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THE LOCK-IN EFFECT OF PRELIMINARY INJUNCTIONS

Kevin J. Lynch[*]

Abstract

Judges suffer from the same cognitive biases that afflict the rest of us. They use shortcuts to help them deal with the uncertainty and time pressure inherent in the judicial process. Judges should be aware of the conditions when those shortcuts lead to systemic biases in decision-making, and adjust legal standards to reduce or avoid such bias altogether.

One important bias economists and psychologists have identified is the lock-in effect. The lock-in effect causes a decision maker who must revisit an earlier decision to be locked in to that earlier decision. The effect is particularly pronounced where the earlier decision led to the investment of resources that cannot be recovered. Although lock-in does not prevent the decision maker from altering course, it does introduce a systemic bias that should be taken into account.

Preliminary injunctions create the conditions for judicial lock-in. Preliminary injunctions require judges to assess the merits of a case at an early stage and then revisit the merits later. In the early stages of a case, the facts or legal arguments may not be fully developed or the decision may be rushed, leading to a significant risk that the preliminary assessment of the merits will be incorrect. Where irreparable harm occurs as a result of the denial of a preliminary injunction, the judge will face strong motivation to validate his earlier assessment of the merits, even in the face of new evidence or upon further reflection.

In *Winter v. Natural Resources Defense Council, Inc.*, the U.S. Supreme Court recently called into question the appropriate standard for deciding preliminary injunctions. In that case, the Court announced a broad statement of the standard without considering the variety of tests that lower courts have developed. As those courts reassess their test in light of the *Winter* decision, they should ensure that the preliminary injunction standard avoids the potential for lock-in. A flexible standard for issuing preliminary injunctions that employs a balancing test and requires plaintiffs to show only "serious questions" on the merits will achieve the purposes of a preliminary injunction while avoiding the risk of lock-in.

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INTRODUCTION

The evidence that humans are subject to numerous cognitive biases continues to mount.[1] Judges suffer these biases just the same as everyone else.[2] As it turns out, "smarter" people are even more subject to cognitive biases than the general population.[3] This understanding has profound implications for our legal system, where most of the legal standards

1. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (summarizing developments in the field and presenting the numerous heuristics that can lead to biases in certain situations).

2. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001).

3. Richard F. West, Russell J. Meserve & Keith E. Stanovich, *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCHOL. 506, 506 (2012).

employed by judges were developed long before these biases and their causes were understood.

This Article focuses on one cognitive bias in particular, the "lock-in effect."[4] The lock-in effect describes how decision makers get trapped or locked into a particular course of action, due to their motivation to justify resources committed toward that course of action. Even when faced with information that an initial decision has not achieved the expected results, decision makers are biased towards continuing investment in that course of action. The lock-in effect thus introduces a systemic bias to sequential decision-making.

Although lock-in might be expected to occur in numerous situations in the law, this Article focuses on preliminary injunctions. The U.S. Supreme Court recently called into question the appropriate standard for preliminary injunctions,[5] leading lower courts to reexamine their standards for issuing preliminary injunctions.[6] In deciding what the appropriate standard should be, courts should utilize our growing understanding of cognitive biases to ensure that the standard does not introduce any systemic bias into the legal system if it can be avoided. The conditions created when a judge denies a preliminary injunction for failure to show likely success on the merits can be expected to create lock-in because in that situation the judge explicitly decides to allow some irreparable harm to occur to the plaintiff. The same judge is later asked to reconsider whether the plaintiff was right all along. Because the judge will face internal and external pressures to justify the harm that was allowed to occur, the judge is less likely to reverse course on the merits later in the case.

Fortunately, some federal courts have already developed and use a ready solution to this lock-in. The key lies in the "likelihood of success on the merits" prong of tests for issuing preliminary injunctions.[7] To avoid lock-in, judges should employ a flexible standard for deciding preliminary injunctions that uses a sliding scale to weigh all of the preliminary injunction factors, and only requires a showing of "serious questions" to satisfy the merits factor. If a higher standard for success on the merits

4. As discussed below, this or a similar effect might be referred to not just as lock-in, but also as escalation of commitment, entrapment, face-saving, self-justification, effort justification, or path dependence, to name a few. This Article refers to all of these as "lock-in" throughout, only using different terminology when the distinction is important.

5. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008) (stating the four general factors used to decide whether to grant preliminary injunctions without acknowledging the variety of ways lower courts evaluate and weigh those factors).

6. As discussed in Section II.B, *infra*, the test for issuing a preliminary injunction typically involves some variation on a four-factor test that calls on judges to evaluate (1) the likelihood of irreparable harm; (2) the likelihood of success on the merits; (3) the balance of harms; and (4) the public interest.

7. As discussed in Section II.B, *infra*, the standard that plaintiffs must meet for the "likelihood of success on the merits" prong varies across the circuits, with some requiring a "strong showing" and others only looking for "serious questions."

creates a significant lock-in effect, as can be expected, then that standard should be changed. When a showing of irreparable harm has been made, a judge should only deny a motion for preliminary injunction if the moving party cannot demonstrate that there are serious questions going to the merits.[8]

A brief example is helpful to illustrate how the lock-in effect occurs in practice. Suppose an environmental organization files suit in federal court to challenge a decision by the U.S. Forest Service to allow a timber sale in a National Forest. The merits of the case will turn on an issue such as the decision's compliance with the approved management plan for that National Forest, or the adequacy of the Environmental Impact Statement prepared for the project. If the case raises a novel issue, it may be difficult for the environmental organization to show that it has a "strong likelihood" of success, particularly before the administrative record is released, or before the organization can engage expert witnesses to demonstrate why the court should consider an important issue. If the plaintiff cannot meet this high threshold, then a judge cannot issue a preliminary injunction in many federal circuits. However, if the Forest Service plans to proceed with the timber sale, then the trees will be cut down.

Thus, the environmental organization can easily demonstrate irreparable harm[9] and may feel compelled to seek a preliminary injunction.[10] Yet once a judge denies a preliminary injunction and allows irreparable harm to occur, the lock-in effect makes the judge more likely to affirm the earlier finding on the merits to justify having allowed the harm to occur. The judge will face strong self-justification motivations to issue a consistent ruling that it was lawful for the trees to be cut down all along. Reversing course and finding in favor of the environmental organization is always possible, and will likely still occur in some cases; however, it will occur less frequently than it would have if the plaintiffs had never sought a preliminary injunction. This result occurs not because judges intentionally decide to provide cover for their erroneous earlier decisions or because

8. For the purpose of simplicity, this hypothetical refers simply to the elements of irreparable harm and likelihood of success on the merits. However, as explained below, this Article also argues that the balance of harms and the public interest must also be demonstrated before a preliminary injunction should issue.

9. In this example, irreparable harm and success on the merits are largely independent. But that will not always be the case, as sometimes success on the merits and irreparable harm can be tightly linked, such as in cases involving trade secrets, for example. In those types of cases, where neither irreparable harm nor success on the merits can be shown to be likely, lock-in would not be expected to occur because the lack of irreparable harm reduces the incentives to justify the preliminary determination on the merits.

10. The environmental organization would not need to seek a preliminary injunction if the Forest Service agreed to hold off on the timber sale until after the lawsuit could be resolved. In this situation, the judge would not be asked to decide the merits under time pressure and without the benefits of full development of the factual record. Thus, no lock-in effect would occur.

judges fail to adequately deliberate; it occurs because of the lock-in effect.

This Article argues that a uniform standard for preliminary injunctions should include the more flexible "serious questions" test for assessing the merits of the claim and should employ a sliding scale to balance the preliminary injunction factors. Part I of this Article introduces the lock-in effect by describing the developments in the economics and psychology literature that first identified the existence of this bias, addressing potential means for curing the bias, and providing an overview of the treatment of similar cognitive biases in the legal literature. Part II provides background on the current dispute over the proper standard for deciding preliminary injunctions in the aftermath of the Supreme Court's *Winter* decision, distinguishes preliminary injunctions from other forms of preliminary or injunctive relief, and describes proposals for what the appropriate standard should be. Part III then connects lock-in to preliminary injunctions, showing how the unique context created when a judge denies a preliminary injunction based solely on failure to show likely success on the merits creates the same motivations in judges that have been found to cause lock-in. Although further study is needed to prove that lock-in occurs in the context of preliminary injunctions, the strong potential for lock-in justifies uniform adoption of the flexible sliding-scale standard that requires only serious questions regarding the merits. Finally, Part IV responds to the most common objections to the argument made in this Article and the choice of solutions to prevent lock-in from biasing judicial decisions.

I. THE LOCK-IN EFFECT

A few definitional issues are important to resolve before analyzing the lock-in effect as it applies to judicial decision-making and the preliminary injunction standard. The choice of terminology is a difficult one. This Article uses "lock-in" because that term helps to capture the underlying dynamics that lead to a systemic bias in the judicial application of the preliminary injunction standard. Stated generally, this Article employs the term "lock-in" to describe a situation where a decision maker reaches an initial decision on an issue, which leads to some allocation of resources, and then revisits that decision later. The lock-in effect refers to the extent that the decision maker is less likely to change her decision, even in light of new information or after more time for reflection, than she would have been if she never were asked to make the initial decision. Lock-in occurs because of the tendency to want to justify the initial allocation of resources by confirming that the initial decision was correct. The most likely situation for lock-in to occur is when a change in the decision upon later review would imply that the earlier allocation of resources was not the best course of action.

Of course the decision maker can and does change her mind some of the time, but this Article argues that the final distribution of her decisions

will be skewed because of her initial decision and allocation of resources. As argued in Part III, this concept applies to the preliminary injunction context, where a judge denies a preliminary injunction for failure to demonstrate likelihood of success on the merits, thus allowing a demonstrated irreparable harm to occur. Later, that judge is less likely to change the earlier decision on the merits because doing so would mean that the irreparable harm should not have occurred.

The notion of the lock-in effect is derived from a variety of studies in the economics and psychology literature. Some of the concepts have been applied to legal issues before, and even to judicial decision-making. Therefore, the remainder of this Part presents the lock-in concept in more detail, evaluates potential cures for lock-in, and discusses the application of similar concepts to legal problems.

A. *Evidence for and Causes of the Lock-In Effect*

Lock-in is an effect that may be caused by a number of cognitive processes. Much of the discussion regarding what this Article calls lock-in originated in the literature on investment decisions,[11] but the effect has also been studied in relation to hiring decisions,[12] performance appraisal,[13] auctions,[14] technology formats,[15] and policy decisions.[16] Some other names for the lock-in effect include escalating commitment, entrapment, or sunk costs. One of the primary causes of lock-in is self-justification, although other causes such as confirmation bias and cognitive dissonance contribute to the lock-in effect.

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11. Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27, 27 (1976).

12. Brian C. Gunia, Niro Sivanathan & Adam D. Galinsky, *Vicarious Entrapment: Your Sunk Costs, My Escalation of Commitment*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1238, 1240–41 (2009).

13. Mark A. Davis & Philip Bobko, *Contextual Effects on Escalation Processes in Public Sector Decision Making*, 37 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 121, 122 (1986).

14. Gunia et al., *supra* note 12, at 1241–42.

15. S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 212 (1995).

16. Davis & Bobko, *supra* note 13, at 123–25; Barry M. Staw & Jerry Ross, *Commitment to a Policy Decision: A Multi-Theoretical Perspective*, 23 ADMIN. SCI. Q. 40, 40 (1978). This effect has also been discussed in context with the Vietnam War, where President Kennedy initially committed 16,000 troops but President Johnson, in spite of evidence that continued involvement in the war was unwise, increased the deployment of troops to over 500,000. Gunia et al., *supra* note 12, at 1238. A more recent example is perhaps evident in the repeated attempts to repeal the Patient Protection and Affordable Care Act that led to a damaging partial government shutdown, both for the country and for the politicians and groups pushing for the shutdown. *See* Jennifer Rubin, *Ted Cruz Republicans Killing Ken Cuccinelli*, WASH. POST (Oct. 15, 2013), http://www.washingtonpost.com/blogs/right-turn/wp/2013/10/15/ted-cruz-republicans-killing-ken-cuccinelli (discussing, from a conservative perspective, how the public reaction to the government shutdown was impacting the Republican candidate for governor in Virginia).

