Ry. Co. v. Birmingham & Oxford Junction Ry. Co.*, 41 Eng. Rep. 1074, 1076 (Ch. 1848) (emphasis added).

111. *Shrewsbury & Chester Ry. Co. v. Shrewsbury & Birmingham Ry. Co.*, 61 Eng. Rep. 159, 163 (V.C. 1851).

112. See Leubsdorf, *supra* note 4, at 536. Leubsdorf also criticizes Kerr for emphasizing "the plaintiff's probability of success and the preservation of the status quo" without mention of "irreparable injury or the balance of convenience." *Id.* In my view, Kerr did focus on irreparable injury and the balance of convenience, so much so that it is clear that Kerr understood that these factors, rather than the status quo, were of controlling doctrinal significance. See discussion *infra* notes 122-26.

usual effect of an interlocutory order. Kerr merely says that the "effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order."¹¹³ There is no reason to infer that Kerr meant to ascribe doctrinal significance to the status quo, much less to elevate the status quo above the then-settled focus on irreparable harm and the balance of hardships, as Leubsdorf seems to suppose.¹¹⁴

In fact, the context of the quoted language indicates otherwise. Kerr's discussion of the status quo appears in a preliminary Chapter entitled "Injunctions in General," which focuses on the basic "distinction between interlocutory and perpetual injunctions."¹¹⁵ First, Kerr explains that "[p]erpetual injunctions are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right or perpetually restrained from the commission of an act which would be contrary to equity and good conscience."¹¹⁶ Preservation of the status quo is merely put forward as a basis for contrasting an "interlocutory injunction" from this notion of a "perpetual injunction."¹¹⁷ In contrast to a perpetual injunction, which "is in effect a decree, and concludes a right," Kerr explains that an "interlocutory injunction is merely provisional in its nature and does not conclude a right;" rather, it "merely . . . preserve[s] the property in dispute *in statu quo* until the hearing or further order."¹¹⁸ Kerr's second use of the phrase in question again hammers home the distinction between the two types of orders. Kerr notes that by entering the interlocutory injunction, "the court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the mean time *in statu quo*."¹¹⁹

When read in this context, Kerr's use of the phrase "in statu quo" can hardly be taken to have articulated a substantive legal standard. Professor Leubsdorf hangs his contrary conclusion on the notion that Kerr's discussion "says nothing about irreparable injury or the balance of convenience."¹²⁰ The lack of discussion of these standards, however, should not have been surprising in this context. In Chapter II (the only place where the supposedly talis-

113. KERR, *supra* note 105, at 11-12.

114. See Leubsdorf, *supra* note 4, at 536 (concluding that Kerr's treatise "contains some curious omissions," because it emphasizes status quo but "says nothing about irreparable injury or the balance of convenience").

115. KERR, *supra* note 105, at 11.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 11-12.

120. Leubsdorf, *supra* note 4, at 536.

manic phrase is given any significant play), Kerr's focus is to draw the above-noted distinction between perpetual and interlocutory relief, not to rehearse the standards that guide the courts in issuance of such orders.¹²¹

Indeed, when Kerr gets around to discussing those standards in subsequent chapters, he focuses on irreparable harm and the balance of hardships, yet utterly ignores the notion of the status quo. Chapter XV covers extensively the "Protection of Legal Rights to Property by Injunctions Pending Trial of Rights."¹²² In that chapter, Kerr explains that "irreparable" harm – meaning harm that is "not adequately reparable by damages at law" – is "the equity on which the interference of the court by interlocutory injunction is founded."¹²³ Thus, "a man who seeks the aid of the court" by entry of a preliminary injunction "must be able to satisfy the court that its interference is necessary to protect him from that species of injury which the court calls irreparable."¹²⁴ Kerr also announces a balance of hardships approach. He asserts that the decision whether to enter preliminary relief "is governed by the consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction."¹²⁵ Furthermore, he explains that this "balance of convenience and inconvenience" contemplates the entry of an interlocutory order only if "it appear[s] that greater damage would arise to the plaintiff by withholding the injunction, in the event of the legal right proving to be in his favor, than to the defendant by granting the injunction in the event of the injunction proving afterwards to have been wrongly granted."¹²⁶

Notably, Kerr makes no mention of the status quo in his discussion of the doctrinal standards that govern the issuance of interlocutory injunctions. His entire focus is on irreparable harms. There certainly is no notion of a variable standard of irreparable harm or of likelihood of success on the merits.

The Chancery decisions in *Great Western* and *Shrewsbury* have a similar focus. As explained above, both cases involved interlocutory injunctions for specific performance of railway contracts.¹²⁷ In both cases, the plaintiff sought a preliminary order precluding defendant's disposition of its railway to a third party.¹²⁸ Despite the overlapping factual context, and notwithstand-

121. KERR, *supra* note 105, at 11-12.

122. *Id.* at 196-216.

123. *Id.* at 199-200.

124. *Id.*

125. *Id.* at 209-10.

126. *Id.*

127. *Shrewsbury & Chester Ry. Co. v. Shrewsbury & Birmingham Ry. Co.*, 61 Eng. Rep. 159, 164 (V.C. 1851); *Great W. Ry. Co. v. Birmingham & Oxford Junction Ry. Co.*, 41 Eng. Rep. 1074, 1075 (Ch. 1848).

128. *Shrewsbury*, 61 Eng. Rep. at 164; *Great W. Ry. Co.*, 41 Eng. Rep. at 1075.

ing the fact that both courts acknowledged the goal of preserving "property *in statu quo*," the Chancellor in *Great Western* approved the requested injunction while the Vice Chancellor in *Shrewsbury* refused it.¹²⁹

The Vice Chancellor's reconciliation of the two cases in *Shrewsbury* reinforces the conclusion that Chancery's discussion of the status quo derived from and was inextricably rooted in the irreparable injury rule, and therefore not conceived as having independent doctrinal significance.¹³⁰ The Vice Chancellor began with the concession "that there [was] a very great resemblance between the two cases."¹³¹ He also acknowledged that in both cases injunctive relief would maintain the status quo, either by preserving "property *in statu quo*" or by preventing "the Defendant from affecting it by contracts or conveyances, or other acts."¹³² But the court's identification of the status quo had no impact on the standard it applied to distinguish the two cases.

Instead, Vice Chancellor Cranworth's opinion in *Shrewsbury* focused on the balance of irreparable harms. Cranworth argued that the plaintiff in *Great Western* suffered irreparable harm but no "countervailing inconvenience that would result from issuing the injunction,"¹³³ while concluding in *Shrewsbury* that that "balance greatly preponderate[d] in favour of the Defendant and against the Plaintiff."¹³⁴ Specifically, the Vice Chancellor thought that the harm to the plaintiffs in *Shrewsbury* was not irreparable because their losses under their contract with the defendant could be calculated and remedied by an award of monetary damages.¹³⁵ After all, the contract was terminable upon three-years' notice, and thus the plaintiffs could be compensated at the "present rate of through traffic" of "something like £12,000 a year."¹³⁶ If the injunction were wrongly entered, on the other hand, it would "cause enormous injury to all the shareholders in the company who are the present Defendants," in that the defendant would likely lose the opportunity of a long-term lease.¹³⁷

In short, the decision in *Shrewsbury* turned on the Vice Chancellor's assessment that "the inconvenience . . . preponderate[d] beyond all measure in favor of" the defendant, whereas in *Great Western* the only "inconvenience" was to the plaintiff.¹³⁸ Thus, although the Chancery courts in the nineteenth

129. *Shrewsbury*, 61 Eng. Rep. at 165; *Great W. Ry. Co.*, 41 Eng. Rep. at 1075.

130. *Shrewsbury*, 61 Eng. Rep. at 166.

131. *Id.*

132. *Id.* at 165.

133. *Id.* at 167.

134. *Id.*

135. *Id.* at 168.

136. *Id.*

137. *Id.* at 167.

138. See *supra* note 133 and accompanying text.

century had begun to speak in terms of the status quo, they had not elevated the phrase to any sort of test or standard of any doctrinal significance. At most, the phrase was used to describe the usual effect of preliminary injunctive relief. Injunctions preserving the "status quo" may have tended to be the same injunctions that avoided the plaintiff's irreparable injury at little or no inconvenience to the defendant, but the status quo itself played no doctrinal role. Chancery courts proceeded directly to an evaluation of the balance of hardships, unencumbered by any requirement of identifying the status quo.

2. *Mandatory Injunctions in the Courts of Chancery*

As noted above, modern courts sometimes equate the preservation of the status quo with the issuance of a "prohibitory" injunction.¹³⁹ Under this view, a "mandatory" injunction is seen as upsetting the status quo and is subjected to the heightened preliminary injunction standard.¹⁴⁰

As with the status quo, the mandatory/prohibitory dichotomy is traceable in some form to the nineteenth century Court of Chancery. In that era, Chancery noted the distinction between "preventive" and "mandatory" injunctions¹⁴¹ and expressed some form of preference for the latter. The nature and degree of that preference is not easily pinned down. At least one contemporary treatise expressed the dichotomy in terms that seem to support the current approach of the Second, Ninth, and Tenth Circuits:

The object of an interlocutory injunction is to maintain the matters in question in the suit *in statu quo*, until the hearing of the cause; and the Court will not, therefore, *except under very special circumstances*, grant, upon an interlocutory application before decree, an injunction which virtually directs the defendant to perform an act.¹⁴²

If the language of Edmund Daniell's treatise is an accurate depiction of Chancery's approach to mandatory injunctions (in other words, to those that "virtually direct[] the defendant to perform an act"), then perhaps a heightened preliminary injunction standard is historically justifiable in cases involving mandatory injunctive relief. Daniell's proposed requirement of "special circumstances" is reminiscent of the standard offered by the Second, Ninth, and Tenth Circuits,¹⁴³ but did Chancery adopt the modern requirement of a

139. See *supra* notes 49-55 (discussing Second Circuit decision in *Fairfield University*).

140. For an explanation of the failure of this dichotomy, see discussion *supra* notes 31-55 and accompanying text.

141. *Isenberg v. E. India House Estate Co.*, 46 Eng. Rep. 637, 641 (Ch. C.A. 1863).

142. EDMUND ROBERT DANIELL, *PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY* 1661 (1894) (emphasis added).

143. See discussion *infra* notes 18-55 and accompanying text (discussing development of Second, Ninth, and Tenth Circuits' heightened preliminary injunction standards).

heightened showing of the balance of hardships or of a strong likelihood of success on the merits?

The answer is almost certainly no. The authorities cited in the footnotes to Daniell's treatise (including *Great Western* and *Shrewsbury*, discussed in detail above)¹⁴⁴ simply are not in line with the heightened standard applied by some modern courts. In fact, nineteenth-century Chancery cases merely stand for the proposition that mandatory injunctions should issue upon a traditional showing on the balance of hardships and likelihood of success on the merits.

Daniell's treatise cites *Blakemore v. Glamorganshire Canal Navigation*¹⁴⁵ in support of the "special circumstances" standard.¹⁴⁶ To be sure, *Blakemore* does advert to the distinction between injunctions that "restrain" and those that "abate" or "undo what has been done," and even expressly indicates that the latter is appropriate only in "peculiar circumstances."¹⁴⁷ The "peculiar circumstances" identified by Chancellor Brougham in *Blakemore*, however, are not in line with the heightened standard that currently prevails in the Second, Ninth, and Tenth Circuits. Instead, Chancellor Brougham's analysis is entirely consistent with the traditional preliminary injunction formulation. His refusal to sanction the mandatory relief sought there – an order requiring the defendant canal company to undo its earlier widening of the canal in question so as to restore plaintiff's water supply to its original level – expressly turned on a straightforward assessment of the balance of hardships, unencumbered by any heightened standard of proof. Specifically, Chancellor Brougham concluded that the "consequences" that would be suffered by the defendants in attempting to "restore their works, if that were practicable, to the state and condition in which they were many years ago" were simply more significant than the "mischief complained of" by the plaintiff.¹⁴⁸ Indeed, the "mischief complained of" by the plaintiff was the "leading principle" or "guide" relied on by Chancellor Brougham in evaluating the propriety of the mandatory order in that case.¹⁴⁹ His opinion makes no suggestion that this principle should be applied any differently in cases involving mandatory relief.¹⁵⁰

144. DANIELL, *supra* note 142, at 1662 n.5.

145. 39 Eng. Rep. 639 (Ch. 1832).

