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The "Test"--Or Lack Thereof--For Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law

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THE "TEST"—OR LACK THEREOF—FOR ISSUANCE OF VIRGINIA TEMPORARY INJUNCTIONS: THE CURRENT UNCERTAINTY AND A RECOMMENDED APPROACH BASED ON FEDERAL PRELIMINARY INJUNCTION LAW

The Honorable David W. Lannetti *

"It is difficult for attorneys to counsel their clients and predict the way a judge may rule when the legal principles on which the court must base its discretion are unclear, ambiguous, and rife with contradiction."[1]

INTRODUCTION

Preliminary injunctive relief, where a movant[2] is awarded a court order prior to final judgment on the merits of a dispute, serves a necessary role in equity jurisprudence. Courts typically state that preliminary relief is an extraordinary remedy designed to preserve the status quo, with some courts opining that this

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1. Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 532–33 (2003). When Judge Denlow wrote this about the state of preliminary injunction law, he had been a federal Magistrate Judge for seven years. *Hon. Morton Denlow (Ret.)*, JAMS, www.jamsadr.com/denlow/ (last visited Oct. 1, 2015).

2. In this article, "movant" refers to the party requesting preliminary injunctive relief. It is meant to have the same meaning as "movant," "petitioner," or "plaintiff" as used in other articles pertaining to federal preliminary injunctions and Virginia temporary injunctions.

purpose simply describes the abstract goal of preliminary relief [3] and others holding that movants must satisfy a higher burden when seeking injunctions that alter the status quo.[4] After significant evolution, federal courts developed a four-part test for preliminary injunctions,[5] which the circuit courts of appeals have universally accepted but inconsistently applied.[6] The Supreme Court of the United States subsequently resolved this circuit split in part,[7] yet the circuit courts still adhere to different approaches when applying the test.[8]

Virginia has no established test for its equivalent of the federal preliminary injunction, the temporary injunction. Some Virginia courts have used the federal preliminary injunction test, as interpreted by the United States Court of Appeals for the Fourth Circuit, when evaluating petitions for Virginia temporary injunctions—relying on Virginia precedent that looked to federal law when Virginia law was silent.[9] The Supreme Court of Virginia has never affirmed this approach, however. Indeed, when provided an opportunity to adopt the federal test for Virginia temporary injunctions, the court specifically opted not to express its view.[10]

With the inconsistencies regarding interpretation of federal preliminary injunction law—as to both the role of preserving the status quo and interpretation of the four-part test—and the uncertainty regarding whether federal preliminary injunction jurisprudence should guide Virginia courts when evaluating Virginia temporary injunctions, Virginia litigants understandably are confused. Although the absence of a clear test for issuance of a Virginia temporary injunction arguably preserves the court's traditional broad discretion to dole out equitable relief as it deems fair and just, litigants may be ill prepared to address any judicial con-

3. *See* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 110, 113, 115 (2001).

4. *See id.* at 115.

5. *Id.* at 111.

6. *See* Bethany M. Bates, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1529–30 (2011).

7. *See* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20–24 (2008).

8. *See* Bates, *supra* note 6, at 1523, 1535–37.

9. *See, e.g.*, HotJobs.com, Ltd. v. Digital City, Inc., 53 Va. Cir. 36 (2000) (Fairfax County); *see also infra* Part III.C.

10. Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 60 n.6, 662 S.E.2d 44, 53 n.6 (2008).

cerns without clear guidance. When presented with the proper opportunity, the Supreme Court of Virginia should consider indicating what Virginia trial courts should analyze when evaluating a petition for—and what litigants should expect to argue when seeking—a temporary injunction. Current federal preliminary injunction jurisprudence offers a sound launching point for establishing a test for Virginia temporary injunctions.

Part I of this article highlights the need for preliminary relief, explains the historical discretion granted the chancellor in equity, and points out the disadvantages of unfettered equitable discretion. Part II discusses the evolution of evaluating the need for preliminary injunctions in federal court, including the development and interpretation of the four-part test used by modern federal courts. Part III reviews the evolution of temporary injunctions in Virginia, including reliance by some Virginia lower courts on federal preliminary injunction jurisprudence, and the current uncertainty regarding temporary injunction law. Finally, Part IV recommends an approach the Supreme Court of Virginia should consider adopting: an analysis that is independent of the status quo, consistent with preliminary injunctive relief being an extraordinary remedy, and loyal to each requirement the movant must independently satisfy under the federal preliminary injunction four-part test.

Under the recommended test for a Virginia temporary injunction, the movant must establish that: (1) he has more than a 50% likelihood of succeeding at the trial on the merits, i.e., receiving a permanent injunction; (2) he has more than a 50% probability of suffering irreparable harm prior to the trial on the merits if the temporary injunction is not granted; (3) the harm to the movant prior to the trial on the merits if the temporary injunction is not granted is greater that the harm to the non-movant prior to the trial on the merits if the temporary injunction is granted; and (4) the public interest does not outweigh the possible irreparable harm to the movant prior to the trial on the merits if the temporary injunction is not granted.

I. THE NEED FOR PRELIMINARY RELIEF

Injunctive relief, which is designed to address potential injuries where compensation via money damages is inadequate,[11] has played—and continues to play—a key role in American law.[12] Movants often require judicial relief in order to prevent irreparable injury and cannot wait the months or the years necessary to fully litigate a request for permanent injunctive relief.[13] Equity courts responded to this need by allowing interim relief, enforceable against the non-movant via the court's contempt power, very shortly after a dispute arises and without a trial on the merits of the dispute.[14] Preliminary injunctive relief, therefore, has been referred to as "one of the most important tools at the disposal of attorneys."[15] Such relief has been applied in a diversity of contexts, including enforcement of legislation, mergers and acquisitions, covenants not to compete, violations of civil rights and liberties, domestic abuse, environmental concerns, strikes, elections, intellectual property rights, property and zoning disputes, and school children rights.[16]

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11. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.1(1), at 58 (2d ed. 1993); *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 380 (4th ed. 2010) [hereinafter LAYCOCK, CASES AND MATERIALS] ("It is hornbook law that equity will not act if there is an adequate remedy at law.").

12. *See, e.g.*, DOBBS, *supra* note 11, § 1.3, at 13 ("Preliminary injunctions . . . have a wide potential both for averting and for causing harm."); *see also* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 310–16 (discussing "structural" injunctions "designed to correct institutional structures operating in systematic violation of applicable law" and providing school desegregation as an example); Rachel A. Weisshaar, *Hazy Shades of* Winter*: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1012 (2012) (describing a preliminary injunction as an "extraordinarily powerful remedy").

13. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978) ("If [a court] does not grant prompt relief, the [movant] may suffer a loss of his lawful rights that no later remedy can restore. But if the court does grant immediate relief, the [non-movant] may sustain precisely the same loss of his rights.").

14. *See* Denlow, *supra* note 1, at 534 ("A motion for a preliminary injunction entitles a party to priority on the court's calendar and also gives the [movant] an element of surprise.").

15. Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 4 (2013) [hereinafter Wolf, *Massachusetts Standards*].

16. *See, e.g.*, Denlow, *supra* note 1, at 496; Leubsdorf, *supra* note 13, at 525; Wolf, *Massachusetts Standards*, *supra* note 15, at 4; Weisshaar, *supra* note 12, at 1014.

A. *The Concept of Irreparable Injury*

Preliminary injunctive relief necessarily bypasses the due process normally accorded a non-movant, as a remedy is awarded before a trial on the merits.[17] With the sacrifice of due process comes the risk of error.[18] On the one hand, the court might deny a preliminary injunction petition and subsequently realize at trial that an injunction was warranted, potentially forcing the movant to incur irreparable injury during the pre-trial period absent an injunction.[19] On the other hand, the court might grant a preliminary injunction and realize at trial that the injunction was not warranted, demonstrating that the non-movant was wrongfully enjoined while the injunction was in effect.[20] Courts have responded to these risks of error by allowing the movant to seek money damages for an erroneous denial of preliminary relief[21] and by requiring the movant to post an injunction bond that is available to compensate the non-movant for the wrongful enjoinment concomitant with an erroneous grant of preliminary relief.[22] An erroneously granted preliminary injunction is especially significant, as the non-movant's liberty is restrained improperly under the threat of immediate judicial enforcement, including imprisonment.[23] As a result of, *inter alia*, the lack of full due process and

17. *See* DOBBS, *supra* note 11, § 1.3, at 12–14.