Although precise formulations of the lock-in effect can vary, a few general principles stand out that are potentially useful in the context of judicial decision-making. Lock-in can occur when a decision maker has reason to honor or validate resources already invested (known as "sunk costs") by allocating further resources towards a suboptimal course of action.[17] The "reasons" why this lock-in occurs involve a desire, whether conscious or subconscious, to justify a past decision. This self-justification motivation could include both an internal component—a "desire to demonstrate rationality to himself or restore consistency between the consequences of his actions and a self-concept of rational decision making"—and an external component—an "attempt to demonstrate rationality to others or to prove to others that a costly error was really the correct decision over a longer term perspective."[18] Confirmation bias and cognitive dissonance are also important processes that lead to lock-in, and each are discussed in turn below.

Professor Barry Staw first described the self-justification that can result when an individual's behavior leads to negative consequences, identifying the problem as "escalating commitment" in the article *Knee Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*.[19] This work pushed back on the intuitive and seemingly reasonable assumption that individuals would reverse decisions or change behaviors that lead to negative outcomes.[20] Earlier work had shown that under certain circumstances, specifically those instances where a person's own behavior leads to the negative consequences, self-justification processes would be employed by individuals to either rationalize their previous behavior or defend themselves (psychologically) against the adverse consequences.[21] Key aspects of this earlier work were (1) that the consequences were "irrevocable or at least not easily changed" and (2) that "the individual must feel personally responsible for the negative consequences of his behavior."[22]

Professor Staw built on this prior work by conducting a simulation to test self-justification in the context of investment decisions, where both the consequences of the investment decision and the level of personal responsibility could be manipulated as independent variables.[23] The participants were undergraduate business students playing the role of a corporate executive making decisions about the allocation of research and

17. Staw, *supra* note 11, at 41.

18. *Id*. at 41–42.

19. *Id.* at 27.

20. *Id.* at 27.

21. *Id.* (discussing the literature on "forced compliance").

22. *Id.* at 28.

23. *Id.* at 30. The investment decisions made by the subjects were reversible, because at the later decision point, the subject was allowed to allocate investment funds among the two divisions of the hypothetical corporation, independent of the initial investment decision. *Id.* at 31–32.

development funds.[24] Initially the participants were asked to decide in which of two divisions of the hypothetical company to invest the funds. Later,the participants were again asked to invest in the same two divisions, but this time they could allocate funds in any way they wished, and were presented with financial data for the two divisions since the initial investment.[25]

One half of the subjects were presented with "positive consequences," meaning the division they chose for the initial investment improved while the unchosen one declined.[26] The other half were presented with "negative consequences," meaning that the division they initially chose to invest in declined while the other improved.[27] The subjects were randomly assigned so that half of them made both investment decisions in sequence (high personal responsibility) while the other half made only the second investment decision after being presented all the financial information (low personal responsibility).[28] The experiment measured the dependent variable of "the individual's commitment to a previously chosen investment alternative."[29]

Professor Staw found that "individuals invested a substantially greater amount of resources when they were *personally responsible for negative consequences*."[30] Professor Staw attributed this finding to self-justification, which may come from two different sources: (1) a desire to demonstrate rationality to oneself; and (2) an attempt to demonstrate rationality to others or prove that a decision was correct over the longer term.[31]

Professor Staw continued to develop this idea over the coming years. One study simulated the role of decision makers at the World Bank to test processing of information after failure and success and its effect on commitment to policy decisions.[32] The paper developed a theoretical model incorporating a variety of psychological effects, including "reinforcement effects," "expectancy effects," "self-justification effects," "reactance effects," "learned helplessness effect," and the "invulnerability effect."[33] Another study found that "the trapped administrator is one who is most likely to become committed to a policy position and remain inflexible to change in the face of negative consequences."[34] Professor Staw later

24. *Id.*
25. *Id.* at 31–32.
26. *Id.* at 32.
27. *Id.* at 32.
28. *Id.* at 32–33.
29. *Id.* at 33.
30. *Id.* at 39.
31. *See id.* at 41–42.
32. Staw & Ross, *supra* note 16, at 40.
33. *See id.* at 41–45.
34. Frederick V. Fox & Barry M. Staw, *The Trapped Administrator: Effects of Job Insecurity and Policy Resistance upon Commitment to a Course of Action*, 24 ADMIN. SCI. Q. 449, 449 (1979).

attempted to synthesize the work he and his colleagues conducted on the topic,[35] highlighting the importance of factors such as (1) whether the cause of the negative consequences was external and unlikely to persist or internal and likely to persist;[36] (2) evidence for internal and external sources of justification;[37] and (3) the importance of "norms for consistency."[38]

Other researchers have approached this or similar issues from different angles. One study found support for face-saving as a contributor to an entrapment condition by comparing subjects that varied in their level of social anxiety and asking them to make investment decisions in front of small or large audiences.[39] Another study found that, in the context of public-sector decision-making, the context of the decision and the manner in which feedback was framed affected outcomes, such that escalation of commitment was found not only in high-responsibility decision makers but also in low-responsibility decision makers under the right conditions.[40] Another study tested the differences between theories that would either replace or supplement self-justification as the primary cause of lock-in.[41] That study found that supplementary theories led to more complete explanations while replacement theories did not do a better job than self-justification to explain the observed behavior.[42] That study followed an

35. Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 ACAD. MGMT. REV. 577, 578–80 (1981).

36. *Id.* at 580. External or exogenous causes for a setback were often deemed as less likely to persist, such as monsoon rains or equipment failures during the Vietnam War that were not sufficient to change policy makers' minds about whether to continue the war effort. *Id.* Internal causes for a setback were more likely to change commitment to a course of action, because the problems were deemed to be central to the program and likely to persist. *Id.*

37. *Id.* Internal causes for self-justification included protection of self-image, while external pressure to prove to others that an earlier decision was correct might be even stronger. *Id.*

38. *Id.* at 580–81. The norm for consistency is the expectation that consistency in action is to be preferred over switching from one form of action to another. *Id.* Political discussions in recent years regarding flip-flopping, alleged or actual, of prominent politicians from John Kerry to Mitt Romney demonstrate the pervasiveness of the norm for consistency. *See* Glenn Kessler, *Mitt Romney: Flip-Flopper or Not?*, WASH. POST BLOG (Dec. 1, 2011, 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/mitt-romney-flip-flopper-or-not/2011/11/30/gIQAH6ubEO_blog.html; *Bush Attacks Kerry's Flip-Flops*, WASH. TIMES (Sept. 28, 2004), http://www.washingtontimes.com/news/2004/sep/28/20040928-123834-6324r.

39. *See* Jeffrey Z. Rubin & Elaine Lang, *Face-Saving and Entrapment*, 17 J. EXPERIMENTAL SOC. PSYCH. 68, 70–71, 78 (1981), *available at* http://www.gwern.net/docs/sunkcosts/1981-brockner.pdf.

40. *See* Davis & Bobko, *supra* note 13, at 133–35, 137.

41. Replacement theories "posit that other factors influence escalating commitment *instead of* the need to justify previous decisions." Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 ACAD. MGMT. REV. 39, 50 (1992). In contrast, supplementary theories "recognize that other factors influence escalating commitment in addition to the need to justify previous decisions." *Id.*

42. *See id.* at 42–43. The two replacement theories the study discussed were prospect theory and decision dilemma theory. *Id.* at 50–53. While prospect theory was rejected as a replacement of

earlier book that examined "entrapment situations" and pulled out several general characteristics of the phenomenon that depended on either the decision-making situation itself or the response of the decision maker to the situation.[43]

Two other cognitive processes can lead to lock-in: confirmation bias and cognitive dissonance. Confirmation bias involves a process whereby people "interpret subsequent evidence so as to maintain their initial beliefs."[44] Thus, people will seek out information that supports their initial position and overlook information that undermines it.[45] Cognitive dissonance refers to the "psychological discomfort" that comes from inconsistency between "what a person knows or believes and what he does."[46] As a result of this discomfort, a person is motivated to try to reduce the dissonance or to "avoid situations and information which would likely increase the dissonance."[47] Cognitive dissonance has been advanced as a cause of both the sunk cost effect and the escalation of commitment,[48] which can both be seen as examples of lock-in.

Another strand of research focused on the way that broader markets can experience lock-in as a result of path dependence, where initial decisions by economies and markets result in irremediable error.[49] The idea behind path dependence is that initial conditions lead to a decision that is later difficult to change regardless of whether the decision was good in the long

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self-justification, the author stated that prospect theory might explain escalation of commitment in some situations where self-justification does not fit as well, and thus prospect theory could work as a supplementary explanation. *Id.* at 53. It also discussed a number of other psychological, social, or structural issues that could complement self-justification, including whether an audience is observing the decision maker's escalation, the presence of side bets related to the investment in question, group polarization, modeling, and self-presentation. *Id.* at 54–57.

43. JOEL BROCKNER & JEFFREY Z. RUBIN, ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS 4–5 (1985). The situational characteristics include whether the investment was irretrievable, whether the decision maker had any choice to change the situation, whether the goal to be achieved was uncertain, and whether repeated investments were required. *Id.* at 4. For the response characteristics in entrapment situations the decision maker faces increasing conflict as time progresses, increases in emotional involvement over time while rational reasons recede, and the entrapment is self-perpetuating (up to a certain point). *Id.* at 4–5.

44. Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979); *see also* Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 594–603 (2013) (analyzing the confirmation bias's effect on lawyers).

45. Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315, 316–17 (2010).

46. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–2 (1957).

47. *Id.* at 3.

48. *See, e.g.*, Hal R. Arkes & Laura Hutzel, *The Role of Probability of Success Estimates in the Sunk Cost Effect*, 13 J. BEHAV. DECISION MAKING 295, 304 (2000).

49. *See* Liebowitz & Margolis, *supra* note 15.

term.[50] The particular focus of this literature is those situations where the initial decision was not optimal. More specifically, the literature focused on where the suboptimal initial decision can be changed; path dependence results in lock-in of the initial decision even though a different arrangement would be preferable.[51] The research provides an example of the market's choice of VHS as a videotaping format even though Betamax was commonly perceived to be superior.[52]

Other work has assessed the physiological effects or personality traits that correlate with escalating behavior.[53] For example, a polygraph was used to measure skin temperature, heart rate, and other physiological measures during an escalation scenario known as the "dollar auction game."[54] Skin temperature was generally correlated to the stage of the escalation scenario, but the strongest relationship was between heart rate and point of decision.[55] Personality traits based on the Risk Taking Scale and the Machiavellian Test did not correlate with the size of the ultimate bid, although there were correlations with skin temperature, which indicates how relaxed the participant was at various stages of the experiment.[56]

Other motivations and causes resulting in lock-in beyond these might be relevant,[57] but this Article focuses on self-justification, confirmation bias, and cognitive dissonance, for reasons explained in Part III.

B. *Potential Cures for Lock-In*

Because by definition lock-in includes commitment to a decision that later information reveals to be suboptimal, once lock-in is recognized, it is desirable to find a way to avoid or reduce its effects. The potential "cures" for lock-in might involve additional steps in the decision-making process that can reduce or eliminate the effect, or a change in the underlying conditions to avoid the potential for lock-in in the first place. This section discusses and evaluates some of the potential "cures" for lock-in as they apply to the preliminary injunction context. Specifically, these solutions

50. *Id.* at 205–06.

51. *Id.* at 206–07.

52. *Id.* at 208. Perhaps a more current example, though one also fading into the past as well, is the dominance of Windows-based personal computers over Macs, even though Macs are widely perceived to be "better" or at least more stable and less susceptible to viruses.

53. ALLAN I. TEGER, TOO MUCH INVESTED TO QUIT 61–82 (1980).

54. *Id.* at 61–62. The dollar auction game involves a group bidding on a dollar bill such that the highest bidder wins the dollar, but the second highest bidder must also pay his bid. *Id.* at 12. As a result, for both the highest and second-highest bidder, the most recent bid is an irretrievable investment, regardless of whether they win or lose the auction. *Id.* In this situation, the bidding will often exceed the value of the prize such that both the highest and the second-highest bidder lose overall. *Id.* at 13, 23–25.

55. *Id.* at 64–70.

56. *Id.* at 77–78.

57. Brockner, *supra* note 41, at 41.

include the introduction of a second decision maker, the use of devil's advocacy, and other means for avoiding lock-in.

Because of the strong self-justification motives inherent in the lock-in effect, many have advocated the seemingly elegant solution of introducing a second decision maker. The idea is that to the extent lock-in is caused by the desire of the decision maker to justify his initial decision, either to himself or to observers, the introduction of a second decision maker should remove the self-justification motivations driving lock-in.[58] This simple and elegant solution should work and has been proposed by many of the leading researchers in the field.