146. See DANIELL, *supra* note 142, at 1662 n.5 (citing *Blakemore v. Glamorganshire Canal Navigation*, 39 Eng. Rep. 639 (Ch. 1832)).

147. *Blakemore*, 39 Eng. Rep. at 650.

148. *Id.* at 651.

149. *Id.*

150. As Chancellor Brougham's opinion in *Blakemore* further indicates, the Chancery decisions of this era also reflect shades of the Second Circuit's apologies as to the definitional ambiguities inherent in this dichotomy. See *supra* notes 40-46 and accompanying text (discussing Second Circuit's confessions). An order that appears mandatory in substance may be rephrased in formally prohibitory terms, as Chancellor Brougham recognized: The court may

Similar cautionary tones about mandatory injunctions are audible in Lord Westbury's opinion in *Isenberg v. East India House Estate Co.*¹⁵¹ In his view, the courts' power to issue a "preventive remedy" was to "be exercised without difficulty" and to "rest[] upon the clearest principles."¹⁵² The exercise of the power to issue a "mandatory injunction," on the other hand, was to "be attended with the greatest possible caution."¹⁵³

Again, however, this "caution" was not reduced to a requirement of a heightened showing of irreparable harm or likelihood of success. Instead, the hesitation about "mandatory injunctions" seemed merely to stem from an assumption about the balance of hardships. Whereas the balance of hardships apparently was assumed to favor the plaintiff who sought merely "preventive" relief, that assumption might not hold where the plaintiff sought the more invasive relief of a "mandatory" order. Thus, Chancery's "caution" about mandatory relief dictated a specific inquiry into the plaintiff's irreparable harm. As Lord Westbury put it, mandatory relief is "confined to cases where the injury done to the Plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum."¹⁵⁴ This is the traditional concept of irreparable

"indirectly . . . order something to be done, by restraining the party from continuing to keep certain works out of repair." *Blakemore*, 39 Eng. Rep. at 651. Indeed, Chancery courts frequently circumvented the supposed bias against mandatory orders in this way. *Lane v. Newdigate*, 32 Eng. Rep. 818 (Ch. 1804), is commonly regarded as the seminal case. See, e.g., *Blakemore*, 39 Eng. Rep. at 651 (citing *Lane* as decision that went "to the very uttermost verge of all the former cases"); Black, *supra* note 87, at 6 (asserting that *Lane* "began the tradition of making an order prohibitory in form but mandatory in effect"). In *Lane*, Lord Eldon acknowledged the general aversion to mandatory relief, but promptly circumvented it by issuing an order prohibiting the defendant from failing to repair the defendant's property. *Lane*, 32 Eng. Rep. at 819 ("The Order pronounced was, that Defendant . . . be restrained until farther Order, from farther impeding . . . the Plaintiff . . . by continuing to keep the said canals, or the banks, gates, locks, or works . . . out of good repair, order or condition.").

Chancellor Brougham's opinion in *Blakemore* candidly conceded that the slipperiness of the mandatory/prohibitory dichotomy called its vitality into question. "[I]f the court has this jurisdiction" to issue a substantively mandatory injunction in formally prohibitory terms, Chancellor Brougham thought that "it would be better to exercise it directly and at once." *Blakemore*, 39 Eng. Rep. at 651. On the other hand, in Chancellor Brougham's view, "having recourse to a roundabout mode of obtaining the object [i.e., of issuing a substantively mandatory order], seems to cast a doubt upon the jurisdiction." *Id.*

151. 46 Eng. Rep. 637 (C.A. 1863) (cited in Black, *supra* note 87, at 7).

152. *Isenberg v. E. India House Estate Co.*, 46 Eng. Rep. 637, 641 (C.A. 1863).

153. *Id.*

154. *Id.* Interestingly, the *Isenberg* court's discussion itself reveals the speciousness of the oft-supposed equivalence of "mandatory" injunctions and injunctions that alter the status quo. Indeed, Lord Westbury's opinion in *Isenberg* indicates that in his view, a mandatory injunction in that case would preserve the status quo. See *id.* at 641 (describing mandatory injunction as "an order compelling a Defendant to restore things to the condition in which they were at the time when the Plaintiff's complaint was made").

harm. Despite Chancery's "caution" about mandatory relief, Lord Westbury did not lay down any requirement of a heightened showing of irreparable harm; he merely explained that the plaintiff had to satisfy the traditional standard.

To similar effect is *Hervey v. Smith*.¹⁵⁵ In that case, the plaintiffs sought an "interlocutory injunction" requiring the defendant to remove tiles that defendant had placed upon the top of chimney pots, thus interfering with plaintiff's ability to use the chimneys in question.¹⁵⁶ Vice Chancellor Wood found that he was "bound" to grant this "mandatory injunction" and based his analysis entirely on a weighing of the parties' respective hardships.¹⁵⁷ On one hand, Vice Chancellor Wood noted that "[a] most simple and summary act has been done by the Defendant, which can easily be remedied" – "[h]e has put tiles on the tops of chimneys, which can be taken off again."¹⁵⁸ On the other hand, the hardship to the plaintiffs was significant, because they had "enjoyed the use" of the "chimneys in question" for ten years and would suffer great "inconvenience" if they were "stopped up in this summary manner."¹⁵⁹ Accordingly, Vice Chancellor Wood entered the preliminary injunction sought by the plaintiffs, not upon some extraordinary showing of a clear likelihood of success on the merits, but on the traditional ground that there were "[s]everal questions" that had been raised that were worthy of decision at a full hearing.¹⁶⁰

The strongest repudiation of an equitable aversion to mandatory relief appears in Vice Chancellor Stuart's opinion in *Beadel v. Perry*.¹⁶¹ The plaintiff in that case sought an interlocutory order requiring the defendant to take down a wall that he had built in obstruction of plaintiff's rights under the common law doctrine of "ancient lights."¹⁶² In entering this mandatory injunction, Vice Chancellor Stuart referred to "a supposed rule of the Court, that mandatory injunctions cannot properly be made, except at the hearing of the cause," but claimed that he had "never heard of such a rule."¹⁶³ "Looking at

155. 64 Eng. Rep. 510 (V.C. 1855).

156. *Hervey v. Smith*, 64 Eng. Rep. 510, 511 (V.C. 1855).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 511-512.

161. 3 L.R.-Eq. 465 (1866).

162. *Beadel v. Perry*, 3 L.R.-Eq. 465, 466 (1866). The doctrine of ancient lights established a property right against the construction of a structure that would block a window in a neighboring structure in such a way as to require artificial light in order to read in the half of the room nearest the window blocked by the new construction, provided the original structure had had unobstructed access to natural light for twenty years. BLACK'S LAW DICTIONARY 81 (7th ed. 1999).

163. *Beadel*, 3 L.R.-Eq. at 468. Presumably, this language was rhetorical hyperbole. Several Chancery decisions had referred to some form of aversion to mandatory relief. See, e.g.,

all the circumstances of th[e] case," Vice Chancellor Stuart concluded that he was "bound to make an order for a mandatory injunction."¹⁶⁴ Again, the relevant "circumstances" were the standard considerations (specifically, the fact that without the order "the injury which has been inflicted upon the Plaintiffs . . . would be continued") – not some heightened standard.¹⁶⁵

Thus, nineteenth-century Chancery's notion of the "special circumstances" required to justify a mandatory preliminary injunction bears little relation to the current heightened standard. Chancery's expressions of caution about mandatory relief were simply offered in the context of the traditional inquiry into the balance of hardships and likelihood of success.¹⁶⁶

3. *Early American Case Law*

In the nineteenth century, American decisions fell largely in line with the practice of English Chancery in their treatment of the status quo and in the distinction between mandatory and prohibitory injunctions. By the early twen-

Gale v. Abbott, 6 L.T.R. 852, 854 (V.C. 1862) (asserting that "it was useless to come for what was called a mandatory injunction on an interlocutory application . . . for the court [would] not compel a man to do so serious a thing as to undo what he had done, except at a hearing"); Child v. Douglas, 69 Eng. Rep. 237, 244 (V.C. 1854) ("Plaintiff . . . has a right to an injunction to restrain the building of the wall until further order; but I can make no order upon an interlocutory application as to that part of the motion which relates to pulling down what has already been built."). The obvious tension between the cases may be explained, however, not only on the legal realist notion that different judges decided different cases according to their individual proclivities, but perhaps also on the (sometimes silent) application of the standard balance of hardships criteria. In other words, decisions refusing to enter mandatory preliminary relief may simply reflect the fact that the hardships did not favor the moving party. Decisions circumventing the rule against such relief, on the other hand, may have arisen in circumstances involving irreparable harm to the plaintiff and little inconvenience to the defendant.

164. *Beadel*, 3 L.R.-Eq. at 468.

165. *Id.*

166. Previous historical analyses have reached similar conclusions, albeit without any careful examination of the cases. See Black, *supra* note 87, at 7-8 (stating that "principle that guided the courts in their decision to grant or to deny a mandatory injunction" was whether "the injury done to the Plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum" (quoting *Isenberg v. E. India House Estate Co.*, 46 Eng. Rep. 637, 641 (C.A. 1863))); Leubsdorf, *supra* note 4, at 535 (concluding, without analyzing cases, that "[t]alk about mandatory and prohibitory injunctions . . . reflected, however waveringly, the same reluctance to decree burdensome relief without a full hearing that was pervading judicial thought on interlocutory remedies"). Judge Black's analysis also suggests that Chancery's discomfort with mandatory relief may have grown out of two additional considerations: (a) a concern that the pitfalls in an *ex parte* decision would be magnified in cases involving "affirmative action" by a party not given an opportunity to object at a hearing, Black, *supra* note 87, at 8 (citing *Blakemore v. Glamorganshire Canal Navigation*, 39 Eng. Rep. 639 (Ch. 1832)), and (b) "the Chancellor's fear of being unable to enforce a decree that required affirmative acts," Black, *supra* note 87, at 6 n.21 (citing Pound, *The Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 420, 434 (1920)).

tieth century, however, some American courts began to speak of a heightened standard in cases where the moving party sought to overturn the status quo or sought entry of a mandatory order.

a. The Status Quo in America

Initially, American courts' treatment of the status quo followed the path established by the Lord Chancellor. The status quo was put forward not as an element of a doctrinal test, but as description of the usual effect or purpose of a preliminary injunction. The United States Supreme Court's early invocations of the status quo follow this pattern.¹⁶⁷ In *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*,¹⁶⁸ for example, the Court did not speak explicitly in terms of the "status quo," but clearly invoked its essence, explaining that "[w]here an injunction is granted without a trial at law, it is usually upon the principle of *preserving the property*, until a trial at law can be had."¹⁶⁹ The Court's seminal use of the phrase "status quo" apparently came several decades later, in *Houghton v. Meyer*.¹⁷⁰ In that case, the Court explained that the federal courts' statutory authority to issue an *ex parte* temporary restraining order was "intended to give power to preserve the status quo when there is danger of irreparable injury from delay in giving the notice required" in a standard preliminary injunction proceeding.¹⁷¹ None of these early decisions spoke of the status quo as a doctrinal standard; it was always offered as a description of purpose – and in the context of the overarching goal of preventing irreparable injury.

167. In at least one of its earliest decisions, the Court also expressed an understanding of the basic standard for issuance of preliminary injunctions that was in line with the prevailing practice in English Chancery. See *Georgia v. Brailsford*, 2 U.S. 402, 405 (1792) (opinion of Johnson, J.) (explaining that "[i]n order to support a motion for [a preliminary] injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court").

168. 67 U.S. 545 (1862).

169. *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 67 U.S. 545, 552 (1882) (citations omitted) (emphasis added).

170. 208 U.S. 149 (1908). In an earlier opinion, the Court used the phrase in the related context of the trial courts' power to issue stays pending appeal. See *Hovey v. McDonald*, 109 U.S. 150, 161 (1883) (affirming trial courts' "power . . . to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary"); see also *Parker*, 67 U.S. at 552 ("Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had.").

171. *Houghton v. Meyer*, 208 U.S. 149, 156 (1908); see also *Hutchins v. Munn*, 209 U.S. 246, 249 (1908) (explaining that *ex parte* temporary restraining order is appropriate "where irreparable injury may be anticipated if the *status quo* be not preserved").