18. *See id.*; *see also* Leubsdorf, *supra* note 13, at 541 ("The danger of incorrect preliminary assessment is the key to the analysis of [preliminary] relief."). "[R]econciling the need for interim relief with the restriction of freedom that it imposes is the proper focus of the search for appropriate criteria governing interlocutory injunctions." Wolf, *Massachusetts Standards*, *supra* note 15, at 6.

19. *See* DOBBS, *supra* note 11, § 1.3, at 12–14.

20. *See id.*

21. *See* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 300 ("[W]here it is possible to prevent harm by injunction, the court can prevent it, or let it happen and compensate for it."). Although compensatory damages potentially are available to "compensate" the movant in such a situation, the movant who unsuccessfully sought preliminary injunctive relief may have been irreparably harmed prior to the issuance of the permanent injunction, making the available damages inadequate as a matter of law; nevertheless, at that point damages are the best that the law can provide.

22. *See* DOBBS, *supra* note 11, § 2.11(3), at 263–65.

23. *See* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 381 (pointing out that an injunction intrudes on the defendant's liberty "because the injunction orders him to do or refrain from specified conduct" and "because the injunction can be enforced by coercive or punitive measures, including imprisonment"); *see also* Wolf, *Massachusetts Standards*, *supra* note 15, at 6 ("[T]he American legal system operates on the assumption that individuals . . . are free to act as they please until they have been adjudged liable for injury to another. Interim relief is inconsistent with this basic premise because it restricts freedom of action without a final judgment of liability.").

the potential impact on individual liberty, preliminary injunctive relief often is referred to as an extraordinary remedy.[24]

B. *The Historical Discretion of the Chancellor*

Centuries ago in England, the commom-law courts, known as the King's Courts, were granted subject matter jurisdiction based on the King's Writs and could award only damages as a remedy for a wrong.[25] As the needs of English communities continued to grow, the jurisdictional limits of the writ system were frequently reached, resulting in the creation of new writs.[26] The common law subsequently became more rigid and the realm of disputes expanded, resulting in many wrongs being unredressable by the King's Courts because they did not fall within the stringent writ system.[27] In response, equitable modification of the law, administered via royal discretion, filled this void.[28]

This equitable system, which was administered by the King's chancellor, developed outside the sphere of the common law.[29] Petitioners appealed to the chancellor's conscience.[30] Unconstrained by an inflexible writ system or its equivalent, the chancellor could hear disputes and resolve them as he saw fit, doing what—in his mind and based on his morals—was fair and just under the circumstances.[31] Although the King normally appointed ecclesiasti-

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24. *See* Weisshaar, *supra* note 12, at 1021–22. Equitable relief in general historically has been referred to as an extraordinary remedy because one could petition the chancellor for relief only after availing oneself of all legal remedies, i.e., proving that there was no adequate remedy at law. *Id.*

25. *See* Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles from the Past Offer Any Guidelines to Decisionmakers in the Future?*, 36 ALA. L. REV. 1, 3 (1984).

26. *See id.*; *see also* DOBBS, *supra* note 11, § 2.2, at 67 ("When the [movant] came to the chancery for help with an unusual set of facts to which the old writs did not fit, the chancellor sometimes issued a new kind of writ.").

27. *See* Black, *supra* note 25, at 3.

28. *See id.* at 4.

29. *See id.*

30. *See* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 307 ("There is long tradition that a suit in equity is an appeal to the chancellor's conscience.").

31. *See* DOBBS, *supra* note 11, § 2.1(1), at 57 ("Even if a [movant] makes out a case for relief according to all the preexisting rules, the court of equity may in its discretion refuse its aid. Equity courts saw their discretion as a reflection of their flexibility and as a means to justice apart from law."); *see also id.* ("Discretion as to equitable remedies goes beyond the power to deny relief; it extends as well to the power of shaping relief, determining its extent, scope, and particular incidents.").

cal and religious individuals to fill the position of chancellor,[32] the role eventually shifted to legal professionals.[33] This system of resolving disputes outside the writ system was formalized later as a separate body of law, which became known as equity.[34]

Conflict between the common-law courts and the chancellor soon developed, with the courts charging the chancellor with "attempting to subvert the whole law of England by substituting conscience for definite rule."[35] A primary area of conflict was in the injunction arena.[36] Because common-law courts could award only damages, they could provide a remedy *after* a wrong was committed but had no authority to *prevent* the wrong from occurring in the first place.[37] Injunctions therefore became the province of the chancellor, although there was a great deal of uncertainty regarding the standard to be used for issuance of preliminary injunctions.[38]

The notion of a special framework for preliminary injunctions developed under English law during the seventeenth and eighteenth centuries.[39] American equitable jurisprudence—including preliminary injunctive relief law—was imported from England when colonists crossed the Atlantic Ocean.[40] The U.S. Supreme Court codified parts of English law as early as 1792, when rules were adopted stating that English equity practice would guide

32. *See id.* § 2.2, at 68 (describing the medieval chancellor as "a member of the Council [who] sat with other lords of the realm," "a prelate with the weight of the church behind him," and "the king's right hand man [who] acted in the king's name on many occasions").

33. *See id.* § 2.2, at 70 ("[B]y the 15th century the chancellor was clearly a judge, recognized as such and acting as such: he was . . . acting without specific authority from the king to hear the particular case."); *see also id.* § 2.2, at 71 ("The chancellors were mostly churchmen until after Henry VIII put Thomas More's head on a pike."). Although actual chancellors no longer hear equity cases, judges hearing equity cases sometimes are referred to as "chancellors," and "there is still much talk about the flexibility of equity and the discretion of trial judges in equity cases." LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 307.

34. *See* Black, *supra* note 25, at 4.

35. *Id.*

36. *See id.*

37. *See id.*

38. *See id.* at 5.

39. *See* Lee, *supra* note 3, at 126.

40. *See generally* Black, *supra* note 25, at 9–10.

the Court's proceedings.[41] American courts continue to rely on English equity practice and its principles.[42]

C. *The Inherent Uncertainty of Equitable Discretion*

At first blush, the power to fashion equitable remedies—to do what is fair and just—appears to be a noble and desirable avenue of relief.[43] The reality, however, is that there often is no consensus regarding what is fair and just; hence, results from courts of equity can be unpredictable, uncertain, and inconsistent.[44]

The quest for consistency in early equity practice led to the evolution of general equity principles and, in some cases, more structured equitable guideposts and maxims.[45] The focus then turned

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41. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 17 & n.109 (citing Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 411–14 (1792)). The Court subsequently enacted Federal Equity Rules that "directed the lower federal courts to employ the 'practice of the High Court of Chancery in England' to fill the gaps in the law governing federal equity jurisdiction." *Id.* at 17 (citation omitted). With respect to the various states, "[l]acking both coherent native analysis and the stream of diverse cases that fostered the evolution of the law in England, many authorities sought to follow the English precedents and treatises." Leubsdorf, *supra* note 13, at 538.

42. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 19 ("[T]he Supreme Court still relies on English equity practice, including principles extant at the time of the adoption of the Constitution in 1788 and the enactment of the first Judiciary Act in 1789.").

43. *See* DOBBS, *supra* note 11, § 2.4(1), at 92 ("[Discretion] makes possible decisions that are flexible, intuitive, and tailored to the particular case.").