However, recent research indicates that merely introducing a second decision maker may be insufficient if there is not also psychological separation between the decision makers.[59] "Even the subtlest of psychological connections" can undermine the ability of separate decision makers to cure the lock-in effect.[60] "People feel connected to others when they share even subtle similarities like common group membership, similar names, and even the same birthday."[61] Such psychological connections have been shown to result in suffering "the exhaustion of others' self-control efforts" or feeling others' cognitive dissonance as a result of the blurred self–other boundary.[62]

This same psychological connectedness leads one decision maker to be locked in to the previous decision of another, as if it were his own decision.[63] Experiments show that perspective-taking (imagining how the other decision maker felt and thought as he made his decision, or simply imagining a day in the other's shoes) leads to vicarious lock-in in two well-studied lock-in scenarios: investment in a failing business division, and

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58. Gunia et al., *supra* note 12, at 1238–39.

59. *Id.* at 1238. The "psychological" connections tested in this study included perspective-taking, shared attributes (birthdays), and interdependent mindsets. *Id.* As discussed below, judges serving on the same court may be expected to have many comparable psychological connections. *See infra* text accompanying notes 61–63.

60. *Id.* at 1238.

61. *Id.* at 1239. *See generally* Herni Tajifel et al., *Social Categorization and Intergroup Behavior*, 1 EUR. J. SOC. PYSCHOL. 149 (1971) (studying the effects of social categorization on intergroup behavior); Brett W. Pelham, Mauricio Cravallo & John T. Jones, *Implicit Egotism*, 14 CURRENT DIRECTIONS PSYCHOL. SCI., 106, 106 (2005) (explaining that people tend to gravitate towards other "people, places, and things that resemble the self"); Dale T. Miller, Julie S. Downs & Deborah A. Prentice, *Minimal Conditions for the Creation of a Unit Relationship: The Social Bond Between Birthdaymates*, 28 EUR. J. SOC. PSYCHOL. 475 (1998) (observing a similar phenomenon among individuals sharing birthdays).

62. Gunia et al., *supra* note 12, at 1239. *See generally* Joshua M. Ackerman et al., *You Wear Me Out: The Vicarious Depletion of Self-Control*, 20 PSYCHOL. SCI. 326 (2009); Michael I. Norton et al., *Vicarious Dissonance: Attitude Change from the Inconsistency of Others*, 85 J. PERSONALITY & SOC. PSYCHOL. 47 (2003).

63. Gunia et al., *supra* note 12, at 1239.

review of a poorly performing employee.[64] A further experiment has demonstrated vicarious lock-in due to shared birth dates, based on month and year.[65] A final set of experiments has shown that people primed to be interdependent (assigned to write about completing a task by working with others, as opposed to writing about a task completed alone) also exhibited vicarious lock-in with the business investment scenario.[66] These results should give pause to anyone suggesting that lock-in can be avoided in the preliminary injunction context simply by having one judge decide the preliminary injunction and another decide the case on the merits (or having the case go to a jury trial). However, this solution also cannot be dismissed out of hand.

Devil's advocacy has also been suggested in the literature as a potential cure for lock-in based on its supposed ability to help test assumptions in the initial decision.[67] This research builds off the idea that expert reports that recommend a certain course of action can promote escalation of commitment toward that course of action.[68] The study used the investment decision test employed by Professor Staw and found that escalating commitment could be promoted by an expert report recommending increased investment.[69] The study also found that devil's advocacy reduced the escalation, although the marginal significance of this finding compared to the strong increase in investment resulting from the reliance on an expert report meant that, overall, the presence of the expert increased escalation, even when devil's advocacy was employed.[70] Part IV discusses in greater detail the implications of this study for the adversarial system of deciding preliminary injunctions.

Finally, the literature discusses a number of other methods for deterring lock-in.[71] For example, setting limits can encourage the decision maker to envision the goals not being achieved in the short run.[72] Other means for encouraging intentional behavior can prevent lock-in, such as "forewarning

64. *Id.* at 1239–41. Perspective-taking makes people feel as if they are identified with or similar to another person whose perspective they take, thus increasing their psychological connectedness.

65. *Id.* at 1241–42.

66. *Id.* at 1242. Performance of this type of task promotes interdependence and creates a generalized sense of connectedness to others.

67. Charles R. Schwenk, *Effects of Devil's Advocacy on Escalating Commitment*, 41 HUM. REL. 769, 769 (1988).

68. *Id.* at 773.

69. *Id.* at 771, 775–77, 779.

70. *Id.* at 775–80.

71. BROCKNER & RUBIN, *supra* note 43, at 211.

72. *Id.* at 197–203. When, at the outset of the decision-making process, an individual sets a limit beyond which she will not invest, it is easier for her to withdraw from the investment later upon reaching the limit, despite not achieving the goal. This is because the decision to withdraw honors a previous commitment (not to invest over the limit), reducing the cognitive dissonance associated with abandoning the investment. *Id.* at 197.

about entrapment, direct experience with entrapment, exposure to models, and salient information about the costs associated with persistence."[73] In addition to these "cognitive" means for avoiding lock-in, studies have identified a number of "motivational" drivers for avoiding lock-in. These include both negative motivations, such as anxiety over the conflict, as well as positive motivations, such as the desire for successful self-presentation.[74]

C. *The Lock-In Effect and Other Cognitive Biases in the Legal Literature*

The author of this Article has not identified any studies analyzing the lock-in effect on judicial decision-making.[75] Despite this seemingly broad statement, legal scholarship has applied other cognitive biases directly to judicial decision-making and similar or related biases to address problems other than judicial decision-making. This section presents a brief overview of the variety of contexts where these cognitive biases have been applied.

The cognitive biases of judges have received some scholarly attention. One important study tested a sample of 167 magistrate judges for five cognitive biases:

> anchoring (making estimates based on irrelevant starting points); framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving past events to have been more predictable than they actually were); the representativeness heuristic (ignoring important background statistical information in favor of individuating information); and egocentric bias (overestimating one's own abilities).[76]

The study found evidence that each of these cognitive biases affected the magistrate judges.[77] Or, as the study's authors put it, "Judges, it seems, are human."[78] A similar study found evidence of cognitive bias affecting lawyers, resulting in protracted litigation due to biases based on intuition, the framing effect, the confirmation bias, nonsequentialist reasoning, and the sunk-cost fallacy.[79]

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73. *Id.* at 211.

74. *Id.* at 211–18.

75. This statement holds true for other terms for lock-in, such as entrapment or escalation of commitment.

76. Guthrie et al., *supra* note 2, at 784.

77. *Id.*

78. *Id.* at 821 (citing Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 223 (1931)).

79. Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 579–81 (2013). Confirmation bias and the sunk-cost fallacy are both closely related to what this Article describes as lock-in. For a discussion of confirmation bias, see *supra* notes 42–43 and accompanying text. The sunk-cost fallacy is described as a tendency "to continue an endeavor once an investment in money, time, or effort has been made." Hal R. Arkes &

It is not surprising that judges are susceptible to cognitive biases, given the multitude of studies finding the effects of cognitive bias among a wide variety of professionals, "including doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists."[80] While these cognitive biases may play some role when judges rule on preliminary injunctions, they are conceptually distinct from the lock-in effect, which has its origins in self-justification and the irretrievable commitment of resources.

Many other legal scholars have applied related cognitive biases to judicial decision-making. For example, the entire practice of stare decisis, which underlies the common law system, has been described as cognitive error, based on cascades, choice bias, the endowment effect, the framing effect, path dependence, sticky defaults, system justification theory, the motive to simplify, and the motive to cohere.[81] The burden of proof in civil litigation has been analyzed in light of loss aversion and omission bias.[82]

There do not appear to be any studies analyzing the lock-in effect among judges, yet there is no reason to believe that the lock-in effect would not influence judges.[83] However, legal scholarship has analyzed the lock-in effect itself in other contexts, such as when Professor Clayton Gillette analyzed the lock-in effect as it relates to public institutions and their inability to appropriately adjust in a timely manner to changing conditions in society.[84] Additionally, Professor Russell Korobkin has discussed the implications of the endowment effect on legal scholarship, though in the context of allocating legal entitlements and facilitating exchange of those entitlements and not the judicial decision-making

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Catharine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 124 (1985). The sunk-cost fallacy has similar motivational and cognitive causes to lock-in, such as avoiding cognitive dissonance, which adheres to the norm for consistency. Wistrich & Rachlinski, *supra* note 44, at 615.

80. Guthrie et al., *supra* note 2, at 782–83.

81. Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOK. L. REV. 63, 81–96 (2009). In its most basic form, stare decisis "requires adhering to a prior decision because it is the prior decision, not necessarily because it is correct." *Id.* at 96. When stated that simply, stare decisis seems to be a clear instance of lock-in. Whether that type of lock-in is desirable is outside the scope of this Article.

82. Eyal Zamir & Ilana Ritov, *Loss Aversion, Omission Bias, and the Burden of Proof in Civil Litigation*, 41 J. LEGAL STUD. 165 (2012).

83. Whether judges are more or less susceptible to lock-in than others is not known without more detailed study. For example, it is reasonable to assume that the deliberative decision-making process followed by judges can overcome, in part, the lock-in effect. *See, e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (describing a model in which the deliberative process can sometimes, but not always, override initial decisions reached through intuitive processes); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004) (positing a model of judicial decision-making where judges take complex situations and reconstruct them into easier-to-understand decisions).

84. Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 813 (1998).

process itself.[85] Professor Charles Lawrence earlier applied the lessons of cognitive psychology to the issue of unconscious racial bias.[86]

This discussion of the legal scholarship analyzing cognitive biases is not in any way intended to be comprehensive. However, this context helps to highlight the contribution of this Article, which takes one cognitive bias (the lock-in effect) and applies it to one particular instance of judicial decision-making (preliminary injunctions) to shed light on a potential systemic bias that leads to a prescription for avoiding that bias.

II. PRELIMINARY INJUNCTIONS

Now that the lock-in effect has been described, this Part provides a brief background on preliminary injunctions in order to describe the situations under which lock-in can be expected to occur. A description of the preliminary injunction standards used in many jurisdictions reveals that judges are often asked to assess the merits of the case at an early stage, based on incomplete information or rushed decision-making. Proposed reforms of the preliminary injunction standard do not take into account the lock-in effect. Therefore, this Article proposes an improvement to the standard that is designed to reduce or remove the lock-in effect.

A. *Different Types of Injunctive and Preliminary Relief*

An injunction is deemed "preliminary" when it is sought before resolution of the merits of a case. Therefore, a preliminary injunction is distinct from injunctions that may be issued later in the course of litigation, such as a permanent injunction (after success on the merits)[87] or an injunction pending appeal (after failure on the merits but before an appeal is decided). Closely related to the preliminary injunction is the temporary restraining order, which differs from a preliminary injunction principally in

85. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1229 (2003) (describing the endowment effect as "undoubtedly the most significant single finding from behavioral economics for legal analysis to date"). The endowment effect is "the princip[le] that people tend to value goods more when they own them than when they do not." *Id.* at 1228 (citing Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 44 (1980)).

86. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

87. A plaintiff seeking a permanent injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). The precise formulation or level of showing required for each of these factors is not important. The key part of this test for the purposes of this Article is that a permanent injunction, because it comes after the merits have been decided, does not involve any assessment of the likelihood of success on the merits.

the duration of its effect and the urgency of its resolution.[88]

Another related type of preliminary relief is a stay, which can take many different forms. One common stay is a stay of discovery pending resolution of a motion to dismiss.[89] The Supreme Court recently distinguished between a stay and an injunction by noting that an injunction "is a means by which a court tells someone what to do or what not to do," while a stay "operates upon the judicial proceeding itself" and not a particular actor.[90] However, the Court did note that "[a] stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one."[91] Not only do both types of relief have a similar practical effect "of preventing some action before the legality of that action has been conclusively determined"[92] but also there is "substantial overlap between [the stay factors] and the factors governing preliminary injunctions."[93] Oftentimes the test for whether to grant a stay, such as a stay pending appeal or a discovery stay, includes consideration of the likelihood of success on the merits, one of the key prongs of the test for a preliminary injunction.