Early lower court decisions are of the same ilk. Indeed, *Great Western, Shrewsbury*, and other Chancery cases discussed above¹⁷² were often cited and quoted at length in nineteenth-century cases. The Circuit Court of Massachusetts quoted *Great Western*, for example, for the proposition that "the court will in many cases interfere and preserve property in statu quo during the pendency of a suit," so long as "there is a substantial question to be decided."¹⁷³ The Sixth Circuit, for its part, quoted *Shrewsbury* for the idea that the controlling standard in cases of preliminary injunctive relief is "whether 'interim' interference, on a balance of convenience or inconvenience to the one party and to the other, is or is not expedient."¹⁷⁴

Thus, like their contemporaries across the Atlantic, nineteenth-century American judges sitting in equity spoke of the status quo only as an adjective to describe the usual effect of a preliminary order; the notion of a bifurcated legal standard that assigned doctrinal significance to the status quo had not yet taken hold.¹⁷⁵ This approach was also reflected in contemporaneous treatises

172. See *supra* notes 93-138 and accompanying text.

173. *Singer Sewing-Mach. Co. v. Union Button-Hole & Embroidery Co.*, 22 F. Cas. 220, 221 (C.C.D. Mass. 1873) (No. 12,904) (quoting *Great W. Ry. Co. v. Birmingham & Oxford Junction Ry. Co.*, 41 Eng. Rep. 1074, 1076 (Ch. 1848)); see also *Allison v. Corson*, 88 F. 581, 584 (8th Cir. 1898) (citing *Great Western* and *Shrewsbury* for same standard as that stated in *City of Newton*); *City of Newton v. Levis*, 79 F. 715, 718 (8th Cir. 1897) (citing *Great Western*, 41 Eng. Rep. at 1076, and *Shrewsbury*, 61 Eng. Rep. at 166, for proposition that "[a] preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted"); *Blount v. Societe Anonyme Du Filtre Chamberland Systeme Pasteur*, 53 F. 98, 101 (6th Cir. 1892) (quoting and following same passage).

174. *Blount*, 53 F. at 101 (quoting *Shrewsbury*, 61 Eng. Rep. at 166).

175. See *Jensen v. Norton*, 64 F. 662, 664 (9th Cir. 1894) (discussing circumstances giving rise to injunction). The *Jensen* court stated:

When a plaintiff in a court of equity brings a suit in good faith to obtain preventive relief against a threatened injury, and makes a showing of facts sufficient to constitute a cause of action within the jurisdiction of the court, and shows that his adversary intends to, and probably will, ere a hearing can be had, commit acts which may work irreparable injury to him, it becomes the duty of the court to exercise its power at once by issuing an injunction so as to maintain the status quo until the cause can be properly heard and decided.

Id. at 664; *N. Pac. R.R. Co. v. City of Spokane*, 52 F. 428, 430 (D. Wash. 1892) ("The purpose of a restraining order *pendente lite*, in all cases of this nature, is to preserve property which is the subject of controversy, in its existing condition, until a final hearing and determination of the cause . . ."); *Farmers' R.R. Co. v. Reno, Oil Creek and Pithole Ry. Co.*, 53 Pa. 224, 225 (1866) (explaining that "sole object" of preliminary order is "to preserve the subject of the controversy in the condition in which it is when the order is made"). A few nineteenth-century decisions appear to have adopted the bifurcated approach, however, primarily in the context of

on equity, which spoke of the status quo only in descriptive terms, and stated the standard for issuance of preliminary relief in terms of the standard showings on the balance of hardships and likelihood of success without regard to whether the order in question would preserve or upset the status quo.¹⁷⁶

b. Mandatory Injunctions in America

Early American decisions also inherited Chancery's apprehension about mandatory preliminary injunctions. As in the English Chancery decisions cited above, there was no universal agreement as to the precise nature and degree of the apprehension in the American decisions. At least one contemporaneous treatise thought that "the inclination of the American courts was, at one time, very much against granting such an interlocutory injunction,"¹⁷⁷ and dicta in some early decisions seems to support that characterization. In *Audenried v. Philadelphia and Reading Railroad Co.*,¹⁷⁸ for example, the Pennsylvania Supreme Court spoke of a rule "that an interlocutory or preliminary injunction cannot be mandatory."¹⁷⁹ In so doing, the court acknowledged the Chancery cases "in which a mandatory order has been made on an interlocutory applica-

intellectual property litigation. See, e.g., *Whippany Mfg. Co. v. United Indurated Fibre Co.*, 87 F. 215, 216 (3d Cir. 1898) (asserting that remedy of preliminary injunction "is a valuable one," but "also a dangerous one," and should "never be applied when the complainant's case is doubtful – except indeed where the object is merely to preserve the status quo"); *Ladd v. Oxnard*, 75 F. 703, 733 (D. Mass. 1896) (asserting that in "patent, trade-mark, and copyright cases . . . , interlocutory injunctions do not ordinarily preserve the status quo," and accordingly that "in cases of this character, it has not ordinarily been sufficient merely to" establish fair grounds for litigation, and that moving parties in such cases should show that case is "clear and strong").

176. See, e.g., GEORGE TUCKER BISPHAM, *PRINCIPLES OF EQUITY* 514-15 n.8 (5th ed. 1893) (concluding that "office of a preliminary injunction" is "to preserve the *status quo* until, upon final hearing, the court may grant full relief" (citing Judge Taft in *Toledo, A.A. & N.M. Ry. Co. v. Pa. Co.*, 54 F. 730, 741 (N.D. Ohio 1893)) (citations omitted); III JOHN POMEROY, *EQUITY JURISPRUDENCE* 11-12 (1883) (describing "object of an interlocutory injunction" as "preservation of the property or rights in controversy until a full and final hearing upon the merits" and stating that "an application for a preliminary injunction" will "generally be governed . . . by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ"); III WILLIAM WAIT, *ACTIONS AND DEFENSES AT LAW OR IN EQUITY* 682-83 (1878) (asserting that court "will in many cases interfere by injunction, to preserve property *in statu quo* during the pendency of a suit" and that in exercising its discretion to decide whether to issue such order, court should "weigh the nature and extent of the injury which the plaintiff will suffer if the order be withheld, and also the consequences to the opposite party if the order be granted") (citations omitted).

177. BISPHAM, *supra* note 176, at 514; see also WILLIAM MEADE FLETCHER, *A TREATISE ON EQUITY PLEADING AND PRACTICE* 516, § 495 (1902) ("As a general rule, a mandatory injunction will not be granted on preliminary application.") (footnote omitted).

178. 68 Pa. 370 (1870).

179. *Audenried v. Phila. & Reading R.R. Co.*, 68 Pa. 370, 375-76 (1870).

tion," but dismissed them as "very extreme cases" that "ought not to be followed as precedents."¹⁸⁰

For the most part, however, nineteenth-century American decisions recognized that the supposed "rule" against mandatory interlocutory relief was not a rule at all, but merely a reminder that such relief could not be entered without the traditional showing on the balance of hardships. In *In re Lennon*,¹⁸¹ the United States Supreme Court broadly affirmed that the "power of a court of equity . . . is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it."¹⁸² Justice Brown's opinion for the Court did not elaborate on the relevant "circumstances," but his citation to *Hervey*, *Beadel*, and other English Chancery decisions would seem to suggest that he intended no departure from the English practice described above.¹⁸³

In fact, other American decisions of this era expressly repudiated the "rule" announced by the Pennsylvania Supreme Court in *Audenried* and applied the standard preliminary injunction standard to mandatory orders. In his capacity as Circuit Justice, Justice Field rejected *Audenried* and other emerging decisions "denying the authority of a court of equity, on a preliminary application, to issue an injunction, even in a restrictive form, when its obedience would require the performance of a substantive act."¹⁸⁴ Indeed, Justice Field reviewed the English Chancery decisions in some detail, and chided the Pennsylvania Supreme Court for failing to recognize the equitable power to issue mandatory interlocutory relief.¹⁸⁵ Citing *Blakemore v. Glamorganshire Canal Navigation*, Justice Field explained that the "purpose" of preliminary relief is to prevent "waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined."¹⁸⁶ And echoing the

180. *Id.* at 377. The court cited *Lane v. Newdigate*, 32 Eng. Rep. 818 (Ch. 1804), among others, but thought that the Chancery's practice of stating a substantively mandatory order in formally prohibitory terms rendered the decision "a precedent which ought [not] to be followed in this or any other court." *Audenried*, 68 Pa. at 378. "A tribunal that finds itself unable directly to decree a thing," according to the Pennsylvania court, "ought never to attempt to accomplish it by indirection." *Id.*

181. 166 U.S. 548 (1897).

182. *In re Lennon*, 166 U.S. 548, 556 (1897).

183. *Id.*

184. *Cole Silver Min. Co. v. Va. & Gold Hill Water Co.*, 6 F. Cas. 72, 74 (C.C.D. Nev. 1871) (No. 2,990); see also *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co.*, 86 F. 528, 537 (N.D. Cal. 1898) (rejecting "cases which announce the general rule that a court of equity will not, by a preliminary order, change the status of parties, require that which has been done to be undone, or restore property to a possession claimed to have existed prior to the interferences and disturbances which are the subject of [the case]").

185. *Cole Silver*, 6 F. Cas. at 75-76.

186. *Id.*

English Chancery approach described above, Justice Field emphasized that although such irreparable harm can "[u]sually" be prevented by a prohibitory order, there is no bar to mandatory relief where it fulfills this purpose – where "the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property."¹⁸⁷

Thus, the doctrinal focus was irreparable harm, not the form of the injunction. Contemporaneous treatises largely affirmed this approach. John Pomeroy's treatise on *Equity Jurisprudence* acknowledged that "it has been said in some American decisions that a mandatory *interlocutory* injunction would never be granted," but roundly rejected that "manifestly absurd" proposition as "not only opposed to the overwhelming weight of authority," but also as "contrary to the principle which regulates the administration of preventive relief."¹⁸⁸ More to the point, the "principle" identified by Pomeroy that "regulates the administration of preventive relief" is again the standard balance of hardships. Pomeroy explains that a "mandatory" order is proper where the plaintiff's injury is "immediate, and pressing, and irreparable."¹⁸⁹ Other contemporaneous treatises are to the same effect.¹⁹⁰

In sum, despite a few outlying decisions purporting to adopt a firm rule against mandatory relief, American decisions from the nineteenth century provide little historical support for the heightened standard currently in vogue in a few of the federal circuits. Moreover, like their English Chancery contemporaries (but unlike some modern circuit judges), American jurists in the nineteenth century understood that there was no necessary correlation between the mandatory/prohibitory character of an order and the status quo.¹⁹¹ Their

187. *Id.* at 76.

188. POMEROY, *supra* note 176, at 391 n.2.

189. *Id.* at 391.

190. Bispham's analysis is especially pointed in this regard:

Indeed, there would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of rights may occur in the shortest possible time, and a few hours wrong-doing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift, and if the immediate relief afforded could not, in a proper case, be restorative, as well as prohibitory, no adequate redress would, in many instances, be given.

BISPHAM, *supra* note 176, at 515.

191. See, e.g., *Toledo, A.A. & N.M. Ry. Co. v. Pa. Co.*, 54 F. 730, 741 (N.D. Ohio 1893) (noting that "it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant"); BISPHAM, *supra* note 176, at 515 (noting that mandatory injunction may be necessary to preserve status quo in sense that "if the immediate relief afforded could not . . . be restorative, as well as prohibitory, no adequate redress would . . . be given").

focus was on the settled inquiry into the balance of hardships, not on some subjective determination of the character of the order or its effect on the status quo.

c. Origins of the Heightened Standard

The above discussion suggests that the heightened standard adopted in the Second, Ninth, and Tenth Circuits has shallow historical roots and is not traceable to the nineteenth century. This same conclusion can be confirmed by tracing backward from the sources cited in the modern decisions.

i. The Historical Trail in the Ninth and Tenth Circuits

The Ninth and Tenth Circuits have relied on identical authorities in adopting a bifurcated preliminary injunction standard. In *SCFC ILC, Inc. v. VISA USA, Inc.*,¹⁹² the Tenth Circuit relied on its own decision in *Citizens Concerned for the Separation of Church and State v. City of Denver*¹⁹³ and on the Ninth Circuit's decision in *Anderson v. United States*.¹⁹⁴ The Ninth Circuit similarly relied on *Anderson* in its own adoption of the bifurcated standard in *Stanley v. University of Southern California*.¹⁹⁵

These decisions are only weak authority for the heightened standard for which they are cited. *Citizens Concerned* merely suggests, by reference only to 42 *Am. Jur. 2d, Injunctions*, §§ 16 and 20, "that mandatory injunctive relief should be granted only under compelling circumstances inasmuch as it is a harsh remedial process not favored by the courts,"¹⁹⁶ without attempting to prescribe the "compelling circumstances" that the court unquestioningly adopted in the *SCFC ILC* case. *Anderson* is slightly more pointed and supportive of a heightened standard; it provides that "[m]andatory preliminary relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party."¹⁹⁷ Nevertheless, *Anderson* does not

192. *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096 (10th Cir. 1991).