44. *See id.* ("[Discretion] also makes possible decisions that are unanalyzed, unexplained, and un-thoughtful."); *see also id.* § 2.2, at 71 (recalling "the most famous of all comments about equity, the conscience of chancellors was as apt to vary as the length of their feet"); Jacob S. Crawford, *Unlikely to Succeed: How the Second Circuit's Adherence to the Serious Questions Standard for the Granting of Preliminary Injunctions Contradicts Supreme Court Precedent and Turns an Extraordinary Remedy into an Ordinary One*, 64 OKLA. L. REV. 437, 441 (2012) ("The sometimes harsh remedies of equity were imposed with little regard to consistency as well as little to no mechanisms for keeping in check the personal agendas of the Chancellors."); *cf.* LAYCOCK, CASES AND MATERIALS, *supra* note 11, § 2.4(1), at 308 ("Courts of last resort have frequently reiterated that equitable discretion is discretion to consider all of the relevant facts, not discretion for the trial judge to do whatever he wants.").

45. *See generally* Leubsdorf, *supra* note 13, at 527–40 (discussing the evolution of equity analysis from a strict standard to a general standard); *see also id.* at 528 (noting that early chancellors and commentators "were more concerned with the substantive principles created to correct defective rules of law than with the special procedures and remedies available in equity"); *id.* at 527–28 (providing that during the eighteenth century "[t]he existence of irreparable injury and the strength of the [movant's] case influenced decisions, and there [were] hints of what would develop into the balance of convenience and a concern for preserving the *status quo*"); Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW. ENG. L. REV. 173, 177 (1984) (discussing guideposts provided by English equity practice in the nineteenth century) [hereinafter Wolf, *Varying Standards*].

toward the tension between the traditional flexibility inherent in equitable practice and the rigidity of proposed equitable standards and rules, a tension that continues even today.[46] Justice Ginsburg nevertheless pointed out as recently as 2008 that the essence of equity jurisdiction is flexibility and, specifically, the chancellor's authority "to do equity" and fashion appropriate relief for each particular case.[47] Modern Chancellors, including judges presiding over equity cases, retain traditional equitable discretion, albeit largely within the bounds of an equitable framework that includes accepted rules and tests.[48]

II. THE EVOLUTION OF FEDERAL PRELIMINARY INJUNCTION LAW

Statutory guidance for the issuance of federal preliminary injunctive relief—in the form of both preliminary injunctions and short-term *ex parte* temporary restraining orders—is contained in Rule 65 of the Federal Rules of Civil Procedure.[49] Rule 65 provides requirements for notice to the non-movant prior to a preliminary injunction hearing, consolidation of the preliminary hearing with the trial on the merits, security to be provided to the court in case a preliminary injunction is awarded erroneously, and contents of the injunction.[50] Although the federal rule provides a basic proce-

46. *See* Leubsdorf, *supra* note 13, at 532 (pointing out that with the increased demand for injunctions during the nineteenth century and the need for uniformity among the increasing number of chancellors, it was "necessary to evolve principles for guiding injunctive decisions" and that "[t]he turn to general principles merged with the trend to restrain equity's discretion by rules"); *cf.* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 546 (2010) ("Equitable balancing is a decidedly modern phenomenon that was first employed after the Civil War and that became accepted in the early part of the twentieth century to give judges discretion to excuse violations of common law duties when courts concluded that a doctrine was needed to avoid issuing economically inefficient injuntions.").

47. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).

48. *See, e.g.*, Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977) ("A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity."), *overruled on other grounds by* The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), *aff'd*, The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 607 F.3d 355 (4th Cir. 2010) (per curiam).

49. Fed. R. Civ. P. 65. Promulgation of the Federal Rules of Civil Procedure was statutorily authorized by 28 U.S.C. § 2072 and 28 U.S.C. § 1072. With respect to federal preliminary injunctive relief, this article focuses on preliminary injunctions and does not address temporary restraining orders.

50. Fed. R. Civ. P. 65(a), (c).

dural structure for petitioners to acquire preliminary injunctive relief, there is no express language describing the required analysis by which courts should determine whether to issue a preliminary injunction.[51] The injunctive relief evaluation and the ultimate decision whether to grant a preliminary injunction therefore rest soundly upon the court's discretion and are based on English and early American equitable principles.[52]

A. *Preserving the Status Quo*

It has long been stated that the purpose of preliminary relief, and specifically of federal preliminary injunctions, is to preserve the status quo.[53] Although the definition of the status quo is subject to interpretation, it most commonly refers to the current state of affairs.[54] An injunction that commands the non-movant to perform a certain act or acts, known as a mandatory injunction, therefore alters the status quo.[55] Conversely, an injunction that prohibits the non-movant from acting, known as a prohibitory injunction, does not disturb the status quo.[56] Importantly, the premise that the movant always seeks to preserve the status quo through preliminary injunctive relief is flawed, as the movant may seek to alter the current situation.[57] Stated differently, if the sole purpose of preliminary relief were to preserve the status quo,

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51. *See* Fed. R. Civ. P. 65.

52. *See* Denlow, *supra* note 1, at 503–04; Weisshaar, *supra* note 12, at 1021.

53. *See, e.g.*, James Powers, Note, *A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard*, 92 TEX. L. REV. 1027, 1032 (2014). The English Court of Chancery first spoke of the role of preliminary injunctions in preserving the status quo in the mid-1800s. Lee, *supra* note 3, at 127.

54. *Black's Law Dictionary* defines "status quo" as "[t]he situation that currently exists." BLACK'S LAW DICTIONARY 1633 (10th ed. 2014).

55. *See, e.g.*, Black, *supra* note 25, at 1; *see also* BLACK'S LAW DICTIONARY, *supra* note 54, at 904 (defining "mandatory injunction" as "[a]n injunction that orders an affirmative act or mandates a specified course of conduct").

56. *See, e.g.*, Black, *supra* note 25, at 1; *see also* BLACK'S LAW DICTIONARY, *supra* note 54, at 905 (defining "prohibitory injunction" as "[a]n injunction that forbids or restrains an act" and indicating that it is "the most common type of injunction").

57. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 5–6.

> For example, if the [movants], who wish to protest peacefully without interference from hostile onlookers, are seeking a preliminary injunction to secure police protection, they do not want to preserve the status quo: assaults by hecklers while the police do nothing. They want the court to order the police to prevent violence against them by opponents.

Id. at 6.

mandatory preliminary injunctions never would be granted, which is not the case.

Despite the stated purpose, it is not clear what effect, if any, the alleged preservation of the status quo actually has when determining whether to award preliminary relief. There is little historical basis for courts attaching any independent significance to evaluation of the status quo,[58] and there is scant evidence that courts actually incorporate a separate status-quo analysis as part of some bifurcated preliminary injunction evaluation.[59] Additionally, no cogent argument has been advanced for imposing a separate analysis to determine whether the proposed preliminary injunctive relief in fact preserves the status quo.[60] As pointed out in one authoritative source, in practice the status quo discussion "is used more as a way of describing decisions reached on other grounds than as an independent rule."[61] Some courts have said that the preservation adage merely describes the overall abstract goal of preliminary relief and has no effect on the actual evaluation of the facts and circumstances of the dispute.[62] Other courts use this stated purpose as the basis for demanding some unde-

58. *See* Lee, *supra* note 3, at 125–26. As Professor Lee concluded:

> [T]he courts' discussion of the status quo finds its roots in the nineteenth century courts of Chancery, but . . . the status quo was not given any independent doctrinal significance during this period. Similarly, Chancery courts in the same era began to advert to a distinction between mandatory and prohibitory injunctions, but again they did not ascribe any controlling doctrinal significance to the distinction . . . . [J]udicial adoption of a bifurcated preliminary injunction standard has only the shallowest of historical roots, and thus cannot be justified on historical grounds.

Id.; *see also id.* at 161 (noting that "the 'status quo' historically was conceived as a rationale or explanation for the courts' exercise of preliminary equitable relief, not as a substantive standard with independent doctrinal significance"); *cf.* Leubsdorf, *supra* note 13, at 530 ("At common law possession of realty was usually protected until a jury found a greater right in another claimant. For a court of equity to disturb the status quo by inflicting dispossession before trial would have been heretical 'meddling with freehold.'").

59. *See* Black, *supra* note 25, at 23 (noting that a survey of U.S. Supreme Court cases revealed that "the terms mandatory and prohibitory have not been used as an analytical tool in reviewing whether an injunction should have been granted").