The likelihood of success on the merits prong of the preliminary injunction test is critical to the argument that lock-in can be expected to occur. Although this Article focuses on the preliminary injunction standard, other standards that incorporate an initial look at the merits of the

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88. Both preliminary injunctions and temporary restraining orders (TRO) are governed by Rule 65. FED. R. CIV. P. 65. While a preliminary injunction cannot issue without notice, a TRO can. *Id.* 65(a)(1), (b)(1). The TRO must expire within fourteen days unless it is extended for good cause. *Id.* 65(b)(2). Both injunctions and TROs require the movant to give a security sufficient to pay costs or damages to a party later found to be wrongfully enjoined. *Id.* 65(c). However, courts have discretion in determining whether to require a security, and may choose only a nominal surety bond. *See, e.g.*, RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1215 (10th Cir. 2009); Winnebago Tribe v. Stovall, 341 F.3d 1202, 1206 (10th Cir. 2003).

A further distinction between TROs and preliminary injunctions is that normally only a preliminary injunction is available for interlocutory appeal, although courts will focus more on the substance of the order rather than its title when deciding its appealability. *See, e.g.*, Nordin v. Nutri/System, Inc., 897 F.2d 339, 343 (8th Cir. 1990).

Finally, TROs might be expected to exhibit less lock-in because the judge is primed to reconsider the decision more fully when the plaintiff seeks to extend a TRO into a preliminary injunction. However, TROs are typically sought because there is some urgent threat of irreparable harm, and so even in the short time after a TRO is denied, the irreparable harm may occur, thus creating self-justification, confirmation bias, and cognitive dissonance pressures. Further, as discussed *infra* Section IV.C, the granting of a TRO would not be expected to exhibit the same lock-in effect as the denial of a TRO, because of the requirement for showing not just success on the merits but also that irreparable harm, balance of harms, and the public interest support the issuance of a TRO.

89. Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 76 (2012).

90. Nken v. Holder, 129 S. Ct. 1749, 1757–58 (2009).

91. *Id.* at 1758.

92. *Id.*

93. *Id.* at 1761.

underlying case might also be expected to exhibit lock-in. Thus, other areas in which lock-in might be observed could include discovery stays,[94] injunctions or stays pending appeal,[95] and TROs.[96] However, other types of injunctive relief, notably the permanent injunction, do not give rise to concerns about lock-in because they do not involve an initial weighing of the merits. While the purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held," a permanent injunction is only issued once "the parties will already have had their trial on the merits."[97] Thus, because the court has already reached the decision on the merits before a permanent injunction is entered, there is no risk of lock-in.

B. *Standards for Preliminary Injunctions*

When deciding whether to issue a preliminary injunction, judges typically assess some variation of the following four factors: (1) whether irreparable harm is likely to occur if the injunction is not granted; (2) the likelihood of success on the merits; (3) the balance of harms between parties to the litigation if an injunction is issued or if one is not; and (4) the public interest. Courts evaluate these factors differently.[98] Some courts

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94. *See, e.g.*, Feldman v. Flood, 176 F.R.D. 651, 652–53 (M.D. Fla. 1997) (the court will take a "preliminary peek" at the merits to decide whether to stay discovery pending a motion to dismiss).

95. Courts may suspend, modify, restore, or grant an injunction, pending appeal of an interlocutory or final order that grants, dissolves, or denies an injunction. FED. R. CIV. P. 62(c). In *Winter* itself, the Ninth Circuit granted the Navy a stay of the injunction that had been entered by the district court. Natural Res. Def. Council, Inc. v. Winter, 502 F.3d 859, 863–65 (9th Cir. 2007), *rev'd*, 129 S. Ct. 365 (2008). The standard that appellate courts use to stay civil judgments pending appeal includes "a strong showing that [the movant] is likely to succeed on the merits." *Id.* at 863 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). For the purposes of this Article, there is no need to distinguish between a stay of an injunction pending appeal and a request for an injunction pending appeal, although the Supreme Court might make such a distinction in narrow circumstances. *See Nken*, 129 S. Ct. at 1757–60.

96. TROs are decided using the same factors as preliminary injunctions, including the factor regarding likelihood of success on the merits. McLeodUSA Telecomm. Serv., Inc. v. Qwest Corp., 361 F. Supp. 2d 912, 918 (N.D. Iowa 2005).

97. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395–96 (1981).

98. The seminal work in this field was done by Professor Leubsdorf, where he identified the variety of formulations courts use to decide preliminary injunctions and proposed a coherent rationale to understand this variety. *See generally* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) (analyzing the factors the courts consider for issuing a preliminary injunction).

Additionally, the public interest prong in particular is notoriously difficult to rationalize and predict. One court has described the public interest prong as the "wild card" of the preliminary injunction analysis. Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986). Scholars have described the public interest prong as "make weight" for supporting a decision primarily based on other prongs, Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 234 (1984), or as a factor that "may disguise and superficially legitimate a judge's or party's personal agenda," Lea B. Vaughn, *A Need for Clarity: Toward a New*

treat some factors as threshold factors while some courts treat all four factors as independent requirements.[99] Other courts adopt some variation of a sliding-scale approach—the standard for one or more factors may be reduced based on a particularly strong showing on other factors.[100]

This Article focuses on the "likelihood of success on the merits" factor. As Part III discusses, this is the principal factor that creates the conditions where lock-in can occur. Despite some language seemingly to the contrary in recent Supreme Court opinions, lower federal courts have adopted a variety of standards for assessing the likelihood of success on the merits. Some courts state that a plaintiff must show that he is "likely to succeed on the merits,"[101] while others state that the court will weigh the "likelihood of success on the merits."[102] "Likely to succeed on the merits" seems to imply that the plaintiff must show that success is more likely than not, although courts are not always explicit if that is the case. "Likelihood of success on the merits," in contrast, seems to leave open whether the plaintiff must prove a 51% chance of success, or some greater or lesser chance of success. Additionally, the phrase "substantial likelihood of success on the merits"[103] is also not clear—does "substantial" mean 5%? 25%? 50%? 75%? Some courts provide more clarity and seem to require greater than a 51% chance of success, by stating that the plaintiff must demonstrate a "strong likelihood of success."[104] Other courts indicate that a less than 50% chance of success is sufficient, allowing an injunction to issue upon a showing of "serious questions" as to the merits of the case.[105] The array of different formulations used by courts, even within the same jurisdiction, has led to some confusion about what precisely plaintiffs must show.

Furthermore, to the extent that preliminary injunction standards require

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Standard for Preliminary Injunctions, 68 OR. L. REV. 839, 864 (1989). *See generally* Orin H. Lewis, Note, *"The Wild Card That Is the Public Interest": Putting a New Face on the Fourth Preliminary Injunction Factor*, 72 TEX. L. REV. 849 (1994).

99. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds by* 559 U.S. 1089 (2010).

100. *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011); Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010); Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins., 582 F.3d 721, 725 (7th Cir. 2009).

101. *See, e.g.*, Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011). The Supreme Court in *Winter v. Natural Resource Defense Council, Inc.* used this formulation. 129 S. Ct. 365 (2008).

102. *See, e.g.*, Ty, Inc. v. Jones Grp., Inc., 237 F.3d 891, 895–96 (7th Cir. 2001).

103. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009).

104. Tumblebus Inc. v. Cranmer, 399 F.3d 754, 760 (6th Cir. 2005).

105. *Cottrell*, 632 F.3d at 1134–35. Other formulations include whether there are "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberative investigation." RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1208 n.3 (10th Cir. 2009).

a showing that the plaintiff is more likely than not to succeed on the merits, no court has adequately explained how such a standard is any different than the ultimate burden of proof carried by the plaintiff when the merits are decided. In civil cases, the plaintiff wins by demonstrating a greater than 50% chance that his claims should prevail. Although the Supreme Court has cautioned that "[a] party thus is not required to prove his case in full at a preliminary-injunction hearing,"[106] this language seems inconsistent with the Court's other statements that plaintiffs seeking a preliminary injunction "must normally demonstrate that they are likely to succeed on the merits of their challenge."[107] Furthermore, Rule 65(a)(2) explicitly provides a procedure for consolidating a preliminary injunction hearing with a trial on the merits.[108] Thus a standard for likelihood of success on the merits that is equivalent to the party's burden of proof at trial is not just bad policy, it is inconsistent with the Federal Rules of Civil Procedure.[109]

The Supreme Court recently examined the preliminary injunction standard in a series of cases, most notably the *Winter* decision from 2008. In *Winter*, the Court stated the four traditional factors for a preliminary injunction as if they were each individual requirements to be met, and also stated that a showing of a "possibility" of irreparable harm is insufficient.[110] However, the resolution of the case rested on neither the irreparable harm nor the likelihood of success on the merits prongs; instead, the Court based its holding on the failure of the plaintiff to establish that the balance of harms between the parties and the public interest favored a preliminary (or permanent) injunction.[111] Thus the Supreme Court, apparently without fully considering the consequences of its sweeping and unnecessary language,[112] has led the lower courts to

106. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

107. Perry v. Perez, 132 S. Ct. 934, 942 (2012).

108. FED. R. CIV. P. 65(a)(2).

109. *See Camenisch*, 451 U.S. at 395 (noting that courts normally require clear and unambiguous notice of the intent to combine a preliminary injunction hearing with a trial on the merits in order to afford the parties a full opportunity to present their respective cases); *see also* Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 34–35 (2d Cir. 2010) (rejecting the interpretation that *Winter* and related cases "require[] a preliminary injunction movant to demonstrate that it is more likely than not to succeed on its underlying claims, or in other words, that a movant must show a greater than fifty percent probability of success on the merits").

110. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375–76 (2008).

111. *Id.* at 378.

112. The reasons why the Supreme Court either intentionally or unintentionally chooses to make sweeping and inaccurate statements about procedural issues are puzzling. Perhaps *Winter* and similar cases are examples of "bad cases mak[ing] bad law." *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (redefining pleading standards in response to "national security" concerns raised in a suit challenging action by the Attorney General and other government official tasked with responding to the threats of terrorism). *Winter* and *Iqbal* involved the Supreme Court overturning lower courts that had taken a more careful and balanced approach in cases that pitted national

reexamine long-established preliminary injunction standards. The Fourth Circuit has even changed its preliminary injunction test because it viewed the Supreme Court as having "articulated clearly what must be shown to obtain a preliminary injunction."[113]

Despite the broad statements in the decision, the variety of different formulations of the preliminary injunction standard has survived in the lower courts even after the *Winter* decision.[114] Although the Fourth Circuit felt compelled to follow the sweeping statements in *Winter*, the Second,[115] Seventh,[116] Ninth,[117] Tenth,[118] and D.C.[119] Circuits have expressly retained their balancing tests.

In light of the variety of standards for preliminary injunctions that lower courts apply, and the seemingly inconsistent view of the Supreme Court that there is only one standard, a number of questions come to mind. What should the standard for preliminary injunctions be? Should there be a uniform standard across all federal courts? Should each factor of the standard be a separate requirement, or can some balancing occur? What is

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security concerns against environmental values and civil rights, respectively. The dissenting opinion in *Winter* by Justice Ruth Bader Ginsburg is the only portion of the decision that addresses explicitly the "sliding-scale" approach and the need to preserve the flexibility that "is a hallmark of equity jurisdiction." *Winter*, 129 S. Ct. 365 at 391–92 (Ginsburg, J., dissenting). What the majority in *Winter* thought about the sliding-scale approach can only be inferred based on the broad and sweeping language regarding the appropriate standard for preliminary injunctions, and the dicta regarding the showing required for the irreparable harm prong. *Id*. at 375, 378.

113. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds by* 559 U.S. 1089 (2010).

114. *See* Bethany M. Bates, Note, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011) (examining the split amongst the circuit courts in using the four factor test and the degree to which they use a sliding scale and require a showing of likelihood of success on the merits); *see also* Sarah J. Morath, *A Mild* Winter*: The Status of Environmental Preliminary Injunctions*, 37 SEATTLE U. L. REV. 155, (2013).

115. *See* Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (reaffirming the standard applied by the circuit "[f]or the last five decades" and noting the benefits of the "serious questions" formulation).

116. *See* Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (citing *Winter* for the proposition that "[t]here also must be a plausible claim on the merits"). The strength of the merits required depends on the balance of harms. *Id.*

117. *See* Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (noting that the *Winter* Court did not explicitly discuss the "sliding-scale" approach).