193. *Id.* at 1099 (citing *Citizens Concerned for the Separation of Church and State v. City of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980) (requiring "compelling circumstances" to impose mandatory injunctive relief that disturbs status quo).

194. *SCFC ILC*, 936 F.2d at 1099 (citing *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1979) (finding preliminary injunction that alters status quo "particularly disfavored" and requiring "strong showing of entitlement").

195. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (commenting that mandatory injunction altering status quo is "particularly disfavored" and that facts and law clearly must favor movant to prevail) (citations omitted).

196. *Citizens Concerned for the Separation of Church and State v. City of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980).

197. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)).

explicitly prescribe the clear showing required under *SCFC ILC*; it does not say that a party moving for a preliminary injunction must show that the traditional factors weigh "heavily and compellingly" in its favor.¹⁹⁸

Moreover, the historical trail disappears fairly quickly as one attempts to trace the sources cited in *Anderson*. The Ninth Circuit's opinion in *Anderson* relies on earlier decisions out of the Third and Fifth Circuits, which generally seem to confirm the requirement of a "clear" showing on the facts and the law to sustain a mandatory preliminary injunction.¹⁹⁹ Those cases, in turn, rely on authorities that generally cannot be read to establish a heightened standard.²⁰⁰

198. See *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991) (requiring heightened standard for preliminary injunctions that (1) alter status quo, (2) are mandatory, (3) afford substantially all relief sought).

199. *Anderson*, 612 F.2d at 1114, cites the following authorities: *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (asserting that "[m]andatory preliminary relief . . . should not be issued unless the facts and law clearly favor the moving party"); *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1181 (3d Cir. 1976) (concluding that "[t]he power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised"); *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561-62 (5th Cir. 1971) (suggesting that "when a plaintiff applies for a mandatory preliminary injunction, such relief 'should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party'" (quoting *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958))).

200. A comprehensive pedigree chart of the cites in the chain of authority in question may help to clarify the cites that follow in footnotes below. As noted above, *Anderson* cites three principal authorities: (1) *Martinez*, 544 F.2d at 1243; (2) *Spectro Foods Corp.*, 544 F.2d at 1181; and (3) *Exhibitors Poster Exch.*, 441 F.2d 560. The chain of authorities under these three decisions is as follows:

(1) *Martinez*, 544 F.2d at 1243, relies on *Zugsmith v. Davis*, 108 F. Supp. 913, 915 (S.D.N.Y. 1952) (stating that mandatory injunctions are issued only in "extreme cases, where the right is very clear") (citations omitted); *Gamlen Chem. Co. v. Gamlen*, 79 F. Supp. 622, 631 (W.D. Pa. 1948) (noting mandatory preliminary injunctions that alter status quo are granted only in "rarest of cases"); and *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) (concluding that preliminary mandatory injunction is only granted where facts and law clearly favor moving party).

(a) *Callander* cites *American Lead Pencil Co. v. Schneegas*, 178 F. 735, 738-39 (N.D. Ga. 1910) (commenting that mandatory injunctions are almost never granted at preliminary stage).

(i) *Zugsmith* relies on *Trautwein v. Moreno Mutual Irrigation Co.*, 22 F.2d 374, 376 (9th Cir. 1927) (commenting that mandatory preliminary injunctions are issued only "in extreme cases where the right is very clear") (citation omitted).

(2) *Spectro Foods*, 544 F.2d at 1181, relies on *Dorfman v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (stating that power to issue mandatory preliminary injunction should be "sparingly exercised") (citations omitted); *O'Malley v. Chrysler Corp.*, 160 F.2d 35, 36 (7th Cir. 1947) (noting that interlocutory mandatory injunctions are very rarely issued and only upon "clearest equitable grounds") (citations omitted); and *Warner Bros. Pictures v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940) (observing that preliminary injunctions are "far-reaching power, never to be indulged in except in a case clearly demanding it") (citations omitted).

Consider, for example, the Fifth Circuit's decision in *Miami Beach Federal Savings & Loan Ass'n v. Callander*,²⁰¹ an explicit predecessor to the Fifth Circuit decisions cited by the Ninth Circuit in *Anderson*.²⁰² The *Callander* decision relies on an early twentieth-century district court decision in *American Lead Pencil v. Schneegas*.²⁰³ But *American Lead Pencil*, in turn, does not adopt a heightened standard or clear showing requirement. Instead, it is a relic of the discredited "rule" against mandatory relief. Citing authorities such as Daniell's treatise on Chancery Practice²⁰⁴ and the Pennsylvania Supreme Court decision in *Audenried*,²⁰⁵ the *American Lead Pencil* decision concludes that "an application for an injunction *pendente lite*" may not "go further than to maintain the status quo, and grant what would be, in effect, a mandatory injunction."²⁰⁶

The same historical trail also leads to other authorities that actually undermine the proposition for which they are cited. *Callander* relies on the district court decision in *Gamlen Chemical v. Gamlen*.²⁰⁷ Instead of suggesting a heightened standard for mandatory orders, however, the *Gamlen* decision proposes that any "grant[] of a preliminary injunction is an exercise of a very far reaching power, never to be indulged in except in a case clearly demanding it."²⁰⁸ And although the court in *Gamlen* adverts to the supposed rule that "[a] preliminary injunction cannot be mandatory,"²⁰⁹ it does not adopt

(3) *Exhibitors Poster Exch.*, 441 F.2d at 561-62, relies on *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 97 (5th Cir. 1963) (finding that injunction only should be ordered when question posed by movant is free from doubt) (citations omitted).

201. 256 F.2d 410 (5th Cir. 1958).

202. See *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979) (citing *Exhibitors Poster Exch.*, 441 F.2d at 561-62 (quoting *Callander*, 256 F.2d at 415)).

203. 178 F. 735 (N.D. Ga. 1910).

204. *Am. Lead Pencil v. Schneegas*, 178 F. 735, 738-39 (N.D. Ga. 1910) (citing *Thomas v. Hawkins*, 20 Ga. 126, 134 (1856) (quoting 3 DANIELL, *supra* note 142, at 343)).

205. *Am. Lead Pencil*, at 739 (citing *McCauley v. Kellogg*, 13 Fed. Cas. 1261, 1264-65 (C.C.D. La. 1874) (No 8,688) (citing *Audenried v. Phila. & Reading R.R. Co.*, 68 Pa. 370 (1871))).

206. *Id.* at 737-39. For another decision in this chain of authority that is to the same effect, see *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940) (citing *Audenried*, 68 Pa. at 370, for proposition that preliminary injunction that "alter[s] the prior status of the parties fundamentally . . . may be directed only after a final hearing"). See *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1181 n.19 (3d Cir. 1976) (citing *Warner Bros.*, 110 F.2d at 293, for proposition that "[an] interlocutory mandatory injunction is never appropriate unless it operates to preserve or restore the status quo."); *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979) (citing *Spectro Foods*, 544 F.2d at 1175, for proposition that mandatory preliminary relief is disfavored).

207. *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) (citing *Gamlen Chem. v. Gamlen*, 79 F. Supp. 622 (W.D. Pa. 1948)).

208. *Gamlen Chem.*, 79 F. Supp. at 631.

209. *Id.* (citing *Audenried*, 68 Pa. at 375-76).

a bifurcated standard. Rather, *Gamlen* announces a general reluctance to issue any form of preliminary order "except in a case clearly demanding it," and suggests that the "showing of irreparable injury during the pending [sic] of the action" is the threshold for *all forms* of preliminary injunctive relief.²¹⁰ Other decisions in this same chain of authority are to the same effect.²¹¹

This is not to say that the heightened standard was fashioned out of whole cloth in *SCFC ILC* and *Stanley*. The earliest invocation of the standard may be the Ninth Circuit's decision in *Trautwein v. Moreno Mutual Irrigation Co.*,²¹² another of the predecessors to the decisions cited by the Ninth Circuit in *Anderson v. United States*.²¹³ In *Trautwein*, the Ninth Circuit rejected the supposed rule "that a mandatory injunction will not be issued on an interlocutory application" as "'against the weight of authority.'"²¹⁴ At the same time, however, the court suggested that "'mandatory injunctions'" are appropriate in "extreme cases, where the right is very clear indeed, and where

210. *Id.* To be sure, the decision also asserts that it "must also appear that the injunction is required to preserve the status quo," *id.*, but the court's definition of the status quo reveals that its focus is fixed on irreparable harm. In explaining that "[e]quity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status though he succeeded in making the change before the chancellor's hand actually reached him," the court emphasizes that the proper inquiry is irreparable harm, not some arbitrary definition of the status quo. *Id.*

211. See *Toledo, A.A. & N.M. Ry. Co. v. Pa. Co.*, 54 F. 730, 741 (N.D. Ohio 1893) (cited in *Trautwein v. Moreno Mut. Irrigation Co.*, 22 F.2d 374, 376 (9th Cir. 1927) (cited in *Zugsmith v. Davis*, 108 F. Supp. 913, 915 (S.D.N.Y. 1952) (cited in *Callander*, 256 F.2d at 415) (cited in *Martinez*, 544 F.2d at 1243) (cited in *Anderson*, 612 F.2d at 1114). In *Toledo*, the court acknowledged that the usual "office of a preliminary injunction is to preserve the status quo," but also recognized that historically, mandatory injunctions were issued when necessary to prevent the "irreparable injury" that might otherwise ensue where "the status quo is a condition not of rest, but of action." *Id.* at 741. Thus, *Toledo* emphasized that irreparable harm is the controlling inquiry regardless of the form of the order, upholding the issuance of a mandatory injunction to protect the moving party from suffering ongoing irreparable harm — "the injury being a continuing one" that required issuance of the mandatory order. *Id.* at 745; see also *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (concluding that "power to issue a preliminary injunction, especially mandatory one, should be 'sparingly exercised,'" but explaining that standard for issuing any "such an injunction" merely requires court to "balance the damage to both parties") (cited in *Spectro Foods*, 544 F.2d at 1181 n.19) (cited in *Anderson*, 612 F.2d at 1114); *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 97 (5th Cir. 1963) (suggesting generalized reluctance to issue any form of preliminary injunction unless "it is clear that the question presented by the litigant who seeks the injunction is free from doubt") (cited in *Exhibitors Poster Exchange v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 562 (5th Cir. 1971)) (cited in *Martinez*, 544 F.2d at 1243) (cited in *Anderson*, 612 F.2d at 1112).

212. 22 F.2d 374 (9th Cir. 1927).

213. See *Anderson v. United States*, 612 F.2d 1112, 1114-16 (9th Cir. 1979) (citing *Exhibitors*, 441 F.2d at 561-62) (quoting *Callander*, 256 F.2d at 415) (citing *Zugsmith v. Davis*, 108 F. Supp. 913, 915 (S.D. N.Y. 1952) (citing *Trautwein*, 22 F.2d at 376)).