60. *See* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 448 ("[Courts] almost never explain how this standard relates to the [preliminary injunction] four-part test." (citations omitted)); *see also* Powers, *supra* note 53, at 1027 ("Such statements of purpose, while notable, need not go beyond functioning as mere platitudes, throwaway lines in a judicial opinion that do not figure in the substantive test applied by the court.").

61. 11A CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.2, at 195 (2d ed. 2013).

62. *See* Powers, *supra* note 53, at 1036.

fined higher burden of proof to acquire a mandatory, as opposed to a prohibitory, preliminary injunction.[63]

Within the last twenty years, commentators and judges have begun to understand the problems inherent in predicating preliminary injunctive relief on preserving the status quo.[64] First, the definition of the status quo varies: some define it as the actual current state of affairs,[65] and some define it as the last act that was not in violation of the law, sometimes referred to as the last uncontested peaceable act.[66] Second, assuming the status quo is defined as the actual current condition, some movants actually may not be seeking to preserve the status quo through preliminary relief; they may in fact be seeking a mandatory injunction.[67] Some courts and many modern commentators therefore view preservation of the status quo as describing the effect—and not the purpose—of a preliminary injunction, and have criticized the imposition of a heightened requirement for mandatory injunc-

63. *See id.* at 1031–35. One commentator attributes application of the heightened psychological effects on both litigants and judges. With respect to litigants, he identifies "loss aversion"—that, contrary to expected utility theory, preferences *will* be affected by what someone possesses when making a decision—and the "endowment effect"—the tendency of someone to over-value goods he or she owns. *Id.* at 1037–39. With respect to judges, he identifies "status quo bias"—a reluctance to deviate from the status quo when given a choice—and "omission bias"—the tendency to view acts that cause harm as worse than omissions that are equally harmful. *Id.* at 1039–42. The commentator concludes that such a heightened standard is not justified and should be abolished. *Id.* at 1050–51.

64. *See, e.g.*, Black, *supra* note 25; Lee, *supra* note 3.

65. *See, e.g.*, Braintree Labs., Inc. v. Citigroup Global Mkts., Inc., 622 F.3d 36, 40–41, 41 n.5 (1st Cir. 2010); *see also* WRIGHT, ET AL., *supra* note 61, § 2948.2, at 124 (citing cases).

66. *See, e.g.*, Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (defining the status quo as the "last uncontested status between the parties which preceded the controversy"); *see also* WRIGHT, ET AL., *supra* note 61, § 2948, at 124–27 (citing cases); *cf.* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 448 ("Courts commonly say that preliminary injunctions are designed to preserve the status quo. Sometimes they elaborate that they mean 'the last actual peaceable uncontested' status quo."). Some courts have dealt with this definitional imprecision by "shift[ing] the focus to preserving *the subject matter of the lawsuit* so that the court will be able to grant effective relief when the suit is resolved on the merits." Wolf, *Varying Standards*, *supra* note 45, at 174 (emphasis added).

67. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 26 (pointing out that "[t]he line is not always clear between the two forms of injunction" and that "[t]hrough the use of the 'double negative' order, a court will sometimes enter an injunction that looks like a prohibitory injunction but in fact is an affirmative (or mandatory) injunction").

tions, claiming that the mandatory/prohibitory classification is a distinction without a difference.[68]

The notion of a heightened standard for mandatory injunctions apparently has a historical derivation in the hierarchical nature of law and equity courts.[69] In the early nineteenth century, courts of equity did not have authority to issue mandatory injunctions.[70] This was because, in large part, it was thought improper to order someone to perform an affirmative act without having first had a full examination of the merits of a cause of action.[71] A prohibitory injunction, on the other hand, does not order any action be taken—but rather prohibits the non-movant from acting—and therefore was thought to be within the proper purview of equity.[72] Equity courts soon responded by issuing negative decrees that, although purporting to restrain a wrong, were framed to compel the non-movant to perform affirmative acts, making any distinction between mandatory injunctions and prohibitory injunctions illusory.[73] As one commentator noted, "[a non-movant's] mandato-

68. *See* Weisshaar, *supra* note 12, at 1022–23 ("Many modern commentators view the early use of the notion of preserving the status quo as merely describing the effect, not the purpose, of a preliminary injunction and criticize the calcification of this notion into a rule."); *see also* WRIGHT, ET AL., *supra* note 61, § 2948.2, at 195–96 ("[W]ith a little ingenuity practically any mandatory injunction may be phrased in prohibitory form."); Black, *supra* note 25, at 9 (referring to the "traps inherent in the use of the terms—the possibility of framing a mandatory decree in negative language, thus making it appear to be prohibitory; the mandatory effect of every injunction, even a prohibitory one; and the changeable nature from one to the other depending on the time that the [movant] gets to the courthouse"); Leubsdorf, *supra* note 13, at 546 ("The distinction between requiring action and prohibiting action is mainly a verbal one unrelated to the likelihood of irreparable loss to the [non-movant]."); Powers, *supra* note 53, at 1028 (noting that the heightened standard requirement has been "much criticized"); *cf.* Black, *supra* note 25, at 14 (contending that "the distinction: if any actually remain[s], appear[s] to have been subsumed in a four-pronged analysis"). Judge Posner in a Seventh Circuit opinion aptly summed up the criticism of the distinction:

> Preliminary relief is properly sought only to avert irreparable harm to the moving party. Whether and in what sense the grant of relief would change or preserve some previous state of affairs is neither here nor there. To worry [about] these questions is merely to fuzz up the legal standard.

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

69. *See generally* Black, *supra* note 25, at 1–2; *see also* Lee, *supra* note 3, at 124–49 (discussing the historical standard).

70. *See* Black, *supra* note 25, at 6.

71. *See id.* at 8.

72. *See id.* at 1.

73. *See id.* at 6–7; *see also supra* note 68 and accompanying text.

ry conception of an order can almost always be rephrased by a competent [movant's] attorney in prohibitory terms."[74]

Although many courts today continue to discuss the mandatory/prohibitory injunction distinction,[75] most commentators agree that there is no justification for applying different standards based on whether the status quo is affected.[76] As one circuit court of appeals opined:

> It is often loosely stated that the purpose of a preliminary injunction is to preserve the status quo .... It must not be thought, however, that there is any particular magic in the phrase "status quo." The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties by the issuance of a mandatory injunction or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.[77]

The U.S. Court of Appeals for the Fourth Circuit, which includes Virginia, currently takes a more progressive approach. Although it states that the purpose of a preliminary injunction is "to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's abil-

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74. Lee, *supra* note 3, at 164.

75. *See* Black, *supra* note 25, at 2.

76. *See id.* (analyzing the historical treatment of mandatory versus prohibitory injunctions and concluding that "the terms mandatory and prohibitory, as part of the standard used in granting or denying a preliminary injunction, are not helpful analytical tools" and, "[a]ccordingly, the vestiges of these terms should be stricken from legal language"); Lee, *supra* note 3, at 10 (concluding that "the heightened [status quo] standard is historically and theoretically unsound, and that the circuits that adopt a uniform standard have the better approach"); *see also id.* at 166 ("The notion of a heightened standard of proof is the misguided product of recent twentieth-century opinions; it finds no support in early decisions in English Chancery or even in this country."); Powers, *supra* note 53, at 1028 ("Disrupting the status quo may provide a benefit to one party, but only by depriving the other party of some right he previously enjoyed.") (quoting O Centro Espirita Benegficiente Uniao de Vegetal v. Ashcroft, 389 F.3d 973, 1015–16 (10th Cir. 2004)).