118. *See* RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1208 n.3 (10th Cir. 2009) (reaffirming that in certain cases the "movant need only show 'questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberative investigation'" (quoting Walmer v. U.S. Dep't of Def., 52 F.3d 851, 854 (10th Cir. 1995))). The Tenth Circuit actually cited *Winter* but reframed the first prong of the test to be "a likelihood of success on the merits" as opposed to "he is likely to succeed on the merits." *Compare id.* at 1208, *with* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

119. *See* Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009) (reaffirming the sliding-scale approach and noting that *Winter* "does not squarely discuss whether the four factors are to be balanced on a sliding scale").

the showing required to demonstrate a likelihood of success (in all its various formulations)? The following section presents a few of the problems with existing standards, then describes the various proposed solutions from scholars and judges.

C. *Problems with Preliminary Injunctions*

Requiring a showing of likelihood of success on the merits is problematic because it asks for an estimation of the ultimate outcome of the case before the case has been fully developed, and it is often on a compressed timeframe not conducive to deliberative decision-making. Plaintiffs often seek preliminary injunctions before discovery can be completed or even commenced, meaning that plaintiffs may not have the proof to show they can win, even where such proof exists. In challenges to federal agency action, plaintiffs may seek preliminary injunctions before the government has prepared an administrative record, making it difficult to show likelihood of success based on establishing that the record is inadequate or that the challenged action was arbitrary. Finally, unlike other rulings that occur before trial, such as motions to dismiss or summary judgment, no rules regarding burdens of proof or inferences protect against the imbalances of information that may exist between plaintiffs and defendants.[120]

Preliminary injunctions also can force parties to argue the merits before they have fully developed them. The time pressures on judges, who might be asked to act before some action is taken by the defendants, means that the issues may not be researched thoroughly or sufficiently deliberated upon. The Supreme Court recognized this reality when it stated "[t]he choice for a reviewing court should not be between justice on the fly or participation in what may be an 'idle ceremony.'"[121] The Court further noted that "haste . . . is often necessary" when deciding a preliminary injunction. As a result, they are often decided "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."[122] Despite these difficulties with weighing the merits at the preliminary injunction stage, the Supreme Court nevertheless asserted that

120. For example, in a motion to dismiss, the plaintiff need only show that a claim is plausible, not that it is certain to prevail. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009). On summary judgment, any disputed facts preclude resolution, and all inferences are drawn in favor of the non-moving party. *See* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). In contrast, in the preliminary injunction context, the plaintiff seeking the injunction has the burden to show likelihood of success on the merits even though an informational imbalance may favor the defendant. *Winter*, 129 S. Ct. 365 at 374.

121. Nken v. Holder, 129 S. Ct. 1749, 1757 (2009) (quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 (1941)). Although the *Nken* Court was discussing a stay pending appeal, the same logic would apply to a preliminary injunction, where the ability to grant interim relief is supposed to allow sufficient time for the merits to be decided.

122. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

a preliminary injunction is an "extraordinary remedy"[123] that can only issue after a showing that the plaintiff "is likely to succeed on the merits."[124]

Federal courts that apply a "sliding scale" approach have discussed many of the problems that arise from application of a too rigid standard for preliminary injunctions. The Second Circuit has defended the value of its own "sliding scale" standard on the basis that it "permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction."[125] The source of the "value" of this approach is "its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation."[126] Justice Ruth Bader Ginsburg also noted in her *Winter* dissent that "[f]lexibility is a hallmark of equity jurisdiction" and that this flexibility is consistent with the "sliding scale" approach to preliminary injunctions.[127] Abandoning this flexibility would limit the value of preliminary injunctions:

> Preliminary injunctions should not be mechanically confined to cases that are simple or easy. Requiring in every case a showing that ultimate success on the merits is more likely than not "is unacceptable as a general rule. The very purpose of an injunction . . . is to give temporary relief based on a preliminary estimate of the strength of plaintiff's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case. Limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility."[128]

The problem with an overly rigid preliminary injunction standard is that all the reasons supporting why a preliminary injunction is necessary—to

123. *Winter*, 129 S. Ct. at 376 ("A preliminary injunction is an extraordinary remedy never awarded as of right.").

124. *Id.* at 374. This statement was not necessary to the holding, which was based on consideration of the balance of the equities and the public interest. *Id.* at 378. The Court expressly did not decide whether the plaintiff had established a likelihood of success on the merits. *Id.* at 378–79. Even though the success of the merits prong was expressly identified as outside the scope of the *Winter* decision, a later Supreme Court decision has pointed to *Winter* for the proposition that "[p]laintiffs seeking a preliminary injunction of a statute must normally demonstrate that they are likely to succeed on the merits of their challenge to that law." Perry v. Perez, 132 S. Ct. 934, 942 (2012).

125. Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

126. *Id.*

127. *Winter*, 129 S. Ct. at 391–92 (Ginsburg, J., dissenting).

128. Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35–36 (2d Cir. 2010) (alteration in original) (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.3 (2d ed. 2009)).

prevent "justice on the fly" and to preserve the status quo until the legal disputes can be fully litigated—apply not just in those cases where it is possible to demonstrate likely success on the merits, but also in any case that ultimately does succeed on the merits. Furthermore, if forcing an early decision based on the likelihood of success on the merits contributes to lock-in, then an inappropriately high standard for success on the merits can bias the outcome of cases in which plaintiffs seek preliminary injunctions.

D. *Proposed Standards from Scholars*

Scholars and other commentators have proposed several distinct solutions to address the variety of uncertain and indeterminate standards lower federal courts use to decide preliminary injunctions. None of these solutions has examined the lock-in effect or other cognitive biases, which this Article contends should help shed light on which of these solutions, or another solution entirely, should be adopted in the federal courts.

Professor John Leubsdorf published the seminal scholarly work on preliminary injunctions in 1978.[129] After explicating the history and development of the preliminary injunction standard, Professor Leubsdorf argued that "[s]ince preliminary injunctions issue on the basis of rudimentary hearings, the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."[130] Leubsdorf identified the "danger of incorrect preliminary assessment" as "the key to the analysis."[131] Recognizing that irreparable harm is possible on both sides, Leubsdorf suggested two inquiries:

> First, [the court] should appraise the likelihood that various views of the facts and the law will prevail at trial. Second, the court should assess the probable loss of rights to each party if it acts on a view of the merits that proves to be erroneous. The court can then chart the course likely to inflict the smallest probable irreparable loss of rights.[132]

This formulation is similar to the balancing tests or sliding-scale approach employed by many of the circuits, and it appears to conflict with a hard reading of *Winter* that would require a showing of likely success on the merits regardless of the magnitude and certainty of irreparable harm. This Article shares Professor Leubsdorf's assessment that a key issue is the

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129. Leubsdorf, *supra* note 98, at 525–66. Other scholars have labeled this the "Leubsdorf-Posner" formulation because Judge Posner later adopted it in one of his cases. *See* Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 390–91 (2005).

130. Leubsdorf, *supra* note 98, at 540–41.

131. *Id.* at 541.

132. *Id.*

uncertainty inherent in early assessments of the merits, although it comes at this view from a different approach informed by a modern understanding of cognitive biases.

A more recent scholarly look at preliminary injunction standards points out that "in the presence of legal uncertainty, a key (but largely unappreciated) function of preliminary injunctions is to promote efficiency."[133] According to this law-and-economics view, "it is unimportant whether the injunction is issued so long as adequate compensation is provided ex post."[134] This solution would transform the adequacy of surety from "an independent reason not to issue a preliminary injunction" to a sufficient basis to issue the injunction, regardless of any assessment of the merits or of irreparable harm.[135] This solution holds some appeal, as it could completely eliminate the risk of lock-in based on inaccurate preliminary assessments of the merits. However, along with Professor Leubsdorf,[136] this Article contends that the merits do have a valuable role to play and that judges can assess them without creating an unacceptable risk of lock-in. Furthermore, litigation often involves parties that have great disparities in wealth and so the party seeking an injunction may not be able to afford to post a bond, and preliminary injunctions should not be categorically denied on that basis.

A final category of solutions calls for a uniform standard. U.S. Magistrate Judge Morton Denlow has argued that the lack of a uniform standard for preliminary injunctions has led to inconsistent judgments and inequitable decisions.[137] More recently, an excellent student Note examined the impact that the *Winter* decision has had among the circuits and called for greater uniformity based on jurisdictions applying a variation of the sliding-scale approach.[138] This Article joins those calling for greater uniformity in preliminary injunction standards, and, as Part III explains in more detail, it contends that some form of the sliding-scale approach can best achieve the goals behind granting preliminary injunctive relief.

III. THE LOCK-IN EFFECT OF PRELIMINARY INJUNCTIONS

This Part connects the theory of lock-in to preliminary injunctions. This unique set of circumstances, occurring when a judge denies a preliminary injunction based solely on failure to show likely success on the merits, creates a lock-in effect in judicial decisions. The "success on the merits" standard required for preliminary injunctions is the main reason why

133. Brooks & Schwartz, *supra* note 129, at 387.

134. *Id.* at 393.

135. *Id.*

136. John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 43 (2007).

137. Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 530–33 (2003).

138. Bates, *supra* note 114, at 1523.

judicial lock-in occurs. This Article proposes that incorporating a more flexible standard, one requiring only "serious questions" on the merits to grant a preliminary injunction, will still appropriately limit issuance of the injunctions while avoiding the risk of lock-in by failing to preserve the status quo.

A. *Does Lock-In Occur?*

Preliminary injunction proceedings create the conditions where lock-in can be expected to occur. Judges asked to decide a preliminary injunction must make some assessment of the movant's likelihood of success on the merits, regardless of the precise standard applied. This assessment is often made early in the case before full development of all the facts and often under significant time pressure. In addition to assessing the merits, the judge must look to whether irreparable harm will occur, whether the balance of hardships favors an injunction, and where the public interest lies.[139] If these three factors are all met, but a preliminary injunction is nevertheless denied for failure to show likely success on the merits, then irreparable harm will likely occur, outweighing any harm that would have resulted from a preliminary injunction. Under those circumstances, the irreparable harm that follows the denial of a preliminary injunction represents the irretrievable commitment of resources that leads to lock-in, and the second look at the merits by the judge creates conditions where strong internal and external self-justification motives can be expected to influence the outcome of the case on the merits. Although judges certainly can and have changed their minds on the merits after denying a preliminary injunction, the lock-in effect can be expected to systematically bias outcomes so that cases in which a preliminary injunction was denied will be less likely to succeed on the merits as compared to situations where no preliminary injunction was sought.[140]

When deciding a preliminary injunction, the judge may face significant pressure to rule quickly to preserve legal rights that might otherwise be lost. Unless the defendant agrees to hold off on taking any offending action until the legal claims can be resolved, the judge might have to issue an

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139. *See supra* Section II.B (discussing the four factors weighed in granting or denying a preliminary judgment).

140. This statement is stronger than one that simply says cases where preliminary injunctions are denied are more likely to lose on the merits than cases where preliminary injunctions are granted. Certainly some, if not most, of the difference in those cases would be due to differences in the strength of the underlying claims—those cases that are stronger are more likely to have a preliminary injunction granted in the first place. Rather, the claim here is that when a preliminary injunction is denied based on a failure to show likely success on the merits, there exists some level of uncertainty about the underlying merits. Some of the cases where an injunction is denied should later be successful on the merits. But because the judge has said the merits were not strong enough at the initial stage, and then allowed some irreparable harm to occur, there will be pressure on the judge to justify the initial decision.

injunction quickly to prohibit behavior that the defendant would otherwise be permitted to carry out. The briefs presented by the parties in this situation may not be as helpful to the judge because of the rush in preparing them. In easy cases a judge may not need time to reflect on the arguments or to conduct independent research into the law, but in more difficult cases this may not be possible.

The judge may hold a hearing on the preliminary injunction (although a hearing is not required) at which evidence would ordinarily be offered to the court. At this stage, the evidentiary rules and procedures normally in place at a trial are often not present. Furthermore, at this stage of the litigation, the facts of the case often have not been fully developed. This would most often be the case when the parties have not yet completed or even commenced discovery. Where there is a significant disparity of information between the parties, the movant may be at a significant disadvantage in terms of having to prove his case without the benefits of discovery. In administrative law cases challenging agency action, the record on which the court is to base its review may not have been produced yet, making a searching and thorough review of a record nearly impossible.

The cases where one would expect to find the greatest lock-in effect are those where (1) irreparable harm was demonstrated; (2) the balance of harms tipped in favor of the plaintiff, perhaps strongly; (3) the public interest favored an injunction; but (4) plaintiff was not able to demonstrate a high enough likelihood of success on the merits, even though he demonstrated *some* likelihood. In these cases, a preliminary injunction would be denied.[141] That would be enough to end some cases, but in many, the plaintiff might still proceed to seek a decision on the merits to prevent additional irreparable harm and to obtain whatever relief is still available.