214. *Trautwein v. Moreno Mut. Irrigation Co.*, 22 F.3d 374, 376 (9th Cir. 1927) (quoting 32 CORPUS JURIS INJUNCTIONS § 7 (1923) (citations omitted)).

considerations of the relative inconvenience bear strongly in complainant's favor."²¹⁵

The quoted language is from the 1923 edition of *Corpus Juris*,²¹⁶ which seems to have coined the language in an effort to summarize the various authorities cited in its footnotes, including many of the decisions discussed herein, such as *In re Lennon*,²¹⁷ *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co.*,²¹⁸ *Toledo, A.A. & N.M. Railway Co. v. Pennsylvania Co.*,²¹⁹ *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*,²²⁰ *Blakemore v. Glamorganshire Canal Navigation Co.*,²²¹ *Hervey v. Smith*,²²² and others.²²³ Thus, the Ninth and Tenth Circuit's heightened standard is traceable only to a few relatively recent twentieth-century decisions and to the authors of the *Corpus Juris* compendium. The trail of historical authority relied on in these cases and in *Corpus Juris*, however, is largely inconsistent with the heightened standard.

ii. *The Historical Trail in the Second Circuit*

The Second Circuit's historical chain of authority is even less impressive. In fact, the Second Circuit's heightened standard appears to be traceable not to any purportedly longstanding precedent, but to the court's misapplication of its own decisions.

The court's recent articulations of the heightened standard purportedly emanate from the Second Circuit's 1977 decision in *Jacobson & Co. v. Armstrong Cork Co.*²²⁴ *Jacobson*, however, cannot withstand the broad reading attributed to it. True, the court in *Jacobson* initially suggested "that a different standard applies to mandatory injunctions,"²²⁵ accepting the defendant's reliance on *Clune v. Publishers' Ass'n of New York City*²²⁶ for this proposi-

215. *Id.*

216. 32 CORPUS JURIS INJUNCTIONS § 7 (1923).

217. See discussion *supra* note 181-83 and accompanying text.

218. 86 F. 528 (N.D. Cal. 1898), discussed *supra* note 184 and accompanying text.

219. 54 F. 730 (N.D. Ohio 1893), discussed *supra* note 191 and accompanying text.

220. 6 F. Cas. 72 (D. Nev. 1871) (No. 2,990), discussed *supra* notes 184-87 and accompanying text.

221. 39 Eng. Rep. 639 (Ch. 1832), discussed *supra* notes 145-50 and accompanying text.

222. 69 Eng. Rep. 510 (V.C. 1855), discussed *supra* notes 155-60 and accompanying text.

223. See 32 CORPUS JURIS INJUNCTIONS § 7 (1923) (citing cases).

224. 548 F.2d 438, 441 (2d Cir. 1977) (applying heightened standard to mandatory injunctions) (cited in *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

225. *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 441 (2d Cir. 1977).

226. 214 F. Supp. 520, 531 (S.D.N.Y.), *aff'd on the opinion below*, 314 F.2d 343 (2d Cir. 1963).

tion.²²⁷ But the *Jacobson* court never suggested that this "different standard" incorporated the current notion of a "clear showing that the moving party is entitled to the relief requested," or that "extreme or very serious damage will result from a denial of preliminary relief."²²⁸ To the contrary, *Jacobson* applied the traditional preliminary injunction standard in affirming the order in that case.²²⁹

The plaintiff in *Jacobson* was a distributor of acoustical ceiling systems who sought a preliminary injunction requiring the defendant manufacturer of those systems to resume selling its products to the plaintiff.²³⁰ The district court granted plaintiff's motion, finding that "while plaintiff had not made a compelling case of probable success on the merits" of its antitrust claims, "it had shown sufficiently serious questions going to the merits to make them a fair ground for litigation."²³¹ In the district court's view, this finding was sufficient to sustain the injunction – when "coupled with the court's finding that the potential hardship to [Plaintiff] outweighed any inconvenience that [Defendant] might suffer as a result of an injunction."²³²

The Second Circuit affirmed. Although it had vaguely suggested that a "different standard" applied to mandatory orders, the *Jacobson* court upheld the injunction in that case under the traditional preliminary injunction formulation. First, the court rejected the defendant's argument that the *Clune* requirement of a showing of "extreme or very serious damage" required reversal.²³³ Although the district court had not made a finding under this standard, the *Jacobson* court consciously looked the other way, explicitly rejecting the argument "that satisfaction of the *Clune* standard is . . . a *sine qua non* for obtaining a mandatory preliminary injunction."²³⁴ It concluded "that 'irreparable harm' is indistinguishable from 'extreme or very serious damage,'"²³⁵ and explained that both standards merely reaffirm the "traditional

227. *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520 (S.D.N.Y. 1963). *Clune* itself is the end of the line for the Second Circuit's historical chain of authority. Although the opinion says that the differential treatment of mandatory orders is "well known," the court offers no authority at all for its conclusions. *Id.* at 531. Thus, *Clune* adds nothing to the historical pedigree of the Second Circuit's heightened standard.

228. *Tom Doherty Assocs.*, 60 F.3d at 34 (quoting *Abdul Wali*, 754 F.2d at 1025).

229. *Jacobson*, 548 F.2d at 441.

230. *Id.* at 440.

231. *Id.* at 440-41 (citing *Sonesta Int'l Hotels Corp. v. Willington Assocs.*, 483 F.2d 247 (2d Cir. 1973)).

232. *Id.* at 441.

233. *Id.*

234. *Id.* at 441 n.3.

235. *Id.* At least one subsequent Second Circuit decision has read *Jacobson* to stand for this narrow proposition – that "extreme hardship" is to be equated with irreparable injury. See *Nassau Boulevard Shell Serv. Station, Inc. v. Shell Oil Co.*, 875 F.2d 359, 363 (2d Cir. 1989).

reluctance" to preliminary injunctive relief "in doubtful cases or where the injury complained of is capable of compensation in damages."²³⁶

Second, the *Jacobson* court also rejected the defendant's argument that the applicable standard required the district court to find a strong "likelihood of success on the merits."²³⁷ After reviewing Second Circuit precedents (none of which, incidentally, purported to draw any substantive distinction between mandatory and prohibitory orders), the *Jacobson* court concluded that the applicable standard "require[d] no more than a showing of 'sufficiently serious questions going to the merits to make them a fair ground for litigation,'" so long as the plaintiff also made "a sufficient showing of irreparable injury."²³⁸ Under this standard, *Jacobson* affirmed the mandatory order requiring the defendant to resume supplying its products to plaintiff, holding that there were serious questions on the merits and that the "balance of hardships" tipped decidedly in the plaintiff's favor.²³⁹

Thus, *Jacobson* does not support a heightened standard for mandatory injunctions. Despite the puzzling rhetoric accepting the defendant's reliance on the *Clune* case for the general proposition that "a different standard applies to mandatory injunctions," the substance of the *Jacobson* decision affirms that the traditional formulation applies. Indeed, the *Jacobson* court expressly rejected both prongs of the heightened standard currently in vogue in the Second Circuit – first concluding that the "extreme or very serious damage" formulation is "indistinguishable" from the traditional showing of "irreparable harm,"²⁴⁰ and then refusing to impose a heightened showing of a clear likelihood of success on the merits.²⁴¹

B. Analytical Foundations of the Preliminary Injunction Standard

Although the traditional formulation of the preliminary injunction standard dates to the nineteenth century, courts did not clearly articulate the substantive policy basis of the standard until quite recently. For many years, the courts exercised their discretion to issue preliminary relief under an undefined

236. *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 441-42 n.3 (2d Cir. 1977) (quoting *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520, 531 (S.D.N.Y. 1963)).

237. *See id.* at 442-43 (rejecting defendant's argument in favor of "serious questions going to the merits" standard).

238. *Id.* at 443 (quoting *Sonesta Int'l Hotels Corp. v. Willington Assocs.*, 483 F.2d 247, 250 (2d Cir. 1973)).

239. *Id.* at 445 (finding that plaintiff's "loss of good will and customers" could not be "rectified by monetary damages" and that defendant's only injury – "that which arises from being compelled to sell to a distributor against its will" – was "insignificant" by comparison).

240. *Id.* at 441 n.3.

241. *See id.* at 442-43 (requiring no showing of probable success on merits).

"balance" of the four traditional factors, without any substantial explanation of the policy behind the standard.²⁴² Academic commentary was similarly silent.

1. *The Economic Model*

The pathbreaking commentary came in Professor John Leubsdorf's *Harvard Law Review* piece in 1978.²⁴³ After canvassing some of the history behind the courts' current preliminary injunction standards, Professor Leubsdorf suggested a "model" that purported to capture the policy considerations at stake at the preliminary injunction stage in accordance with "much, but not all, of the received learning on preliminary relief."²⁴⁴ Under Leubsdorf's model, the purpose of a preliminary injunction is "to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."²⁴⁵ In other words:

A court considering a motion for interlocutory relief faces a dilemma. If it does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does grant immediate relief, the defendant may sustain precisely the same loss of his rights.²⁴⁶

As Leubsdorf explained, the source of this "dilemma" is uncertainty. Because "the court's interlocutory assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached," Leubsdorf noted that any decision the court makes on a preliminary injunction motion presents some risk of irreparable harm.²⁴⁷ Thus, the key insight of Leubsdorf's model is that the court's decision whether to grant a preliminary injunction involves a tradeoff between two predicted costs: the irreparable harms that would be suffered by the moving party if the injunction were erroneously denied, and the irreparable harms that would be suffered by the non-moving party if the injunction were erroneously entered. According to Leubsdorf, the purpose of the preliminary injunction standard is to direct the court to "[w]hichever course promises the smaller probable loss."²⁴⁸

242. For a precise identification of the various analytical holes left by the courts, see Audain, *supra* note 4, at 1233-45.

243. See generally Leubsdorf, *supra* note 4 (proposing model for preliminary injunction cases).

244. *Id.* at 541.

245. *Id.*

246. *Id.*

247. See *id.* (noting that this is true "[w]hen irreparable harm to legal rights on both sides is possible").

248. *Id.* at 542.

Leubsdorf further posited that the standard factors applied by the courts can be understood within the confines of this model. First, the courts' focus on the "irreparable harm" anticipated by the parties draws an important distinction between injuries that can be redressed at final judgment and those that cannot. The court should consider only the latter:

The court need not consider every harm resulting from an erroneous preliminary decision, but only the harm that final relief cannot redress. If the final judgment can remedy the plaintiff's injuries, there is no occasion to grant immediate protection which may turn out to have been based on error. Likewise, if the defendant's injuries from what turns out to be an erroneous injunction can be redressed later, there is no reason to deny interim relief otherwise warranted.²⁴⁹

Second, the moving party's likelihood of success on the merits "is the key to the analysis of interlocutory relief."²⁵⁰ The model suggests that the court's prediction of the likelihood of success on the merits should be used to weigh the expected irreparable harms to the two parties:

The court, in theory, should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of the irreparable loss that the defendant would suffer if enjoined from exercising what turns out to be his legal right. It should then make a similar calculation of the probable irreparable loss of rights to the plaintiff from denying the injunction.²⁵¹

In sum, the Leubsdorf model suggests that the decision whether to enter a preliminary injunction should favor "the course likely to inflict the smallest probable irreparable loss of rights."²⁵² The court's assessment of which course accomplishes this goal depends on a determination of "the likelihood that various views of the facts and the law will prevail at trial" and of "the probable loss of rights to each party if it acts on a view of the merits that proves to be erroneous."²⁵³ As Leubsdorf conceded understatedly, "reducing this model to hard figures is usually impractical."²⁵⁴ Yet "mathematical expectations of profit or loss are familiar tools in decisionmaking theory," and Leubsdorf asserted that the model provides a more concrete analytical structure for the decision whether to grant a preliminary injunction even if it does not offer an objective solution based on "hard figures."

249. *Id.* at 541.

250. *Id.*

251. *Id.* at 542 (footnote omitted).

252. *Id.* at 541.

253. *Id.*

254. *Id.* at 542.