77. Canal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974) (citations omitted); *see also* Leubsdorf, *supra* note 13, at 546 ("Emphasis on preserving the status quo is a habit without a reason."); *id.* at 540–41 (arguing that "the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decisions").

ity to render a meaningful judgment on the merits,"[78] it defines the status quo as the "last uncontested status between the parties which preceded the controversy."[79] Existing case law nevertheless is inconsistent and often unreasoned,[80] and practitioners therefore are understandably confused regarding what role, if any, status quo may play in a preliminary injunction analysis.[81]

B. *The Four-Part Test Applicable to Federal Preliminary Injunctions*

Although the concept of preliminary injunctive relief has existed since the birth of the nation, American courts "have not followed consistent paths through the maze of [such] relief."[82] In addition to the Supreme Court ignoring its own prior rulings, the federal courts of appeals often have overlooked precedent set by

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78. Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013) (quoting Sun Microsystems, Inc. v. Microsoft Corp. (*In re* Microsoft Corp. Antitrust Litig.), 333 F.3d 517, 525 (4th Cir. 2003), *abrogated on other grounds by* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006)). Of note, the Fourth Circuit did not use the prohibitory vs. mandatory distinction in *Pashby* to analyze the proposed preliminary injunctive relief but rather used it only to determine what standard to apply to its abuse of discretion *review* of the district court's action: an "exacting standard of review" (for prohibitory injunctions) or an "exacting standard of review [that] is even more searching" (for mandatory injunctions). *Id.* (quoting Sun Microsystems, Inc., 333 F.3d at 524).

79. *Id.* at 320 (quoting Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 378 (4th Cir. 2012)).

80. According to Professor Lee:

> [O]ne set of [U.S. Court of Appeals] circuits concludes that the "status quo" is a critical factor in determining the appropriate preliminary injunction standard, while another holds that it is utterly irrelevant. Although the essence of the conflict is relatively clear on the face of the courts' opinions, the analytical substance of the debate has been quite opaque. None of the circuits have offered much in the way of a theoretical framework for addressing the question. Both sides tend to cite their own prior holdings, snippets of dicta (such as the general notion that the purpose of preliminary relief is to preserve the status quo), and *ipse dixit* conclusions.

Lee, *supra* note 3, at 124. Even judges apparently are confused regarding the mandatory/prohibitory distinction. *See* Black, *supra* note 25, at 20 (reporting that, based on a judicial survey, "the comments of the judges indicate that the terms are not at all helpful; they actually confuse the process").

81. *See, e.g.*, Powers, *supra* note 53, at 1031 ("Meanwhile, the Supreme Court has not resolved what role the status quo should play in preliminary injunction doctrine, prolonging a fundamental disagreement among the federal circuit courts of appeals.").

82. Wolf, *Massachusetts Standards*, *supra* note 15, at 18; *see also id.* at 21–22 (claiming that, during the twentieth century, "the Supreme Court continued its meandering course through various tests and criteria" and that "over a period of fifteen years [between 1994 and 2009], the Court had numerous opportunities to clarify the standards for preliminary relief, but it failed to do so").

the Court as well, setting the stage for the creation of multiple inconsistent "tests" for the issuance of preliminary injunctions.[83]

Consistent with the original intent of equity, the early application of preliminary relief relied on the inherent discretion of the chancellor.[84] The concept of a chancellor looking to a preliminary injunction "test" was anathema to equitable principles, as petitioners appealed to the conscience of the court because the chancellor was tasked with designing a remedy that was fair and just, based on the unique circumstances of each individual case.[85] In the late nineteenth century, equity courts nevertheless began to evaluate preliminary injunctions generally by balancing the equities and looking at the movant's likelihood of success.[86] Irreparable injury thereafter was invoked as a ground for injunctive relief, with some courts treating it as a threshold issue and other courts including it as an additional element of a multi-part analysis.[87] The "public interest" factor emerged later, in 1939, although subsequent incorporation of this factor by courts in their preliminary injunction calculus was inconsistent.[88]

Before long, many federal jurisdictions began to use a four-factor test when determining whether to grant a petition for preliminary injunction.[89] Wording of the test varied slightly between jurisdictions, but the four factors generally consisted of: (1) the movant's likelihood of success on the merits; (2) the irreparable harm to the movant in the absence of preliminary relief; (3) the balance of the equities between the movant and the non-movant; and (4) the public interest.[90] Another articulation of the test di-

83. *See id.* at 18 (noting that "the [Supreme] Court has not used its prior precedents regularly in developing standards" and that "the lower federal courts, prior to *Winter*, have barely given nodding recognition to the Supreme Court opinions regarding interlocutory injunctions").

84. *See, e.g.*, Weisshaar, *supra* note 12, at 1018 ("Chancery [during the nineteenth century] could provide [preliminary injunction movants] with remedies not available in the common law courts, which were limited to providing damages.").

85. *See supra* Part I.B.

86. *See, e.g.*, Denlow, *supra* note 1, at 501–02.

87. *See* Leubsdorf, *supra* note 13, at 533 ("[The invocation of an irreparable injury requirement] reflected a more functional view of equity's proper role. Chancery's intervention was to be based on the inadequacy of damage remedies, not on the Chancellor's conclusion that the substantive law was defective.").

88. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 21.

89. *See* Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 839 & n.2 (1989).

90. *Id.*

vides the "balance of the equities" prong into two factors—the movant's irreparable harm in the absence of preliminary relief and the non-movant's harm should preliminary relief be granted—and deletes the irreparable injury prong, as it is subsumed in the "irreparable harm to the movant in the absence of preliminary relief" factor.[91] The two multi-part tests actually are the same because the "balance of the equities" factor typically is evaluated by comparing the hardship of the movant *without* preliminary relief to the hardship of the non-movant *with* preliminary relief, i.e., the harm to each side assuming it does not acquire what it seeks.[92] Additionally, because a court essentially is comparing the situation with and without the requested preliminary injunction, the time period during which the factors—other than likelihood-of-success—are evaluated is between the preliminary injunction hearing and the anticipated trial on the merits.[93]

1. The Split Amongst the U.S. Circuit Courts of Appeals

Although in modern times the federal courts of appeals have largely agreed on the four factors to be considered when determining whether a preliminary injunction is warranted, they have applied the factors inconsistently using one of three different approaches.[94] One approach consists of a sequential inquiry, where each factor is evaluated separately, and the movant must satisfy each of the four factors for preliminary relief to be granted.[95] A second approach is a balancing analysis, where the court looks at the four factors together, and a lesser showing on one factor can

91. *See, e.g.*, Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977), *overruled by* The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), *aff'd*, The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 607 F.3d 355 (4th Cir. 2010) (*per curiam*); *see also* Vaughn, *supra* note 89, at 869 ("[F]or many courts, the showing of irreparable injury is necessarily implied in the balance of hardships.").

92. *See* WRIGHT, ET AL., *supra* note 61, § 2948.2, at 170–72.

93. *See id.* § 2948, at 125–27.

94. *See* Denlow, *supra* note 1, at 497–98; *see also* Wolf, *Massachusetts Standards*, *supra* note 15, at 26–27 ("Historically, the United States courts of appeals have differed widely in their approaches to preliminary relief . . . . [Prior to 2008,] the federal appellate courts had used at least nine different tests, excluding variations, for interlocutory relief."); Weisshaar, *supra* note 12, at 1021 ("Although nearly all federal courts examine these [four traditional] factors, the courts differ in the way they describe the factors and in the weight they give each factor.").

95. *See* Weisshaar, *supra* note 12, at 1015.

be cured by a particularly strong showing on one or more of the other factors.[96] The third approach requires an initial threshold investigation of one or more of the factors and, depending on whether the threshold is met, evaluating the remaining factors, usually in a balancing methodology.[97] The balancing and threshold approaches often are referred to collectively as "sliding-scale" analyses or standards because each approach typically allows for strong consideration of some factors to compensate for relative weakness in other factors.[98] A sequential test necessarily is the most stringent analysis because each of the four factors must be satisfied;[99] stated differently, the failure of the movant to satisfy any of the four factors, to the required standard, will result in the court denying the requested preliminary injunctive relief.[100]

A sliding-scale approach to evaluating preliminary injunctions arguably is consistent with the traditional equitable discretion granted to the chancellor.[101] Judge Richard Posner, a long-time judge of the U.S. Court of Appeals for the Seventh Circuit, ironically distilled this equitable analysis quantitatively into a mathematical formula, building upon a concept introduced by Professor John Leubsdorf.[102] Judge Posner advocates that jurists evaluating preliminary injunctions should grant injunctive relief if: $P \times H_P > (1 - P) \times H_D$, where P is the movant's likelihood of success at the trial on the merits (which also is the probability that denying the preliminary injunction would be erroneous); H_P is the harm to the plaintiff/movant if the preliminary injunction is denied; $(1 - P)$ is the non-movant's likelihood of success at the trial on the merits (which also is the probability that granting the preliminary injunction would be erroneous); and H_D is the harm to

96. *See id.*

97. *See id.*

98. *See, e.g., id.* References to "sliding-scale" approaches in this article therefore include both "balancing" and "threshold" analyses.