At times, the likely irreparable harm demonstrated by the plaintiff may in fact occur. If the balance of harms weighed strongly in the plaintiff's favor, then this actual harm would far outweigh any harm that an injunction might have caused the defendant. This would still be the result the judge expected, who affirmatively choose not to intervene in spite of this actual harm, believing that the case would not succeed on the merits. The judge is then eventually asked to decide a summary judgment motion (if there are no disputed material facts) or preside over a trial to decide the merits of the case. While a jury might serve as the fact finder (unless it is a bench trial), the judge will still decide evidentiary disputes and determine

141. One might also expect to find a lock-in effect where a preliminary injunction was granted, such that a judge would be more likely to find in favor of plaintiff once a preliminary injunction had issued. However, I believe this presents a much less serious concern because the judge would have determined that the balance of harms favored the injunction, as well as the public interest. Thus the standard already acknowledges the risk of error when granting a preliminary injunction, but provides a means for assessing which risk is greater. Furthermore, plaintiffs are often required to post a bond covering any damages to the defendant as a result of a preliminary injunction, which would also reduce the risk of lock-in effect when an injunction is granted.

whether the facts are sufficient to prove the legal claim alleged.

In this situation, a judge's easiest option is to conform to the earlier ruling and dismiss the case on the merits. The judge is under significant pressure to justify the earlier decision that allowed the irreparable harm to occur. This might be justified by new evidence that was introduced on the merits or new arguments that were more developed, resolving some of the cognitive dissonance that would occur if a judge were to effectively reverse the earlier assessment of the merits that allowed the irreparable harm to occur. However, the lock-in effect places judges under pressure to interpret new evidence or apply new legal arguments in a way that would justify the denial of the preliminary injunction by affirming the earlier assessment of the merits, particularly where confirmation bias is the underlying process leading to lock-in.

In an ideal world, the judge would evaluate the evidence and the legal arguments, ignore the prior denial of a preliminary injunction, and decide the case. But according to lock-in theory, a judge might be less likely to ultimately find for a plaintiff after allowing some irreparable harm to occur. Additionally, confirmation bias would likely arise in this situation because the judge will have a tendency to seek out evidence supporting the earlier decision on the merits and discounting or failing to give sufficient weight to any contradictory evidence. This effect should be greater the larger the harm that occurred. This is not to say that a judge would consciously dismiss a claim considered meritorious solely to justify the denial of the preliminary injunction. But a judge might be more skeptical of the evidence that supports a plaintiff's claim, or prone to a more narrow reading of the law, in a way that systematically would disfavor plaintiffs who failed to secure a preliminary injunction.

Lock-in theory does not mean that judges will never reverse themselves after denying a preliminary injunction. It does not mean that judges will consciously dismiss claims in order to save face, justify their earlier decisions, or protect their reputations among themselves or outsiders. However, the unconscious results of the lock-in effect still matter for plaintiffs. As a result of the lock-in effect, a plaintiff may reduce his chances of success on the merits when he seeks a preliminary injunction, but fails to demonstrate a sufficiently high likelihood of success.

An example is helpful to understand how this might play out. Let us return to the example of a challenge to a timber sale as discussed in the Introduction. On the merits, the plaintiff must show that the U.S. Forest Service acted in an arbitrary or capricious manner in approving the timber sale. Irreparable harm is easily demonstrated in this case because once the trees are cut down the forest cannot be returned to its pre-harvest state. The balance of harms and public interest prongs also should not pose a great challenge for the environmental organization, absent some unique and compelling circumstances that require the trees to be cut down immediately.

Thus, the issuance of a preliminary injunction will hinge on whether the plaintiff can meet the standard for likelihood of success on the merits. If the government does not agree to prevent the sale and subsequent harvest of the timber, the plaintiff may be forced to seek a preliminary injunction before the government files its administrative record. In this situation, the key evidence necessary to prove the decision was arbitrary and capricious may not be available for the reviewing court to consider. Suppose there is a "smoking gun" email indicating that the government knew of a serious legal defect but deliberately swept it under the rug. Or suppose it would only be apparent upon a review of the record that the government had not conducted all of the studies needed to show that the forest would regenerate sufficiently quickly after the timber harvest. In these cases, the preliminary injunction would be denied and the trees would then be cut down before the merits could be decided.

When the judge is later confronted with the full record and asked to decide the merits of the case, how will she respond if new evidence supports the plaintiff's claims? In an ideal world, the judge will not suffer from the cognitive biases that affect everyone else, such as confirmation bias, but instead will evaluate the new evidence and decide that the plaintiff should succeed on the merits. However, we do not live in such an ideal world.[142] Judges are people too, and they suffer the same cognitive biases that the rest of us suffer. Because of the conditions for lock-in created by the preliminary injunction, the judge will face pressure to justify the denial of the injunction to herself and to her peers, the parties, and the public.

Another way to look at the lock-in effect is to abstract away all the details of the case, and just look at some hypothetical probabilities of success. Suppose that the federal courts in our hypothetical jurisdiction will decide 200 similar cases in a year.[143] Assume that in every one of these cases, irreparable harm will occur if an injunction is not granted and the balance of harms favors an injunction, as does the public interest. In half of those cases, one party seeks a preliminary injunction. Assume that the probability of success on the merits for each set of 100 cases is 40% at the outset. So for the 100 cases where a preliminary injunction is not sought, ultimately the plaintiff prevails in 40 of the cases. If the other 100 cases have the same probability, then 40 of those should also succeed, unless lock-in biases the outcome.

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142. *See* Samual Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 113 (1990) (noting that few attain the ideals of ignoring sunk costs and focusing only on the prospective benefits and costs of alternative courses of action).

143. Of course, in the vast majority of cases, courts do not actually decide the merits. Only a tiny fraction of cases are resolved at trial. Summary judgment may also be seen as a decision on the merits, for those cases where there are no relevant factual disputes. Many other cases may settle, however, or they may be dismissed by the court or the parties.

How are judges to assess the likelihood of success in those cases where plaintiffs seek a preliminary injunction? If the judge has no further information other than the success rate of plaintiffs in other cases, then the judge will determine that the plaintiff's chance of success is 40%. If this jurisdiction requires a 51% likelihood of success, then the judge will deny the preliminary injunction. This will occur regardless of any irreparable harm to the plaintiff, and even if the balance of harms would strongly favor an injunction. So then once those irreparable harms occur, and the judge is then asked to revisit the merits, will 40 of the cases succeed? Or will some of the cases now lose, particularly the close ones where the facts supporting the claim are more marginal. Perhaps only 35 cases will prevail. Or 30. Or 25. The number would vary according to the strength of any lock-in effect.

Condition	*Total Cases*	*PIs Denied*	*Ultimate Success, 25% Lock-in*	*Ultimate Success, 5% Lock-in*
No PI sought	100	0	40	40
PI sought, *Winter* test	100	100	30	38
PI sought, sliding scale	100	0	40	40

Perhaps the previous example was too simplistic, because the judge and the parties do know *something* about the strength of the case at the preliminary stage. So let's assume that 50 of the cases are "clear" cases, and we know that in 20 of them the plaintiff will win and in the other 30 the plaintiff will lose.[144] That would still leave 50 cases where the outcome is not clear at the outset. Absent any information that the plaintiff's chance of success is greater than the average success rate of 40%, the judge will deny a preliminary injunction for those cases. Absent any preliminary injunction proceedings, the plaintiff should prevail in 20 of those 50 "close" cases. However, if the lock-in effect biases the outcome of those cases, perhaps the plaintiff will only prevail in 15 instead of 20 cases. Again, the precise number will depend on the strength of the lock-in effect.

This situation would come out differently if the plaintiff does not have to show that he is 51% likely to succeed on the merits. If a 40% chance of success would meet the "serious questions" test, then judges, absent further information beyond the average 40% rate of success, would always issue a

144. In theory one would expect the parties to settle in "clear" cases, although in practice many cases that may seem clear to a judge would not seem clear to the parties. *See* Wistrich & Rachlinski, *supra* note 44, at 593. For the purposes of this Article, one can simply consider the final outcome of the case without becoming concerned over the precise means of resolution.

preliminary injunction and irreparable harm would be avoided.[145] The status quo would be preserved long enough for the judge to decide the merits of the claim.

Condition	*Total Cases*	*PIs Denied*	*Final Result, 25% Lock-in*	*Final Result, 5% Lock-in*
No PI sought	100	0	40	40
PI sought, *Winter* test, easy case	50	30	20	20
PI sought, *Winter* test, close case	50	50	15	19
PI sought, *Winter* test, all cases	100	80	35	39
PI sought, sliding scale, easy case	50	30	20	20
PI sought, sliding scale, close case	50	0	20	20
PI sought, sliding scale, all cases	100	50	40	40

The precise impact of the lock-in effect will likely depend on numerous factors, and quantification of the effect will require more detailed study of existing court data or new experiments using judges. However, imposing relatively high standards for success on the merits creates the conditions for lock-in to occur, and it can be expected to occur as a result.

B. *Proposed Solutions*

If one assumes that lock-in occurs in practice, at least in some cases, then this Article argues that this systematic bias against plaintiffs who seek and lose preliminary injunctions creates an injustice in our legal system. As a result, steps should be taken to reform the preliminary injunction standards applied in federal court. The lock-in effect justifies a uniform standard for preliminary injunctions and provides some insight into *what* the uniform standard should be.

The best approach for reducing the risk of lock-in is simply to remove

145. Under this hypothetical, a preliminary injunction would always issue in the close or uncertain cases. This is because we are assuming that irreparable harm, the balance of harms, and the public interest all favor an injunction. While there will be some preliminary injunctions that are later vacated after the merits are decided, these do not pose a risk of lock-in themselves because the judge does not have to justify the harm to the defendant, which was outweighed by the risk of harm to the plaintiff. Part IV discusses in more detail the issue of the asymmetry of the lock-in effect on preliminary injunctions.

the conditions that create it. Put another way, lock-in can be largely avoided if the standard for likelihood of success on the merits is set appropriately, at a low level. Part of the problem with some of the existing standards for evaluating preliminary injunctions is that they ask the same question of the merits as would be decided at a full blown trial—whether the plaintiff is more likely than not correct. Therefore, judges in jurisdictions that do not employ a sliding scale or balancing test are asked to decide the same question twice, only the first time they do not have all of the relevant evidence, the protections of trial procedures, or sufficient time to reach a deliberative decision. If the initial decision were reliable, then lock-in would not create a concern. But because the initial decision has such great potential to be wrong, there is a risk that the first decision will lock-in the judge to some degree, so that some claims that should prevail on the merits do not.

This is not to say that the likelihood of success on the merits should be ignored entirely. Rather, the best approach is one already identified by several circuits—a sliding scale. So long as a case raises "serious questions" on the merits, then a preliminary injunction should issue so long as the risk of irreparable harm if an injunction is not issued outweighs any harm that would be caused by an injunction. Harm from an injunction that can be addressed through a bond need not factor into the balancing, although any irreparable harm to the defendant must always be balanced.[146] The "serious questions" test will help to weed out claims that have no merit (which can also be addressed through motions to dismiss)[147] or marginal claims. Balancing will ensure that preliminary injunctions are not issued excessively or in cases where the public interest or the harm to the defendant would be too serious. This approach would greatly reduce the risk of lock-in compared to those jurisdictions that require a showing that plaintiff is "likely to succeed on the merits" or a "likelihood of success on the merits."[148] This approach would also reduce the uncertainty[149] of

146. *E.g.*, Ohio Oil Co. v. Conway, 279 U.S. 813, 814 (1929); SMC Corp., Ltd. v. Lockjaw, LLC, 481 F. Supp. 2d 918, 930 (N.D. Ill. 2007). By definition, any harm that might be addressed through a bond would not be irreparable, because money would in theory compensate any party harmed by the issuance of an injunction. However, courts often will weigh monetary or other compensable harms against irreparable harm when balancing the harms under the preliminary injunction standard.

147. One open question is the relationship between the "serious questions" standard for a preliminary injunction and the heightened "plausibility" standard for pleading used to decide motions to dismiss. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952–54 (2009). Although the movant on a preliminary injunction has the opportunity to present additional evidence beyond the complaint, discovery may not have occurred yet, and so the difference between the two standards may not be much, if any.