Leubsdorf's model was embraced and amplified by Richard Posner, now Chief Judge of the Seventh Circuit and one of several who may lay claim to the title of father of the law and economics movement. Judge Posner first adopted a variant of Leubsdorf's model in a Seventh Circuit opinion, and subsequently refined it in his treatise on *Economic Analysis of Law*.²⁵⁵ In *American Hospital Supply v. Hospital Products, Ltd.*,²⁵⁶ Judge Posner explained that "[a] district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken."²⁵⁷ Like Leubsdorf, Posner concluded that the court's prediction of the likelihood of success could be understood as a mechanism for "weighting" the expected irreparable harms. Posner formalized the model by suggesting that the trial court's decision is governed by "a simple formula":

Grant the preliminary injunction if but only if $P \times H_p > (1 - P) \times H_d$, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error . . . exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error. That probability is simply one minus the probability that the plaintiff will win at trial; for if the plaintiff has, say, a 40 percent chance of winning, the defendant must have a 60 percent chance of winning ($1.00 - .40 = .60$). The left-hand side of the formula is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right-hand side simply the probability of an erroneous grant weighted by the cost of grant to the defendant.²⁵⁸

Like Leubsdorf before him, Posner offered a preemptive response to his expected critics (and to Judge Swygert's biting dissent).²⁵⁹ Specifically, Posner explained that his "formula" was "not offered as a new legal standard," and was not intended "to force analysis into a quantitative straitjacket."²⁶⁰ Admittedly,

255. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 605-06 (5th ed. 1998) (proposing formula to balance harm to parties with risk of error).

256. 780 F.2d 589 (7th Cir. 1986).

257. *Am. Hosp. Supply v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986). Judge Posner articulated this intuitive explanation, but not the formal model that followed, in an earlier opinion. See *Roland Mach. Co. v. Dresser Inds.*, 749 F.2d 380, 388 (7th Cir. 1984) (stating that "task for the district judge . . . is to minimize errors").

258. *Am. Hosp. Supply*, 780 F.2d at 603; see also POSNER, *supra* note 255, at 605-06 (explaining formula for whether to grant or deny preliminary injunction).

259. *Am. Hosp. Supply*, 780 F.2d at 609-10 (Swygert, J., dissenting) (asserting that essential role of judge in preliminary injunction process is to "rely on [his] own judgment, not on mathematical quanta" and that litigating attorneys cannot be expected to "dust off their calculators and dress their arguments in quantitative clothing").

260. *Id.* at 593. In a sense, both Leubsdorf and Posner understate this point. The model is not only not "intended" to "force analysis into a quantitative straitjacket"; analytically, quantification of the expected irreparable harms is logically untenable. Because courts define

the evidence presented to the court will not facilitate an objective calculation of the numerical values called for in the formula. Instead, Posner explained that the formula is intended as "a distillation of the familiar four . . . factor test that courts use in deciding whether to grant a preliminary injunction."²⁶¹

2. *The Triumph of the Economic Model*

The economic model was hardly accepted with open arms by the academy. Despite Leubsdorf's and Posner's disclaimers to the contrary, Professor Linda Mullenix dismissed the economic model as calling for an "econometric methodology" involving an impossible "quantification of an unquantifiable process."²⁶² Professor Linda Silberman similarly proposed to discard the economic approach on the ground that "[b]oth probability of success and harms to plaintiff and defendant are highly complex assessments, not reducible to a simple numerical measurement."²⁶³ The headline of a *Legal Times* article reflected the same skepticism: "*You Say You Want an Injunction? Practice Your Math.*"²⁶⁴

Professor Mullenix's reaction was especially acerbic. She insisted that "Judge Posner's formula replaces vague, discretionary, equitable assessments with quantifiable verities" of "mathematical precision," to the extent that traditional equitable balancing could be swept aside as "an untidy anachronism"²⁶⁵ and "judges could be dispensed with altogether."²⁶⁶ In Mullenix's view, in other words, the economic model is "disingenuous" in obscuring subjectivity "in the complexities of algebraic babble,"²⁶⁷ and even "paradoxical[]" and

harm irreparable harm as harm that cannot be remedied by an award of money damages, any effort to place a dollar value on such harms will necessarily fail. Thus, the economic model's triumph is that it provides analytical structure for an evaluation of the traditional factors applied by the courts. It disciplines the court to ask the right questions, but it does not and cannot purport to provide quantitative answers.

261. *Id.*

262. See Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 543-544 & 548 (1987) (criticizing Judge Posner's formula as "an abomination in theory and practice").

263. Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279, 306 (1987).

264. See W. John Moore, *You Say You Want an Injunction? Practice Your Math*, LEGAL TIMES, Mar. 17, 1986, at 1 (noting that critics of Posner's approach argue that "it is very misleading to suggest that a preliminary injunction effort can be reduced to a numbers game"). Not all of the commentaries were critical; one article compared Judge Posner to Isaac Newton, concluding that "Judge Richard Posner would certainly have made Sir Isaac Newton proud were Newton alive today." Audain, *supra* note 4, at 1218.

265. Mullenix, *supra* note 262, at 550.

266. *Id.* at 570.

267. *Id.*

"ironic[]" in requiring "counsel and judges to do precisely the opposite of what equity demands – quantify the litigant's injuries and harms."²⁶⁸

Despite the academy's caustic reaction, I submit that the economic model proposed by Leubsdorf and refined by Posner has since emerged as the triumphant, dominant theory of preliminary injunctions. First, it is important to understand that the above critiques imply a false dichotomy. Despite the rhetoric employed by Professor Mullenix, the choice between the economic model and the "traditional" equitable formulation is not a choice between "subjectivity" and "mathematical precision." Leubsdorf and Posner can (and should) be taken at their word; their model's utility does not depend on quantification of irreparable harms or probabilities of success. It properly assumes that any estimate of such variables will quickly devolve into a subjective conceptualization.

But this assumption does not deprive the model of its utility.²⁶⁹ Instead, it merely clarifies that the model's utility lies not in an unrealistic expectation of mathematical quantification, but in its "distillation" of a "positive" economic rationale for the traditional formulation – a theoretical framework for evaluating the court's exercise of its discretion in considering the traditional four factors.

Thus, the true choice presented by the economic model is not whether to abandon subjective, equitable discretion, but whether such discretion should be guided by an overarching principle, or left to the whim of the court. In other words, the criticism that the economic model requires subjective value judgments that cannot be reduced to objective, quantifiable numbers is accurate, but beside the point. Such value judgments must be made regardless of whether or not one embraces the economic model. The difference, then, is that the economic model explains why such value judgments matter. Without some overarching theoretical construct, judges are left to make such judgments according to their own capricious standards – which are no standards at all.²⁷⁰

268. *Id.* at 550.

269. See Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 705-06 (2000) (arguing that failure of economic model to provide "objective, universal answers . . . should be neither surprising nor fatal to the model's utility," in that primary role of economic analysis is not to "yield an objectively verifiable answer," but to "facilitate a debate that extends beyond . . . empty rhetoric"); Silberman, *supra* note 263, at 304 (arguing that "unless the symbolic formulation of $P \times H_p > (1 - P) \times H_d$ clarifies or enhances for lawyers and judges the decision of whether to grant a preliminary injunction, there is no need to bother" (citing *Am. Hosp. Supply v. Hosp. Prods. Ltd.*, 780 F.2d 589, 609 (7th Cir. 1986) (Swygert, J., dissenting) (asserting that if mathematical formula is "merely a distillation of the traditional four-prong test," then "why bother?"))).

270. Perhaps this approach is preferable to some, because they believe that the subtle equities presented to courts on preliminary injunction motions can never be reduced to any

A more satisfactory objection to the economic model would be to question its theoretical construct – to argue that minimization of irreparable error costs is not a legitimate goal, or that another goal is more significant. But the critics of the model have made no attempt at such a criticism. Professor Douglas Laycock has expressed some skepticism as to the economic model's utility, but nevertheless has acknowledged that "Posner and Leubsdorf focus attention on the right question"²⁷¹ and that their model "is a helpful distillation in one important way: it focuses attention on the point of the balancing process and specifies the relationship among the factors to be balanced."²⁷² Professor Silberman similarly has objected that the expressions in the model are "not reducible to a simple numerical measurement," but nevertheless has conceded that the model "helps to conceptualize the notion of relativity between harm to the parties and likelihood of success."²⁷³

It is in this sense that the economic model has emerged triumphant. It has provided the dominant conceptual framework for ordering and balancing the traditional factors considered by the courts at the preliminary injunction phase. The model is dominant in the sense acknowledged by Professor Laycock: It focuses the courts "on the right question" and thereby explains the conceptual relationship between the traditional factors. The model's detractors do not dispute this important contribution, nor have courts or commentators offered any competing framework.

Most importantly, the triumph of the economic model is evident in the current case law in the federal courts. When Leubsdorf and Posner examined the cases, they identified a number of points on which the courts failed to reach a consensus. Perhaps the most fundamental disagreement they identified concerned the relationship between the showing of likelihood of success and the moving party's irreparable harm. Some courts suggested that a showing of

standards, and thus the best results will be ensured by preserving boundless discretion. See John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1136 (1996) (offering originalist, historical response to notion that judicial power encompasses role of expressing societal values not embodied in specific legal texts). But one should not be confused into thinking that an inability to divine quantifiable probabilities and harms necessarily dictates this result.

271. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES, CASES AND MATERIALS* 424 (2d ed. 1994) (querying whether "the court's goal" should be "to minimize the risk of legally unjustified irreparable harm, recognizing that the balancing of risks must inevitably be verbal and imprecise," and challenging thoughtful student to "formulate a better one").

272. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 120 (1991). *But see id.* (cautioning that model is "a misleading distillation in another way" in that it "greatly oversimplifies the variables that go into the balance" and in that "variables cannot be conceptualized even in theory as having discrete values that could be represented by points on a graph or by single numbers in an equation").

273. Silberman, *supra* note 263, at 306. *But see id.* at 307 (concluding that economic "formula . . . is one that equals less than the sum of its parts and is of no utility").

likely success was a threshold requirement²⁷⁴; others rejected that notion and favored a "sliding scale" approach.²⁷⁵ Without a conceptual framework for evaluating this relationship, the courts' disagreement on this issue was left to flounder.

The most important triumph of the economic model has been its apparent ability to unify the courts' treatment of this issue. Only a few courts explicitly have adverted to the economic framework,²⁷⁶ but many others implicitly have adopted its fundamental premise in announcing the overarching goal of minimizing the irreparable harms that might ensue in the event that the preliminary decision turns out to be erroneous.²⁷⁷ And whereas the courts previously were in substantial disarray as to the propriety of a "sliding scale" under which a stronger showing of irreparable harm could compensate for a

274. See *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 383 (7th Cir. 1984) (indicating, in opinion by Judge Posner, that some cases suggest that plaintiff must make threshold showing on all four traditional factors); *Leubsdorf*, *supra* note 4, at 526 (noting that "[o]ne line of cases requires plaintiffs to show a fair question on the merits, another a substantial probability of success, another a reasonable certainty, and another a clear right," without any theoretical "explanation for choosing one instead of another") (footnotes omitted).

275. See *Roland Mach.*, 749 F.2d at 383 (noting that some cases do not require plaintiff to prevail on all four factors).

276. See, e.g., *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990) ("The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.") (quoting *Roland Mach.*, 749 F.2d at 387-88); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (citing *Leubsdorf* for proposition that preliminary injunction standard requires district judge "to exercise[] his discretion in such a way as to minimize the risk that a litigant will suffer an irreparable loss of legal rights in the period before final resolution of the dispute"); *Am. Elec. v. Singarayar*, 530 So. 2d 1319, 1324 (Miss. 1988) (adopting Judge Posner's approach in suggesting that court should "undertake[] these inquiries to help it figure out whether granting the injunction would be the error-minimizing course of action, which depends on the probability that the plaintiff is in the right and on the costs to the plaintiff, the defendant, or others of granting or denying the injunction." (quoting *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986)).

277. See *Cont'l Group, Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 357 n.9 (3d Cir. 1980) ("If the final judgment can remedy the plaintiff's injuries, there is no occasion to grant immediate protection which may turn out to have been based on error. Likewise, if the defendant's injuries from what turns out to be an erroneous injunction can be redressed later, there is no reason to deny interim relief otherwise warranted." (quoting *Leubsdorf*, *supra* note 4, at 541)); see also *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 743 (1st Cir. 1996) ("In determining whether the district court was justified in finding a significant risk of irreparable harm, we first note that when the likelihood of success on the merits is great, a movant can show somewhat less in the way of irreparable harm and still garner preliminary injunctive relief."); *Constructors Assoc. of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978) ("On the basis of the data before it, the district court must attempt to minimize the probable harm to legally protected interests between the time that the motion for a preliminary injunction is filed and the time of the final hearing.").

lesser likelihood of success, the courts today overwhelmingly (if not unanimously) have adopted such an approach.²⁷⁸

Perhaps the timing of this doctrinal unification does not alone suggest that credit is due to the economic model. But in my view, the influence of Leubsdorf and Posner is evident not only in the post hoc timing of the courts' holdings, but also in the conceptual consensus that is now prevalent in the courts' opinions, and in the fact that the conceptual goal mapped out by Leubsdorf and refined by Posner finds almost no detractors or competitors in the academy or in federal jurisprudence.