99. *See* Black, *supra* note 25, at 45; *see also* Vaughn, *supra* note 89, at 867 (pointing out that "failure on any one part of the test results in a failure to meet the entire test").

100. *See* Vaughn, *supra* note 89, at 867.

101. *See supra* notes 84–85 and accompanying text.

102. *See* Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd., 780 F.2d 589, 593 (7th Cir. 1986). Judge Posner's formulation is a mathematical representation of how Professor Leubsdorf described the preliminary injunction balancing analysis. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 118–23 (1991) [hereinafter LAYCOCK, DEATH] (citing Leubsdorf, *supra* note 13, at 540–41).

the defendant/non-movant.[103] Although the formula appears to consider only the movant's likelihood of success and a balancing of the equities, the irreparability of the movant's harm is assumed in the formulation[104] and, as suggested by Judge Posner, the harm to third parties, i.e., the effect on the public interest, can be included in the probabilities.[105] This quantitative analysis is neat and compact, but it arguably is simplistic[106] and, in any case, the difficulty—or impossibility—of assigning numeric values to the harms greatly reduces its practical value.[107] It does, howev-

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103. *Am. Hosp.*, 780 F.2d at 593.

104. *See* Lee, *supra* note 3, at 151 (discussing Leubsdorf's "important distinction between injuries that can be redressed at final judgment and those that cannot"); *see also* LAYCOCK, DEATH, *supra* note 102, at 120–21 ("The Leubsdorf-Posner formula implicitly assumes that all harm can be characterized as either reparable or irreparable, and that only irreparable harm counts.").

105. *Am. Hosp.*, 780 F.2d at 594.

106. Even Judge Posner recognizes that his formulaic analysis is a bit facile. *See id.* at 593 (pointing out that his formula "is intended not to force analysis into a quantitative straitjacket but to assist analysis by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors"). Such attempts to convert abstract legal principles into mathematical formulations are not new, and this one actually is a variant of the famous Learned Hand negligence calculus: PL > B, where P is the probability of harm, L is the associated liability, and B is the burden or cost to prevent the harm. *See* U.S. v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947). In the preliminary injunction equation, the burden would be what the non-movant will suffer, i.e., the product of the non-movant's probability of success and harm suffered. *See Am. Hosp.*, 780 F.2d at 593 (referring to the Posner formulation as a "procedural counterpart" to Judge Hand's negligence formula). The dissent in *American Hospital* harshly criticizes use of the formula, claiming that "[p]roceedings in equity and cases sounding in tort demand entirely different responses of a district judge" and that the precision required by the formula is "antithetical to the underlying principles of injunctive relief." *Id.* at 609 (Swygert, J., dissenting). According to Professor Laycock, a more proper articulation of the Leubsdorf-Posner formula—to properly account for actual complexities and to demonstrate the formula's uselessness—is as follows:

> Courts deciding whether to grant preliminary relief should try to minimize the risk of legally unjustified irreparable harm, considering the probability that the preliminary relief will be consistent with the ultimate rights of the parties, and considering the likelihood, severity, and degree of irreparability of the harm that [the movant] may suffer if preliminary relief is erroneously denied and of the harm that [non-movant] may suffer if preliminary relief is erroneously granted, recognizing that each of these variables extends over a range of possibilities.

LAYCOCK, DEATH, *supra* note 102, at 122.

107. *See* Lee, *supra* note 3, at 152 n.260 ("[A]nalytically, quantification of the expected irreparable harms is logically untenable. Because courts define . . . irreparable harm as harm that cannot be remedied by an award of money damages, any effort to place a dollar value on such harms will necessarily fail."); *see also* LAYCOCK, DEATH, *supra* note 102, at 120 ("The problem is not just that the variables cannot be quantified in fact. The problem is more fundamental: these variables cannot be conceptualized even in theory as having discrete values that could be represented by points on a graph or by single numbers in an

er, force the court to focus on the balancing process and the relationship among the various factors to be balanced.[108]

As these analyses continued to mature, each federal circuit appeared to develop a unique approach regarding the application of the four-factor test, and some federal district courts announced their own individual methodologies.[109] The evolution of federal preliminary injunction relief resulted in a "dizzying array of alternative 'sliding scale' standards that had been adopted by various federal circuits," in addition to the sequential analysis,[110] with more than nine separate approaches.[111] It also was clear that the courts of appeals were inattentive to Supreme Court precedent, perhaps because of the Supreme Court's own inconsistent approach to preliminary injunctions.[112] Concern arose that these varying standards could lead, or had led, to inconsistent judgments, inequitable decisions, unnecessary litigation, and forum shopping.[113] By the end of the twentieth century, the disagreement among federal circuit courts was well documented, and commentators universally agreed that "the coexistence of these [various preliminary injunction] standards in the federal courts has led to confusion."[114] These commentators also suggested that

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equation."); *cf.* JOHN L. COSTELLO, VIRGINIA REMEDIES § 13.08[1] (4th ed. 2011 & Supp. 2014) ("There are many cases where harms and probabilities are not quantifiable, but the trial judge must deal with them nonetheless.").

108. *See* LAYCOCK, DEATH, *supra* note 102, at 120.

109. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 17–18.

110. Jean C. Love, *Teaching Preliminary Injunctions After* Winter, 57 ST. LOUIS U. L.J. 689, 692 (2013).

111. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 27.

112. *See generally id.* at 18–26 (discussing examples of Supreme Court decisions and how those decisions lacked uniformity).

113. *See* Denlow, *supra* note 1, at 530–34. By "inequitable decisions," Judge Denlow was referring primarily to the arguably absurd situation that might result from requiring a higher burden of proof for a permanent injunction—a preponderance of the evidence standard—than for a preliminary injunction subject to a sliding-scale test—potentially a significantly lower standard. *See id.* at 532. "[P]arties with weak cases will be encouraged to seek preliminary injunctive relief in cases where permanent relief may not be possible." *Id.* Judge Denlow went on to opine that a lower, uncertain standard "encourages additional litigation because neither the winning nor the losing side on the motion for a preliminary injunction is able to predict the likely outcome of the litigation on the merits," whereas a 50% likelihood standard would help the parties evaluate their positions. *Id.* He further pointed out that attorneys are unable to counsel their client and predict the judicial outcome when the legal principles that the court will employ are "unclear, ambiguous, and rife with contradiction." *Id.* at 532–33.

114. *See, e.g.*, Vaughn, *supra* note 89, at 840.

"the time has come for a uniform standard and [for] the Supreme Court [to] address this question."[115]

2. The Fourth Circuit's Preliminary Injunction Test

As the federal circuit courts of appeals each developed a distinctive approach to evaluating the four preliminary injunction equitable criteria, the U.S. Court of Appeals for the Fourth Circuit adopted one of the most complex threshold tests in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.*[116] There, Blackwelder sought a preliminary injunction to remain a Seilig furniture distributor after its dealership had been terminated.[117]

Like most other federal circuit preliminary injunction tests, the Fourth Circuit's test incorporated the four familiar factors.[118] Under its analysis, however, if the balance-of-the-hardships factor was strongly satisfied, a preliminary injunction could be issued without evaluating all other factors.[119] Specifically, the Court held that "the first step in a Rule 65(a) [preliminary injunction] situation is for the court to balance the 'likelihood' of irreparable harm to the [movant] against the 'likelihood' of harm to the [nonmovant]."[120] "[I]f that balance is struck in favor of [the movant], it is enough that grave or serious questions are presented; and [the movant] need not show a likelihood of success."[121] The court indicated that this preliminary relief analysis depends upon a "flexi-

115. *Id.* at 846 n.33; *see also* Denlow, *supra* note 1, at 533 ("The standard should define the elements necessary for obtaining a preliminary injunction and provide guidance as to how those standards should apply while providing trial courts with necessary discretion."). One commentator went so far as to opine that "[w]hile non-uniformity of [preliminary injunction] decisions may serve a creative purpose in the short run, over time it tends to breed disrespect for and discontent of the law and advance the perception that judicial decisionmaking is largely arbitrary." Wolf, *Varying Standards*, *supra* note 45, at 236.