148. There does not appear to be any court decision explaining what a "strong" showing of likelihood of success on the merits entails, but if it requires greater than 51% probability, then the test for a preliminary injunction is oddly *higher* than the ultimate burden of proof.

precisely *what* likelihood of success the plaintiff must show—it must be enough, when weighed against the irreparable harm, to outweigh any harm to the defendant from an injunction.

C. *Need for Further Study*

In many ways, the question of whether lock-in affects preliminary injunctions demands empirical research. Certainly empirical studies could test whether this bias exists in practice, as this Article argues can be expected. Such study might involve hypothetical cases that can be manipulated to control for all the variables that might lead to lock-in. A natural experiment also might be identified where the decision to seek a preliminary injunction is random, and not based on any assessment by the parties of the strength of their case. The study could then test whether the differences in the preliminary injunction standard (the likelihood of success on the merits prong) affect the ultimate outcome of the cases. If lock-in occurs, as this Article argues, then the lock-in effect should be stronger in jurisdictions that require a plaintiff to demonstrate a 51% chance of success on the merits. Jurisdictions that employ a sliding-scale or balancing approach should have a much weaker lock-in effect, if any. The Fourth Circuit might provide an interesting test case because of the recent change there in preliminary injunction standards. Based on the analysis of this Article, parties who seek a preliminary injunction should prevail in the Fourth Circuit at a lower rate after *Winter* than they did before.[150]

This Article located only one empirical study—the *Justice on the Fly* study—that comes close to addressing the topic of lock-in. Professors Fatma Marouf, Michael Kagan, and Rebecca Gill gathered data on stays of removal in immigration cases following the Supreme Court decision in *Nken v. Holder*, which announced as the applicable standard essentially the same preliminary injunction standard announced in *Winter*.[151] This study can potentially shed light on whether lock-in occurs in these cases. To test whether lock-in occurs, one would want to know (1) that the choice to seek a stay of removal was random—unrelated to the strength of the underlying

149. Of course there would still be some level of uncertainty inherent in this process, but given the preliminary nature of the determination, it is not feasible to ever completely remove uncertainty. Uncertainty is simply a part of litigation that all parties and their lawyers must deal with.

150. *E.g.*, Jonah M. Gelbach, *Locking the Doors to Discovery? Accessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270 (2012); Jonah M. Gelbach, Selection in Motion: A Formal Model of Rule 12(b)(6) and the *Twombly-Iqbal* Shift in Pleading Policy (Aug. 29, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138428; Of course selection effects may also be present, making this analysis difficult. For example, parties may be less likely to seek a preliminary injunction in the Fourth Circuit under the heightened standard because they are less confident they can show that they are likely to succeed on the merits.

151. Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. (forthcoming 2014) (draft on file with author).

appeal—and (2) that the granting or denial of a stay of removal was related to the underlying strength of the appeal. When the authors of this study compared the grant rate for petitions among people who never asked for stays to those for people who sought a stay but were denied, they did not find a significant difference. Thus, this study does not provide evidence that the lock-in effect occurs in those cases.

The *Justice on the Fly* study does not, however, prove the opposite, that lock-in does not occur, at least not for preliminary injunctions at the district court level. First, the sample size of the study is necessarily small due to the short amount of time that has passed since the *Nken* decision, particularly given the relatively low success rate of the cases studied.[152] Second, the study does not examine whether lock-in is greater in jurisdictions with a higher standard for granting the stay. Third, the lock-in effect may be present to a lesser extent, or not at all, at the circuit court level where cases are decided by a panel of three judges, instead of a single judge. Fourth, the framing of the question could be improved to better test the issue. The *Justice on the Fly* study was not designed to test lock-in but rather to assess the correlation between grants of a stay and the ultimate success of the petition. One aspect of this issue clearly apparent from the *Justice on the Fly* study is that these issues are complicated and difficult to tease apart. The study found large variation among the circuits in terms of the rate at which stays were granted, as well as the "error" rate in terms of the match between granting or denying stays and the ultimate resolution of the petition. Given the importance of this issue, and the scarcity of empirical data, further study would help to assess whether lock-in occurs on preliminary injunctions, to what extent it biases outcomes, if at all, and what impact those findings would have on the appropriate standard for deciding preliminary injunctions.

IV. RESPONSES TO COMMON CONCERNS

Many alternative explanations or reasons to reject the premise of this Article may come to mind. The next section addresses some of the key concerns that have been raised on this issue, and ultimately concludes that the basic premise of this Article is sound—lock-in can be expected to occur when judges decide preliminary injunctions, and the best way to avoid that lock-in is by reducing the conditions that lead to lock-in.

A. *There Is No "There" There*

Perhaps at this point the reader is not convinced that lock-in occurs. After all, judges change their minds all the time. With further time to

152. For example, out of 934 cases in the study where a stay of removal was requested, only eighty-four of the petitions were ultimately granted. Among those, the stay was denied in forty-one of the cases.

reflect on a problem, or especially with additional evidence, judges can and do change their initial opinions on the merits of a claim. This Article has not pointed out any instance of a judge saying that he would not change his initial decision on the merits because he did not want the irreparable harm that occurred to have been a waste. Given that reality, is there any hard data to back up the assertion that lock-in exists?

As an initial matter, of course the judicial process can result in reconsideration of preliminary assessments of the merits. Judges grant motions for reconsideration, after all. Trial judges also will reconsider earlier decisions when appellate courts overturn parts of those decisions. A judge who denies a motion to dismiss might ultimately dismiss the case on the merits. And even in the preliminary injunction context, judges who deny injunctions based on insufficient likelihood of success on the merits do sometimes nevertheless rule in favor of the plaintiff after a trial. The point of lock-in is not that judges never change their minds; it is much more modest. This Article's argument regarding lock-in is that judges are less likely to change their minds, and that this difference will systemically bias outcomes against parties who unsuccessfully seek a preliminary injunction.

Furthermore, because the lock-in effect is a cognitive bias, judges will not explicitly state that they are being biased in their decisions, and they may not even be aware it is occurring. Because the effect results in unintentional bias, it will not be directly reflected in any one opinion. It can only be detected after a systematic review of a sufficiently large and sufficiently similar set of cases so that small but significant effects can be discerned.

This Article also does not purport to have direct evidence of lock-in on preliminary injunctions occurring in practice. The thrust of this Article is ultimately a modest one. Based on insights from the psychology and economics literature, and a consideration of the circumstances when a judge denies a preliminary injunction solely for failure to demonstrate a likelihood of success, the conditions are ripe for lock-in to occur. Because lock-in has been observed in other similar situations, there is no reason to believe that judges deciding preliminary injunctions under existing standards will not be similarly biased. Of course this instantiation of the lock-in effect will not be proven until more detailed study occurs, but such study is outside the scope of this Article.

B. *Other Solutions*

Even if the reader is persuaded that lock-in is likely to occur, one might object to the proposed solution. This Article's solution is a modest one in that it simply suggests that an existing standard employed by a number of different circuits should be applied more uniformly. It is less drastic than a solution others have proposed—eliminating consideration of the merits

altogether at the preliminary injunction stage. Nevertheless, the following subsections address the two main alternative proposals that can be seen as less dramatic steps to reduce or avoid lock-in: (1) requiring separate decision makers to decide the merits if one has already decided a preliminary injunction; or (2) increasing awareness of the potential for lock-in and training to de-bias judges and protect against lock-in.

1. Separate Decision Makers

One seemingly obvious solution would be to have different judges decide preliminary injunctions and final determinations on the merits. By separating out the preliminary decision from the ultimate resolution of the case, one might expect to reduce most or all of any lock-in effect that occurs. However, given the recent experiments identifying "vicarious entrapment,"[153] an alternative solution is preferable. Judges may readily be expected to exhibit many "psychological connections" that would make separating preliminary from final determinations on the merits an insufficient remedy. Judges belong to their own group and might be readily expected to exhibit collegiality to other members of their court. Judges will have an easy time seeing a case from the perspective of another judge, and may not want to make a colleague look bad. Additionally some judges will share additional attributes, such as their alma mater, political party, prior work experience, etc. Any of these seems a more powerful basis for a psychological connection than the shared birthday found to cause vicarious lock-in in experiments.[154] Additionally, even if judges are aware of the potential for lock-in, that awareness does not mean it can be avoided, just as economics students who extensively studied economic irrationality did not avoid the vicarious entrapment.[155]

In some cases, there is another way to separate the initial decision maker from the ultimate decision maker—the jury. In these cases, the judge might make initial determinations on the preliminary injunction, but the jury would ultimately decide the case. The jury and the judge should be sufficiently psychologically separate to avoid vicarious lock-in, and regardless of the level of psychological separation, the jury would not even know of the prior decision (unless a very savvy juror could deduce that the judge was likely to have denied a preliminary injunction).

This Article concedes that in jury trials, the risk for lock-in should be expected to be less than in bench trials. However, relying on the jury to reach an independent decision is not a perfect solution for several reasons. Initially, the relative proportion of civil cases that go to a jury trial is

153. Gunia et al., *supra* note 12 (discussing four experiments that explored the concept of vicarious entrapment).

154. *Id.* at 1241–42.

155. *Id.* at 1242.

incredibly small.[156] The same judge who decides a preliminary injunction might later dismiss the case on a motion to dismiss or summary judgment. Additionally, the expense of continuing to a jury trial might be enough to cause settlement in a way that is unfavorable to a plaintiff compared to a settlement that might have been reached if a preliminary injunction had issued.[157] Moreover, a judge would still exert some control over the ultimate decision at trial—through jury instructions, legal rulings, or even evidentiary rulings—that might constrain the jury's ability to decide fairly, or increase the likelihood that the jury would return a verdict that vindicates the judge's earlier ruling on the preliminary injunction.[158] Thus, relying on the jury would likely not eliminate the negative impact that lock-in has in this context, at least not entirely.

2. Cognitive De-biasing

Another potential solution is to make judges aware of the risk of lock-in and to provide them with feedback on their errors so they can avoid them in the future. The term for this type of approach is "cognitive de-biasing."[159] Unfortunately, attempts at de-biasing have been met with limited success.[160] Although recent research into de-biasing may prove more successful, simply avoiding the conditions of lock-in is a better approach.

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156. *U.S. District Courts—Civil Cases Terminated, by Action Taken*, U.S. COURTS (2012), http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2012/Table410.pdf (indicating that in 2012, of 271,385 federal civil cases filed, only 1.2% reached trial).

157. One might object that the granting of a preliminary injunction would cause some defendants to settle, but as discussed *infra* Section IV.C, the concern about the risk of lock-in is not symmetrical, and therefore it is appropriate to focus on the denial of preliminary injunctions, because of the motivational effects caused by allowing irreparable harm to occur and because of the informational imbalances that often exist early in a case.

158. Again, this need not be intentional, and having a case submitted to a jury would be expected to reduce the lock-in effect to some degree. However, even if a judge is not intentionally attempting to constrain the jury, the subtle effects of lock-in can still influence judicial decision-making in a way that is systematically biased against plaintiffs who seek but fail to obtain a preliminary injunction.

An example of how the judge can still affect the outcome of a trial despite the findings of the jury can be seen in the patent dispute between Apple and Samsung. In that case, the district court judge, Lucy Koh, recently overturned the jury's damage award, cutting it nearly in half and ordering a retrial. *See* Ian Sherr, *U.S. Judge Reduces Apple's Patent Award in Samsung Case*, WALL ST. J. (Mar. 1, 2013), http://online.wsj.com/article/SB10001424127887323478304578334540541100744.html. Given the variety of ways in which the judge still influences the outcome on the merits in a jury trial, lock-in can still be expected to occur. The judge might interpret factual findings of the jury in a different light to justify her earlier ruling, for example. She also might limit evidence that goes before the jury that would affect the outcome of the case.

159. *See* Katherine L. Milkman, Dolly Chugh & Max H. Bazerman, *How Can Decision Making Be Improved?* 3 (Harvard Bus. Sch., Working Paper No. 08-102, 2008), *available at* http://www.hbs.edu/faculty/Publication%20Files/08-102.pdf.

160. *See* Baruch Fischhoff, *Debiasing*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422, 428 (Daniel Kahneman, Paul Slovic & Amos Tversky, eds. 1982).