3. *The Status Quo Under the Economic Model*

This background sets the stage for a conceptual evaluation of the proper role of the "status quo" in the preliminary injunction standard. If the goal of a preliminary injunction is to minimize irreparable harm to the parties, weighted by the court's prediction of the proper outcome on the merits, what is the proper role of the status quo?

a. *The Status Quo as a Proxy for Irreparable Harm?*

It might be argued that the bifurcated status quo standard makes economic sense in that injunctions that preserve the status quo predictably impose relatively minimal hardships on non-moving parties, whereas injunctions that

278. See *supra* note 7. Moore's Federal Practice asserts that the consensus on this point is less than universal. Specifically, the treatise concludes that the First, Fifth, and Eleventh Circuits have rejected some variation of the "sliding scale" approach. See 13 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 65.22[5][a], at 65-57 (asserting that "[t]he First Circuit has rejected the 'alternative test' . . . under which likelihood of success on the merits need not be shown if other factors (e.g., potential harm to the plaintiff and lack of potential harm to the defendant) are strong"); *id.* § 65.22[5][e], at 65-64 (concluding that under Fifth Circuit law, "[a] weakness in proof on one of the four factors may not be remedied by demonstrating corresponding strength in another"); *id.* § 65.22[5][k], at 65-72 (suggesting that "the Eleventh Circuit has refused to adopt the Second Circuit's more liberal approach"). The cases cited in support of these conclusions, however, do not expressly reject the notion of a sliding scale; they merely indicate that the moving party bears the burden of establishing all four of the traditional factors. See, e.g., *Cherokee Pump & Equip., Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994) (observing that moving party has "burden of persuasion" on all four factors); *NLRB v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 67 (1st Cir. 1994) (stating that moving party bears burden of establishing "a clear likelihood of success"); *Nnadi v. Richter*, 976 F.2d 682, 690 (11th Cir. 1993) (noting that moving party "bore the burden of proving each of these four factors"). Moreover, as noted above, other decisions in each of these circuits expressly adopt some notion of a sliding scale. Thus, the better reading of the cases is that although the moving party bears the burden on all four factors, that party's burden on individual factors may vary depending on the strength of the showing on other factors. This is the only reading that preserves all of the cited cases, which have not been overruled and thus should be read to be consistent with each other wherever possible.

upset the status quo tend to impose relatively significant hardships on non-moving parties. This rationale is arguably consistent with the historical origins of the courts' discussion of the status quo, which was inextricably intertwined in the goal of avoiding irreparable harm.²⁷⁹

Consider, for example, some of the injunctions recently upheld in the circuits that accord doctrinal status to the status quo, such as an order enjoining a defendant's solicitation of his former employer's employees or clients in alleged violation of an employment contract,²⁸⁰ an order enjoining a defendant's use of a trademark that allegedly infringes or dilutes a plaintiff's mark,²⁸¹ or an order staying enforcement of a new statutory restriction on the number of suspensions on deportations issuable by the Immigration and Naturalization Service (INS) in any single year.²⁸² Preservation of the "status quo" in these instances is consistent with the goal of minimizing irreparable harms. Breach of a non-solicitation agreement produces irreparable harm in the form of "loss of customers as well as customer goodwill," while enforcement of such a provision against an employee does not interfere from his "pursuing a livelihood in his chosen profession."²⁸³ Alleged trademark dilution and infringement pose a similar balance of hardships skewed in plaintiff's favor, as trademark holders may suffer irreparable injury to "their reputation with their corporate customers and partners, as well as the public at large," whereas defendants will be deprived only of their ill-gotten (and compensable) profits.²⁸⁴ Finally, the harm to the plaintiffs seeking to stay enforcement of the statutory cap on the INS's suspensions of deportations was

279. See discussion *infra* notes 251-59 and accompanying text.

280. See *Am. Fid. Assurance Corp. v. Leonard*, 81 F. Supp. 2d 1115, 1115 (D. Kan. 2000) (granting preliminary injunction because harm to employer outweighed injury to employee).

281. See, e.g., *NBA Props. v. Entertainment Records LLC*, No. 99 Civ. 2933, 1999 U.S. Dist. LEXIS 7780, at *2 (S.D.N.Y. May 25, 1999) (affirming preliminary injunction against defendant's use of NBA logo "show[ing] a silhouetted basketball player dribbling a basketball . . . altered to put a handgun in one hand alongside the words 'SDE SPORTS, DRUGS, & ENTERTAINMENT'").

282. See *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1238 (9th Cir. 1999) (affirming district court's preliminary injunction against enforcement of annual limit on suspensions of deportation imposed under Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

283. *Am. Fid.*, 81 F. Supp. 2d at 1121.

284. *NBA Props.*, 1999 U.S. Dist. LEXIS 7780, at *23. Although the *NBA Properties* court affirmed the prohibitory injunction against the defendant's use of the NBA logo, it refused to endorse a mandatory injunction in the form of a "recall order" requiring defendant to recall magazines already issued with the allegedly infringing advertisement. *Id.* at *31-*35. In so doing, the court reinforced the controlling role of the balance of hardships. It held that "the balance of hardships with respect to the recall relief . . . tips decidedly in favor of the defendant," because "it would be extremely difficult, . . . perhaps a practical impossibility, to recall [the advertisement] from the remaining copies of [the magazine] that have found their way onto newsstands around the country." *Id.* at *34.

heroically irreparable: If the cap were enforced, the record indicated that one the plaintiffs would have been deported and forever deprived of any "opportunity to seek review" of his request for suspension of deportation, and as a result the plaintiff would have lost life-saving cancer treatment not available if he were deported to Nicaragua.²⁸⁵ Any harm to the government, by contrast, was deemed to be "minimal" at best.²⁸⁶ Accordingly, under these circumstances, the courts properly have held that entry of a preliminary injunction is proper and need not be supported by any heightened showing of a "strong" likelihood of success on the merits.²⁸⁷

These results arguably can be justified in terms of the economic model. If an injunction preserving the status quo prevents substantial irreparable harm to the moving party, but imposes little or no such burden on the non-moving party, then entry of the injunction will minimize expected irreparable harms even without a showing that the moving party is highly likely to succeed on the merits. In terms of the formal model, as the ratio of H_p/H_d approaches infinity (i.e., as H_p increases and/or H_d approaches zero), the preliminary injunction will advance the goal of minimizing irreparable harm so long as the moving party has some conceivable chance of success on the merits (so long as $P > 0$).

In plainer English, a preliminary injunction preserving the status quo arguably minimizes irreparable harms even if the court ultimately is more likely to conclude that the injunction is unjustified on the merits. To see why, compare the two possible scenarios under which the court makes an error (and thus imposes irreparable harm on one of the parties). Under the first, the court grants the preliminary injunction, but eventually finds that the moving party's claim fails on the merits. Although the injunction was in error, it has not imposed appreciable irreparable harms, since (by our assumption) the mere preservation of the status quo will not have harmed the non-moving party in a way that cannot be remedied on final judgment (e.g., by an award under the bond posted by the moving party pursuant to Federal Rule 65). Under the second scenario, the court denies the preliminary injunction, but eventually concludes that the moving party is entitled to injunctive relief. Here, the

285. See *Barahona-Gomez*, 167 F.3d at 1236 (discussing hardships facing plaintiffs seeking injunction).

286. See *id.* at 1237 (noting relatively small cost to Government were it wrongfully enjoined).

287. See *id.* at 1235-36 (affirming injunction on ground that plaintiffs had "raised serious questions" as to whether statutory cap on suspensions of deportations was unconstitutional or in violation of Administrative Procedure Act); *Am. Fid. Assurance Corp. v. Leonard*, 81 F. Supp. 2d 1115, 1121 (D. Kan. 2000) (upholding injunction on basis of "a reasonable probability of success on the merits"); *NBA Props. v. Entertainment Records LLC*, No. 99 Civ. 2933, 1999 U.S. Dist. LEXIS 7780, at *15 (S.D.N.Y. May 25, 1999) (explaining that showing of "serious questions going to the merits" is sufficient where balance of hardships tips decidedly in moving party's favor).

court's erroneous ruling at the preliminary phase has imposed substantial irreparable injury because the court's failure to preserve the status quo has imposed harms on the moving party that cannot be remedied by a final judgment of monetary damages (e.g., because those harms cannot reliably be quantified). The economic model tells us that the first scenario is the lesser of two evils – even if it is statistically more likely to materialize – because the second scenario presents meaningful irreparable harms, while the first does not.

The heightened standard for preliminary injunctions upsetting the status quo arguably might be justified under a converse application of the economic model. Consider two of the injunctions discussed in Part I: one requiring Visa to issue 1.5 million Visa credit cards to the moving party, and another requiring USC to rehire its former women's basketball coach at the higher salary it pays to its men's coach. Entry of these injunctions would tend to impose substantial irreparable harm on the defendant, but would not prevent any appreciable irreparable injuries to the plaintiff.

Indeed, in each case, the respective court's refusal to endorse preliminary relief turned on just this sort of analysis. In *SCFC ILC*, the Tenth Circuit explained that the plaintiff had offered only "speculation" as to its expected harm (which in any event would be remedied by a potential award of treble damages at final judgment), whereas Visa had demonstrated prototypically irreparable injury in the form of unquantifiable harm to the "good will" associated with its trademark.²⁸⁸ In *Stanley*, the Ninth Circuit similarly concluded that the plaintiff had "failed to show that the injury she suffered was caused by the alleged wrongful conduct of USC," while the University had shown that it would suffer irreparable harm because a requirement to hire a "dissatisfied" coach would "affect the ability of the school to recruit athletes concerned about the quality and identity of the coaching staff for the next four years."²⁸⁹

Again, this approach arguably can be explained in terms of the economic model. If an injunction upsetting the status quo prevents no appreciable irreparable harm to the moving party, but imposes a substantial irreparable burden on the non-moving party, then entry of the injunction will minimize expected irreparable harms only upon a showing that the moving party is highly likely to succeed on the merits. In terms of the formal model, as the ratio of H_p / H_d approaches zero (i.e., as H_p approaches zero and/or H_d approaches infinity), the preliminary injunction will advance the goal of minimizing irreparable harm only if the moving party is almost certain to succeed on the merits (i.e., as P approaches 1).

This point may also be phrased in plainer English. Consider again the two scenarios under which the court may make an error (and thus impose irrepara-

288. *SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1100-01 (10th Cir. 1991).

289. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1325 (9th Cir. 1994).

ble harm on one of the parties). The first type of error (entry of a preliminary injunction that turns out to be erroneous) would give rise to substantial irreparable harms, since (by our assumption) altering the status quo will harm the non-moving party in a way that cannot be remedied on final judgment. The second (refusal to enter a preliminary injunction that turns out to have been warranted), by contrast, would not create appreciable irreparable harms, since the court's failure to upset the status quo will not impose harms on the moving party that cannot be remedied by a final judgment of monetary damages. All things being equal, the economic model tells us that the second scenario is the lesser of two evils. In other words, the more significant irreparable harms anticipated under the first scenario suggest that the preliminary injunction should be granted only if the greater magnitude of those harms is sufficiently discounted by the moving party's strong likelihood of success on the merits.