116. 550 F.2d 189 (4th Cir. 1977). Notably, the Fourth Circuit refers to its test as a "balance-of-hardship test," an apparent reference to the fact that it uses the balancing prong—or prongs in the case of the Fourth Circuit—of the four-part test as a threshold analysis. *See id.* at 194–96.

117. *Id.* at 192–93.

118. *See id.* at 195.

119. *See id.* The Fourth Circuit ostensibly was applying the preliminary injunction standard as set forth in *Ohio Oil Co. v. Conway*. *Id.* at 193–94 (citing Conway, 279 U.S. 813).

120. *Id.* at 195.

121. *Id.* at 196.

ble interplay" among the factors considered.[122] The court in *Blackwelder* held that the district court erred when it demanded that the movant "must first show 'likelihood of success' in order to be entitled to preliminary relief."[123]

3. The Supreme Court's Guidance in *Winter* and Subsequent Reaction by the United States Courts of Appeals

Against a backdrop where virtually every federal circuit court of appeals evaluated preliminary injunctions differently,[124] the U.S. Supreme Court in 2008 reviewed a case from the U.S. Court of Appeals for the Ninth Circuit in *Winter v. Natural Resources Defense Council, Inc.*[125] In that case, Natural Resources Defense Council ("NRDC") sought a preliminary injunction to stop the U.S. Navy from conducting mid-frequency active sonar training exercises in the waters off the coast of southern California ("SOCAL"), based on alleged injury to certain marine mammals.[126] At the time, the Ninth Circuit employed a sliding-scale test to determine whether a preliminary injunction was warranted: "when a [movant] demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm."[127] Applying the facts of the case, the lower court found that NRDC's high likelihood of success combined with the possibility of injury to the SOCAL marine mammals justified granting a preliminary injunction.[128] The Navy argued on appeal that NRDC had not shown a likelihood of success on the merits and that NRDC "must demonstrate a *likelihood* of irreparable injury—not just a *possibility*—in order to obtain preliminary relief."[129]

Until *Winter*, the Supreme Court had not definitively articulated the necessary criteria to acquire a preliminary injunction,[130]

122. *Id.*
123. *Id.* at 195.
124. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 27.
125. 555 U.S. 7 (2008).
126. *Id.* at 16–17.
127. *Id.* at 21.
128. *Id.*
129. *Id.* at 20–21 (emphasis added).
130. *See* Wolf, *Massachusetts Standards*, *supra* note 15, at 17 (pointing out that the Supreme Court "had left the matter to the courts of appeals, which developed a variety of

although it certainly had addressed evaluation of preliminary injunctions on numerous prior occasions.[131] According to the Court,

> a [movant] seeking a preliminary injunction *must establish* [1] that he *is likely* to succeed on the merits, [2] that he *is likely* to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, *and* [4] that an injunction is in the public interest.[132]

Of note, the cases to which the Court cited for support of its four-factor test all speak in terms of "a likelihood" of irreparable injury and success on the merits, so the Court's choice to use "is likely" in its formulation appears deliberate.[133]

The Court sided with the Navy regarding whether a "possibility" of irreparable injury was sufficient, stating that "[o]ur frequently reiterated standard requires [movants] seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."[134] The Court held that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon *a clear showing* that the [movant] is entitled to such relief."[135]

The Supreme Court also discussed at length the public-interest factor of the four-part test.[136] Quoting one of its prior decisions, the Court noted that "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences

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standards").

131. *See generally* Wolf, *Varying Standards*, *supra* note 45, at 118.

132. *Winter*, 555 U.S. at 20 (emphasis added).

133. *See id.* Although none of the cases cited in *Winter* specifically mentioned "is likely," the Court did use the "is likely" phraseology previously. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("The traditional standard for granting a preliminary injunction requires the [movant] to show that in the absence of its issuance he will suffer irreparable injury and also that he *is likely* to prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides." (emphasis added)). The Court in *Winter* did, however, quote from a well-recognized federal practice and procedure treatise that when seeking a preliminary injunction, an "applicant must demonstrate that in the absence of a preliminary injunction, 'the applicant *is likely* to suffer irreparable harm before a decision on the merits can be rendered.'" *Winter*, 555 U.S. at 22 (emphasis added) (quoting WRIGHT, ET AL., *supra* note 61, § 2948.1, at 139).

134. *Winter*, 555 U.S. at 22. The Court's choice to italicize "likely" here is arguably significant.

135. *Id.* (emphasis added).

136. *See id.* at 24–26.

in employing the extraordinary remedy of injunction."[137] Based on the facts of the case, the Court held that the public interests "must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court."[138] The Court ultimately concluded that "[t]he public interest in conducting training exercises under realistic conditions plainly outweighs the interests advanced by the [movants]."[139] Without expressly so stating, the Court apparently was evaluating whether the public interest outweighed the possible harm to the movant prior to the trial on the merits if the preliminary injunction were not granted.

Despite the *Winter* Court opining that all four prongs *must* be established[140] and that particular attention must be paid to the public interests, the public-interest factor may have little or no importance in preliminary injunction actions involving only private interests.[141] For instance, in a bilateral monopoly, where only the two parties have an interest in the outcome[142]—e.g., a private property encroachment, specific performance of a sales contract—there arguably is no "public interest," unless "enforcement of private property rights," "enforcement of contracts," or some similar generalized concern is characterized as a public interest.[143]

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137. *Id.* at 24 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).

138. *Id.* at 25.

139. *Id.* at 26.

140. The Court articulated the four factors using the conjunctive "and," indicating that all four factors must be satisfied. *See id.* at 20; *see also infra* note 162 and accompanying text.

141. *See* 13 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 65.22[3] (Matthew Bender 3d ed. 2015) ("Although the public interest will not be as important as the other factors considered in the award of preliminary injunctive relief in actions involving only private interests, it will be prominently considered in actions implicating government policy or regulation, or other matters of public concern.").

142. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 74 (4th ed. 1992).

143. In such cases after *Winter*, courts have focused more on a separate public-interest evaluation, even if it is closely aligned with the likelihood-of-success evaluation of a generalized interest. *See, e.g.*, Pashby v. Delia, 709 F.3d 307, 330 (4th Cir. 2013) (holding that "the district court could find that the likelihood of success on the merits satisfied the public interest prong . . . if other considerations did not meaningfully weigh on that factor"); Apple, Inc. v. Samsung Elecs. Co., 678 F.3d 1314, 1338 (Fed. Cir. 2012) ("[A]lthough the public interest inquiry is not necessarily or always bound to the likelihood of success o[n] the merits, . . . absent any other relevant concerns . . . the public is best served by enforcing patents that are likely valid and infringed.") (quoting Abbott Labs. v. Andrx Pharm., Inc., 452 F.3d 1331, 1348 (Fed. Cir. 2006)); Thalheimer v. City of San Diego, 645 F.3d 1109, 1128–29 (9th Cir. 2011) (affirming the district court's conclusion "that the public interest in upholding free speech and association rights" satisfied the *Winter* pubic interest

Winter's four-part test—although similar to preliminary injunction tests the courts of appeals had used previously—is unique upon close examination.[144] Significantly, each of the pre-*Winter* circuit court of appeals' preliminary injunction tests evaluated the "likelihood of success on the merits" and "likelihood of irreparable injury."[145] Based on a plain reading, "likelihood"—similar to "probability"—can be expressed as any percentage between 0% and 100%.[146] In other words, there could be a very low likelihood, e.g., a 5% likelihood, or a very high likelihood, e.g., a 90% likelihood. By contrast, to say something "is likely"—like saying something "is probable"—implies that there is more evidence for than against.[147] Arguably, this is especially true when "likely" is used as an adverb, e.g., "success is likely," as opposed to as an adjective, e.g., "a likely outcome." In other words, the *Winter* formulation can be read to indicate that the movant must prove that there is more than a 50% chance of success on the merits *and* more than a 50% chance of irreparable injury in the absence of preliminary relief,[148] in addition to satisfying the other two prongs of the four-part test.