De-biasing is most important in those situations where the conflict or source of the bias is unavoidable. In the classic business investment example, it is difficult if not impossible to avoid the sequential decisions where sometimes the earlier decision will be shown to be incorrect. In those situations, the best solution was to help the initial decision maker think through all the possible outcomes, including a negative result on the investment. That approach is similar to this Article's proposal for preliminary injunctions. If judges look merely for "serious questions" as to the merits, they are recognizing that not all of those cases will succeed on the merits although some of them will. Furthermore, this standard allows judges to appreciate that it is often impossible to accurately identify at the preliminary stage which claims will succeed on the merits and which will not. Thus, using a "serious question" standard for preliminary injunctions is the solution most consistent with existing literature on cognitive biases.

An additional benefit of this proposal is that it can be implemented relatively easily. Circuits that don't currently employ a sliding-scale test could adopt one. Or the Supreme Court could consider this issue in more detail than it had done in *Winter* and its companion decisions, and hold that the sliding-scale test should be applied for all preliminary injunctions. Although there would be some learning curve for judges when applying a different standard, there would be no administrative burden of reassigning cases after a preliminary injunction was decided. Additionally there would be no burden in terms of educating judges about the lock-in effect and providing them sufficient feedback and individual training for de-biasing to be effective. Therefore, uniform adoption of the sliding-scale test for preliminary injunctions is the best solution to address the risk of lock-in.

C. *Asymmetry*

One natural question is whether lock-in cuts both ways in this context, such that any biases might balance themselves out. While this possibility seems reasonable at first glance, the structure of the preliminary injunction test leads to a one-sided bias for lock-in when preliminary injunctions are denied. As in most situations in life, but particularly those involving cognitive biases, context is key.[161] For preliminary injunctions, the context is more than simply an initial assessment on the merits followed by a later decision on the merits. Although there is some consistency motivation any time a preliminary injunction is decided, the self-justification motives are present in only a limited subset of preliminary injunctions—those where irreparable harm to the movant outweighs any harm from the injunction. For a preliminary injunction to be granted, the judge must explicitly find that irreparable harm would otherwise occur and that any harm from the

161. Korobkin, *supra* note 85, at 1235 (noting that despite the broad range of contexts in which the endowment effect has been observed, "it is not universally apparent nor equally striking across contexts").

injunction is outweighed.[162] Thus, granting a preliminary injunction does not create the same motivation in the judge to justify allowing some irreparable harm to occur.[163] When a preliminary injunction is granted, it merely preserves the status quo long enough for a decision to be reached on the merits, and it is not granted where preserving the status quo causes more harm than not doing so.

Additionally, in many cases courts will require plaintiffs seeking a preliminary injunction to post a bond to cover any damage to the defendant as a result of the injunction, further reducing the likelihood that lock-in will occur when a preliminary injunction is granted. Therefore, it is appropriate to focus on reducing the lock-in effect that occurs when a preliminary injunction is denied without too much concern for lock-in that cuts the opposite direction.

D. *Scope*

If this Article has succeeded in convincing the reader that lock-in is a concern for preliminary injunctions, one may ask, why stop there? Do other legal standards pose the threat of lock-in? The short answer to that question is "yes." Lock-in likely affects more areas of the law than just preliminary injunctions. Other tests that require a preliminary assessment of the merits to be weighed against some irreparable costs come to mind, such as discovery stays or injunctions pending appeal. The potential for lock-in in those areas should be further explored. However, there are good reasons for starting with preliminary injunctions.

First, the standard for issuing preliminary injunctions is currently uncertain. The Supreme Court has called into question the appropriate standard for preliminary injunctions through *Winter*[164] and its companion cases, *Nken*[165] and *Munaf*.[166] Lower courts continue to grapple with whether to adopt the broad and rigid test from *Winter* or to retain the

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162. This factor may not be as important in those cases where irreparable harm and likelihood of success on the merits are tightly linked. In some cases, such as trade secrets cases, any irreparable harm can only result if the claim has sufficient merit. In other types of claims, such as environmental challenges under the National Environmental Policy Act (e.g., *Winter*), the harm is distinct from the merits and so they may diverge.

163. Even if lock-in can occur when a preliminary injunction is granted, it will be a much weaker effect than the lock-in that results when a preliminary injunction is denied solely based on likelihood of success on the merits. If there the irreparable harm from granting an injunction outweighs the irreparable harm from denying an injunction, the injunction will be denied regardless of the judge's assessment of the merits. Thus, denial of preliminary injunctions are the primary, and perhaps the only, situation where a judge will allow irreparable harm to occur because of the preliminary assessment of the merits. Additionally, in general, defendants do not face the same information asymmetries that plaintiffs face at the early stages of litigation and are more able to produce evidence that will show they are likely to succeed before discovery has been completed.

164. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374–75 (2008).

165. Nken v. Holder, 129 S. Ct. 1749, 1760–61, 1766 (2009).

166. Munaf v. Geren, 553 U.S. 674, 689–90 (2008).

flexibility of the standards they have developed over the previous decades. This makes lock-in on preliminary injunctions particularly timely, since lower courts or even the Supreme Court might have cause to reconsider the issue in the near future.

Second, courts often discuss preliminary injunctions as an "extraordinary remedy,"[167] even though they simply preserve the status quo. Thus, denials of preliminary injunctions can be justified even in closer cases on that ground. In contrast, while discovery stays are not granted routinely and require a demonstration of good cause,[168] discovery would normally proceed absent a stay, and so in that situation the court is being asked to prevent the status quo from occurring. Additionally, a discovery stay may still be granted even if there is strong likelihood of success, where the risks of unnecessary discovery outweigh the harms of delay.[169] Thus, there is not the same inclination for judges to find that the plaintiff does not have a likelihood of success when deciding discovery stays.[170]

Third, a preliminary injunction is typically decided early in the life of a case and under significant time pressure. Thus, preliminary injunctions can be expected to have a greater error rate than other situations where lock-in might occur, such as on motions for reconsideration or motions for injunctions pending appeal. Empirical data would be helpful to test this claim as well. If preliminary injunctions are demonstrated to contain more errors than later decisions on the merits, that would provide additional support in the call to address any potential lock-in to those error-laden decisions. However, the unique context of preliminary injunctions, which often occur before discovery has been completed and without the benefit of more rigorous trial procedures for validating evidence, provides ample justification to conclude that the assessment of the merits at the preliminary injunction stage is susceptible to greater error than later determinations.

Fourth, preliminary injunctions pose a greater risk of lock-in because the standard that many circuits apply to assess the merits, such as "likely to succeed on the merits" or a "strong showing on the merits" is functionally the same as the ultimate burden of proof on a plaintiff in civil litigation. At other stages where the judge is asked to make a preliminary assessment of the merits, specifically on a motion to dismiss or a motion for summary judgment, the standard imposed is quite different.

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167. *See, e.g.*, *Winter*, 129 S. Ct. at 375–76.

168. *See, e.g.*, Jackson v. Denver Water Bd., No. 08-cv-01984-MSK-MEH, 2008 WL 5233787, at *1 (D. Colo. Dec. 15, 2008) ("Generally, it is the policy in this district not to stay discovery pending a ruling on motions to dismiss." (citing Ruampant v. Moynihan, No. 06-cv-00955-WDM-BNB, 2006 U.S. Dist. LEXIS 57304, at *4–5 (D. Colo. Aug. 11, 2006))).

169. Lynch, *supra* note 89, at 88 (discussing the weighing of harms from delay and harms from unnecessary discovery based on a "preliminary peek" at the merits).

170. *Id.* at 101.

For motions to dismiss, the court looks not to whether the plaintiff is likely to succeed, but rather to whether the complaint contains sufficient facts that, if taken as true, would state a plausible claim for relief.[171] Summary judgment is granted when there is "no genuine issue as to any material fact" and an essential element of the claim is missing after sufficient time for discovery.[172] Both of these tests explicitly acknowledge that the evidence may differ at a trial on the merits and require that the facts in the complaint or evidence on summary judgment be construed in a light favorable to the non-movant. For preliminary injunctions, in contrast, the movant is not seeking to end the case, but simply to preserve the status quo until the issues can be resolved on the merits at trial. Thus, the conditions are sufficiently different in the Rule 12(b) and Rule 56 contexts that lock-in does not present as great a concern.

Fifth, injunctions pending appeal are sufficiently different in that appellate judges likely do not exhibit the psychological connectedness that would result in vicarious lock-in at the trial court level.[173] Appellate judges are familiar with reviewing trial court decisions for error, and they would not be expected to face the same self-justification pressures as the judge who initially decided the merits.

Finally, a long time often elapses between a decision on a preliminary injunction and a decision on the merits. This time is much longer than would occur on a motion for reconsideration, for example, which asks the judge to reevaluate a recent decision in light of some overlooked information. Although the length of time might mean that the judge has the opportunity to come to the issue with a fresh perspective,[174] there is still significant pressure for the judge to issue a decision on the merits that conforms to the earlier decision.[175] Furthermore, the length of time that has passed does have a different effect on the conditions that give rise to lock-in: more time between decisions means more time for irreparable harm to occur. Thus, a judge deciding a motion for reconsideration is unlikely to be faced with a situation where some extensive irreparable harm has occurred in the relatively short time since the initial decision being revisited.

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171. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

172. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); *see also* FED. R. CIV. P. 56(c).

173. Evidence of the "affirmance effect" somewhat undercuts this point, as appellate judges likely are to some degree influenced by the lower court's decision. *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 359–63 (2005). Additionally, sometimes appellate court panels reviewing a lower court ruling on a preliminary injunction go beyond the "likelihood of success" question to instead address the merits, thus creating case law with binding precedential effect on further proceedings. *See, e.g.*, Minard Run Oil. Co. v. U.S. Forest Serv., No. 12-4160, 2013 WL 5357066 (3d Cir. Sept. 26, 2013).

174. Judges often have enormous case loads, and so they do not remember all the details of a preliminary injunction motion they may have decided months or even years previously.

175. Conforming to an earlier assessment of the merits also saves time, which is important for federal judges who often have very large caseloads.

E. *Extraordinary Remedy*

A final important objection to this Article's proposal is that it will lead to more preliminary injunctions, which is not necessarily a good outcome. However, more preliminary injunctions would help preserve the integrity of the judicial process by avoiding the choice "between justice on the fly or participation in what may be an 'idle ceremony.'"[176] Furthermore, the proposal is a modest one that does not lead to preliminary injunctions being granted as a matter of course. Rather, preliminary injunctions will only be granted when all four factors, when considered together, justify the injunction. An injunction may issue when there are only "serious questions" as to the merits, but not necessarily so. If there is a relatively small chance of irreparable harm, this may not be enough when combined with the small chance of success. Even if the likelihood of irreparable harm is high, "serious questions" on the merits may not be enough when the harm caused by the injunction would outweigh the harms from denying the injunction.

An additional aspect of this problem is the composition of the parties. The prototypical example of a righteous plaintiff seeking to enjoin the unlawful conduct of some nefarious defendant breaks down in many situations. In many, if not most, cases the defendant is simply seeking to proceed in a lawful manner to pursue her own interests while also benefiting society as a whole. And in some cases, a plaintiff might be the one whose claims would harm the public interest, or who is using the litigation process to extort some gains from a defendant who would rather settle than engage in extensive litigation to vindicate his rights. But these types of litigants are still addressed under this proposal, which simply provides judges with the flexibility to use their equity power to ensure that potentially meritorious claims have their day in court. Frivolous lawsuits are not the cases where a preliminary injunction will occur. And if the balance of harms or the public interest supports denial of a preliminary injunction, then it will not issue. Therefore, while the modest proposal of uniformly applying the existing sliding-scale approach would likely lead to an increase in preliminary injunctions, it would do so on a limited scale that best serves the equitable interests in each case and avoids the injustice of creating a significant bias against plaintiffs who have been denied a preliminary injunction.

CONCLUSION

The potential for lock-in to occur in preliminary injunctions provides justification for calls for greater uniformity among the standards for preliminary injunctions. Additionally, it provides justification for what

176. Nken v. Holder, 129 S. Ct. 1749, 1757 (2009) (quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 (1942)).

should be required to meet the "likelihood of success on the merits" prong. That showing need not be a high one, as serious questions should be sufficient for the issuance of a preliminary injunction. All of the circuits, or the Supreme Court itself, should adopt a balancing approach to preliminary injunctions that requires, at minimum, only a showing of serious questions as to the merits of the case. This approach will preserve the functions of a preliminary injunction—to allow for considered decision-making, to avoid "justice on the fly," and to preserve the status quo until legal claims can be resolved. Additionally, this approach will avoid the conditions for lock-in and remove a potential source of systemic bias from the judicial system.