In sum, the prevailing theory of the conceptual role of preliminary injunctions suggests a possible justification of the bifurcated "status quo" standard. Under this theory, the "status quo" operates as a proxy for the courts' evaluation of the balance of hardships. A preliminary injunction that preserves the status quo may be justified on a minimal showing of likely success on the merits because the balance of hardships tends to favor the moving party, whereas a preliminary injunction that upsets the status quo requires a strong showing of likely success on the merits because the balance of hardships tends to favor the non-moving party. If the status quo is predictably related to the balance of hardships in the foregoing way, then perhaps the bifurcated standard applied in the Second, Ninth, and Tenth Circuits is theoretically sound for these reasons.

b. The Failure of the Proxy Under the Economic Model

Although the foregoing represents the best theoretical case for the bifurcated status quo standard, the argument ultimately fails under the economic model. First, the status quo is not a reliable predictor of irreparable harm. As explained in detail above, the "status quo" historically was conceived as a rationale or explanation for the courts' exercise of preliminary equitable relief, not as a substantive standard with independent doctrinal significance. The economic model helps to justify this historical understanding of the role of the status quo. Statistically, it may be that injunctions preserving the status quo are more likely to minimize irreparable harm, while injunctions upsetting the status quo tend to multiply such harms. But clearly there are exceptions to this "rule."²⁹⁰

290. In this sense, Leubsdorf seems to have overstated the point in his own brief analysis of the status quo. Leubsdorf asserted that "[e]mphasis on preserving the status quo is a habit without a reason," in that "a court interferes just as much when it orders the status quo preserved

In fact, the recent cases out of the Second, Ninth, and Tenth Circuits illustrate this point. Consider the Ninth Circuit's decision in *Stanley* and the Tenth Circuit's decision in the *SCFC ILC* case. It is true that in both cases the court concluded that the balance of hardships favored denial of the "mandatory" preliminary relief sought by the plaintiff, but that conclusion turned more on the particular facts of the cases than on any inherent attribute of mandatory relief. In *Stanley*, for example, the Ninth Circuit explicitly acknowledged that plaintiff's "allegations of intentional sex discrimination, prospective loss of reputation, business opportunity, and serious emotional distress" represented harms that "could not be remedied by money damages."²⁹¹ Thus, its rejection of preliminary relief turned not on the nature of the plaintiff's harms, but on her failure to establish a causal connection between her concededly irreparable harms and any wrongful conduct by the University. The Tenth Circuit's analysis in the *SCFC ILC* case is similar. The *SCFC ILC* court's conclusion that refusal of the injunction would not impose irreparable harm on the plaintiff turned on the plaintiff's failure to present concrete, non-speculative proof of potential irreparable harm to its business,²⁹² not on any notion that mandatory relief requiring a defendant to do business with a plaintiff was somehow incapable of causing such harm.

In fact, the Second Circuit's decision in *Tom Doherty* recognized that a plaintiff may suffer irreparable harm under just such analogous circumstances. There, the plaintiff sought a "mandatory" injunction requiring the owner of the "Power Rangers" property to license the plaintiff's publication of a "juvenile story book" based on this valuable property.²⁹³ The Second Circuit affirmed the entry of this injunction, and in so doing it expressly acknowledged that denial of this relief would have imposed irreparable injury on the plaintiff publisher:

If preliminary relief is not available, [plaintiff] will lose an opportunity to become a major publisher of children's books – that is to say, it will lose an opportunity to become a sufficiently well-known publisher of children's books to attract additional authors and owners of characters. . . . [T]he value of a Power Rangers book to [plaintiff's] fortunes as a children's

as when it changes it." Leubsdorf, *supra* note 4, at 546. In my view, the problem is not that the courts' "habit" is completely irrational, but that the rationale is overbroad. Statistically, it may be wise to preserve the status quo and to refuse to upset it in the run of the cases. The problem is that there are exceptions to the rule, and no predictable way to ensure that the rule's application stays within the bounds set by its rationale.

291. *Stanley*, 13 F.3d at 1324 n.5.

292. *See SCFC ILC*, 936 F.2d at 1100 (analyzing claim of irreparable harm if injunction were not granted).

293. *See Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 32 (2d Cir. 1995) (discussing facts and procedural history).

publisher is beyond ready calculation. It is a wholly unique opportunity, and the amount of damages – in particular, the loss of prospective business from additional children's authors or owners of characters – will be largely indeterminate if the opportunity is denied.²⁹⁴

Thus, even in the Circuits that accord doctrinal significance to the status quo, the case law demonstrates that there is no necessary correlation between the status quo and irreparable harm. The lack of such a correlation substantially undermines the conceptual viability of a heightened burden. Returning again to the formal model, if the status quo tells us nothing about the ratio of H_p / H_d , then there is no defensible basis for imposing any *a priori* standard for plaintiff's showing of likelihood of success on the merits (P). The same point may be rephrased in terms of the two types of error noted above. If there is no clear correlation between the status quo and relative harms, there is no theoretical reason to err on the side of a wrongful denial or wrongful entry of a preliminary injunction, and thus no basis for adopting the bifurcated standard that currently prevails in the Second, Ninth, and Tenth Circuits.

A potential response to this argument might proceed as follows: Even if the status quo is not perfectly correlated to the balance of hardships, it may nevertheless be justifiable in that (a) it is correlated in the run-of-the-mill cases and (b) it is simpler and less costly to apply than a direct examination of the balance of hardships. This argument introduces an additional variable into the economic model: private and public costs of litigation. It posits that reliance on the status quo may be economically justifiable if it generates savings in litigation costs that outweigh any corresponding increase in irreparable harm that would result from a failure to examine the balance of hardships more directly.²⁹⁵

In fact, however, the status quo standard has the opposite effect on litigation costs. The status quo is not only an unreliable proxy, it is also a costly one – more costly than a direct examination of the substantive issue of relative harms. As explained in detail below, the inquiry into the nature of the injunctive order at issue and its effect on the status quo is likely to consume significant litigation resources. Moreover, even under the heightened standard, the court's conclusion that a given order will upset the status quo does not end the analysis; the court must still evaluate the traditional factors to determine whether the moving party's likelihood of success is sufficiently

294. *Id.* at 38.

295. This approach flows directly from the economic literature examining a broad array of procedural mechanisms. See, e.g., Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U. L. REV. 1, 4 (introducing economic model for analysis of legal rules assigning burdens of pleading and burdens of proof and analogizing model to other procedural models developed in economic literature).

clear or whether its irreparable harms substantially outweigh those identified by the non-moving party. Thus, the effect of the bifurcated approach is to impose an additional level of inquiry without simplifying the examination of the traditional factors.²⁹⁶

Consider again the recent cases in the Second, Ninth, and Tenth Circuits. Before the courts in those circuits can proceed to an evaluation of the balance of hardships or the likely outcome on the merits, they must first reach a decision as to the "mandatory" or "prohibitory" nature of the injunction and/or its effect on the "status quo." The inherent ambiguity of these standards virtually assures that the parties will dedicate substantial litigation resources to convincing the court that their conception of the nature of the injunction is more accurate, particularly where the label that the court arrives at dictates whether the plaintiff faces a heightened standard of proof.

These standards are far from self-defining. A defendant's mandatory conception of an order can almost always be rephrased by a competent plaintiff's attorney in prohibitory terms, and the notion of the "status quo" is at least as subjective.²⁹⁷ The Ninth Circuit in *Stanley*, for example, thought that the plaintiff in that case was seeking a mandatory injunction to require the University to hire her as its women's basketball coach at a salary comparable to that paid to the men's coach, but her own attorney was deft enough to frame the moving papers in the prohibitory form of an order enjoining the University "from forcing plaintiff to enter into an unfair and sex discriminatory contract and interfering with plaintiff[s] continued performance as head coach of women's basketball."²⁹⁸ And in the *SCFC ILC* case, the Tenth Circuit characterized the order sought by the plaintiff as altering the status quo, since it would have "required Visa to approve [plaintiff's] 1.5 million card order,"²⁹⁹

296. One response to this conclusion would be that the status quo inquiry might produce litigation-cost savings if the four factors are more efficiently evaluated under the heightened standard than they are under the standard balance. My sense from reading the cases, however, is that the inquiry into whether the four factors weigh "heavily and compellingly" in the moving party's favor is not much simpler than the standard inquiry into whether the four factors support the moving party.

297. See *Developments in the Law-Injunction*, 78 HARV. L. REV. 994, 1058 (1965) (concluding that "[t]he concept status quo lacks sufficient stability to provide a satisfactory foundation for judicial reasoning," and that "[t]he better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial"); Leubsdorf, *supra* note 4, at 546 (asserting that "[t]he test is not even easy to apply, since it eddies off into conundrums about what status is decisive"); see also *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 831, 835 (1994) (acknowledging that "in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms").

298. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

299. *SCFC ILC, Inc. v. VISA USA, Inc.*, 763 F. Supp. 1094, 1099 (D. Utah 1991).

but the district court below had accepted the plausible argument that the order merely preserved the status quo in the sense that Visa's existing regulations required Visa to give "routine authorization" to such applications by existing members.³⁰⁰

The Second Circuit's decision in *Phillip v. Fairfield University* also illustrates the definitional ambiguities inherent in the heightened standard.³⁰¹ According to the Second Circuit, the plaintiff's request for an injunction in that case was "appropriately viewed as prohibitory" because it would "restrain[] the NCAA from acting affirmatively to interfere with [the University's] decision to award plaintiff a scholarship and to allow him to play basketball."³⁰² At the same time, the Second Circuit thought that the injunction would preserve the status quo, since it would "permit[] Fairfield and Phillip to continue the relationship to which they had agreed – that between student-athlete and university."³⁰³ Again, the court's conclusions are hardly self-evident. Without the court's intervention, *Fairfield's* "relationship" with the NCAA would have prohibited Phillip from becoming a "student-athlete" at the University. NCAA rules allowed students who fail to qualify under traditional academic criteria to participate in NCAA-sanctioned sports only if the NCAA agreed to a waiver.³⁰⁴ Thus, without court intervention, the "status quo" arguably was that the University could not consummate its relationship with Phillip by offering him a scholarship to participate as a student-athlete. In this sense, the injunction was a mandatory order requiring the NCAA to grant a temporary waiver and altering the status quo.

Thus, in each of these recent cases, the courts might just as easily have reached the conclusion that the injunction at issue was not subject to the heightened standard. Because the application of the heightened standard turns on questions that have no objective, determinate answer, it can be expected to impose at least two kinds of costs not incurred in the absence of such a

300. *Id.* at 1098. The district court could have found support for this conclusion in those cases that suggest that preservation of the status quo may sometimes require a mandatory order, particularly "where the status quo is a condition not of rest, but of action." *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984); *see also In re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986), *modified on other grounds*, 820 F.2d 1354 (1st Cir. 1987) (en banc) (concluding that "[t]he status quo of daily newspapers is to publish news promptly that editors decide to publish"). The historical discussion above reveals that the courts have long understood that mandatory orders may sometimes be necessary to preserve the status quo. *See supra* notes 146-67. The courts that adopt a heightened standard have lost sight of this fact, and have magnified the definitional ambiguities by assigning doctrinal significance to the nature of an order and to its effect on the status quo.

301. *See supra* notes 49-55 and accompanying text (discussing *Phillip*).

302. *Phillip v. Fairfield Univ.*, 118 F.3d 131, 134 (2d Cir. 1997).

303. *Id.*

304. *Id.* at 133.

standard. First, the bifurcated standard will produce litigation costs: parties and their counsel will invest time and resources in attempting to convince the court of their own view of the nature of the injunction at issue, and courts themselves (both district and appellate) will expend their own time and resources on this hollow inquiry. Second, the heightened standard will give rise to what might be termed "error costs,"³⁰⁵ it will produce decisions that turn on arbitrary and capricious considerations, since the legal standard itself is incapable of consistent, reasoned application.

Accordingly, the economic model unambiguously rejects the heightened standard applied by the Second, Ninth, and Tenth Circuits. In calling for an inquiry into the nature of an injunctive order and its effect on the status quo, these courts simply compound the costs associated with the resolution of a motion for preliminary injunction.

Conclusion

The trend in the federal circuits toward a heightened preliminary injunction standard in cases involving mandatory orders that upset the status quo has little to recommend it. History points decidedly against this approach. The notion of a heightened standard of proof is the misguided product of recent twentieth-century opinions; it finds no support in early decisions in English Chancery or even in this country. The economic conception of the role of preliminary injunctions points to the same conclusion. Continued retention of the hollow inquiry into the nature of an injunction or its effect on the status quo will give rise to additional costs without producing any offsetting benefits.

305. For a discussion of the element of "error costs" in other contexts, see Lee, *supra* note 295, at 5 (explaining that "[e]rror costs are the social costs associated with erroneous legal judgments" and are function of "the standard of proof used by the court, the allocation of burdens, and the court's level of confidence in the accuracy of its decision"); A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J. L. ECON. & ORG. 99, 108 (1989) (analyzing effect of legal errors on decision to bring suit and on incentive to obey law).