Unlike their reaction to prior Supreme Court preliminary injunction opinions, the federal courts of appeals appear intent on acknowledging and—each in their own way—following *Winter*.[149]

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factor).

144. *See Winter*, 555 U.S. at 24.

145. *See generally* Wolf, *Massachusetts Standards*, *supra* note 15 (discussing in detail the pre-*Winter* preliminary injunction tests used by each circuit).

146. *See* POSNER, *supra* note 142, at 5 (discussing assignment of mathematical probabilities by economists).

147. *See* Weisshaar, *supra* note 12, at 1053 (indicating that analysis of the "likely to succeed" prong using a sliding-scale analysis is more difficult for judges to apply consistently than a sequential test, "which naturally seems to parallel the preponderance of the evidence standard used in civil litigation—that is, more likely than not or just over a fifty percent chance").

148. *See id.* at 1052 (taking the position that "likely" means "more than fifty percent likely"); *see also* Denlow, *supra* note 1, at 532–34 (arguing that a movant seeking a preliminary injunction should be required to prove at least a 50% change of prevailing on the merits). *But see* Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 37 & n.7 (2d Cir. 2010) (opining that "[a]lthough the [Supreme] Court repeated the 'likely to succeed on the merits' phrasing, it did not suggest that this factor requires a showing that the movant is 'more likely than not' to succeed on the merits," and claiming that *Winter*'s requirement for better-than-negligible chances did not conflict with the Second Circuit's serious-questions test because a serious-questions showing requires more than better-than-negligible chances).

149. *See generally* Weisshaar, *supra* note 12, at 1012–17 (surveying the various interpretations of *Winter* by the circuit courts of appeals).

The surviving question after *Winter* is whether the sliding-scale analysis is still viable.[150] Perhaps unsurprisingly, the federal courts of appeals are not in agreement regarding the answer.[151] One view is that *Winter* made it clear that the four-part test is a sequential test, the factors need to be evaluated separately, and "is likely" perhaps indicates that more than a 50% probability is required.[152] The other view is that "is likely" simply indicates something more than a mere possibility, the sliding-scale analysis remains valid, and a movant is not required to demonstrate more than a 50% chance of success both on the merits and of irreparable harm in the absence of a preliminary injunction.[153] Although *Winter* addressed only the "movant is likely to suffer irreparable harm" prong, the Court's interpretation of "is likely" in that context clearly should adhere to the "movant is likely to succeed on the merits" factor as well, as the wording of the two phrases is identical.[154]

The tension between the post-*Winter* sequential and sliding-scale approaches perhaps played out most vividly in the U.S. Court of Appeals for the Ninth Circuit, where inconsistent intra-circuit opinions arose.[155] *Winter* was a clear edict that the Ninth Circuit's prior sliding-scale test was unacceptable;[156] the likelihood of success on the merits, no matter how strong, could not make up for the fact that there was a mere "possibility" of irreparable injury in the absence of preliminary relief.[157] The Ninth Cir-

150. *See id.* at 1016 (noting that there currently is a split in federal circuit courts regarding whether sliding-scale preliminary injunction tests have been foreclosed).

151. *See id.*; *see also* Bethany M. Bates, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1556 (2011) ("Winter provided the Supreme Court with an opportunity to clarify the appropriate application [of the four-part test], but the Court's lack of clarity led to more confusion among the circuits.").

152. *See* Weisshaar, *supra* note 12, at 1033–34, 1042–46, 1052.

153. *See id.* at 1035–42.

154. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). According to the well-accepted rule of legal text interpretation, identical words used in a document are presumed to have the same meaning. *See* Ratzlaf v. U.S., 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). This presumption is "at its most vigorous when a term is repeated within a given sentence." Brown v. Gardner, 513 U.S. 115, 118 (1994).

155. *See* Weisshaar, *supra* note 12, at 1040–46.

156. *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (pointing out that "*Winter* explicitly rejected [the Ninth Circuit's prior] approach").

157. *See supra* notes 134–35 and accompanying text.

cuit's decisions after *Winter* therefore necessitated a reformulation of the circuit's four-factor preliminary injunction test.

a. The Post-*Winter* Sequential Preliminary Injunction Test

In *DISH Network Corp. v. Federal Communications Commission*, DISH sought to preliminarily enjoin, on First Amendment grounds, a section of the Satellite Television Extension and Localism Act of 2010 that determined when satellite providers would be required to carry certain educational stations in high definition.[158] The Ninth Circuit upheld the district court's denial of a preliminary injunction, which was based on the movant's failure to demonstrate that it was likely to succeed on the merits of its claim.[159] The circuit court held that for DISH to prevail in its request for preliminary injunctive relief, it had to "demonstrate that it meets all four of the elements of the preliminary injunction test established in *Winter*."[160] DISH's failure to demonstrate one of the factors, i.e., likely success on the merits, therefore was sufficient to defeat its request for preliminary relief.[161] This interpretation of *Winter*—that a sequential test is required—certainly is reasonable.

A plain reading of the four-part test articulated in *Winter*—phrasing the factors in the conjunctive—arguably requires that the movant independently prove each factor, indicating a sequential analysis.[162] The Supreme Court's approach in *Winter* also

158. 653 F.3d 771, 775, *amending and superseding, on denial of reh'g en banc*, DISH Network Corp. v. FCC, 636 F.3d 1139 (9th Cir. 2011).

159. *Id.* at 782.

160. *Id.* at 776.

161. *Id.* at 776–77. According to the court:

> Therefore, even if we were to determine that DISH is likely to succeed on the merits, we would still need to consider whether it satisfied the remaining elements of the preliminary injunction test. However, because we agree with the district court that DISH has failed to satisfy its burden of demonstrating it has met the first element, we need not consider the remaining three.

Id.

162. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116–19 (2012) (discussing conjunctive lists). Commentators have specifically opined that the *Winter* test consists of a conjunctive list. *See, e.g.*, LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 444 ("Read literally, the Court's initial formulation treats these criteria as four separate requirements that [movant] 'must establish.'"); Weisshaar, *supra* note 12, at 1049–50 (arguing that the plain language of *Winter* denotes a sequential test). The plain reading of *Winter* as requiring a sequential test—and the denouncement of the sliding-scale approach—is corroborated by commentary released soon after *Winter* was

demonstrates that it evaluated the four factors sequentially. Although the Navy's appeal challenged the Ninth Circuit's evaluation of the likelihood-of-success and irreparable-injury prongs, the Supreme Court found that NRDC, as the movant, failed to satisfy the public interest factor, making evaluation of the two challenged prongs unnecessary.[163] The Court stated:

> [E]ven if [the movants] have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors *alone* requires denial of the requested injunctive relief. For the same reason, we do not address the lower courts' holding that [the movants] have also established a likelihood of success on the merits.[164]

Stated differently, failure to satisfy one prong rendered evaluation of the other three prongs unnecessary because a movant must satisfy all four factors.[165]

A subsequent Supreme Court opinion also supports that the preliminary injunction test is a sequential analysis. In *Nken v. Holder*, a Supreme Court opinion released five months after *Winter*, an alien sought a stay of removal pending review of the removal order.[166] Analogizing the four-factor test for stays pending appeal with the preliminary injunction four-factor test, the majority reiterated that more than a possibility of irreparable injury and more than a possibility of likelihood of success are required to satisfy the four-factor test.[167] Justice Kennedy, in a concurring

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decided. *See, e.g.*, Bradfute W. Davenport, Jr. & Joshua D. Heslinga, *Bye, Bye,* Blackwelder*? Recent Cases and the Standards for Preliminary Injunctions in Virginia's Federal and State Courts*, 14 LIT. NEWS J. 1, 6 (2009) ("[P]reliminary injunctions will be tougher to obtain because litigants may no longer use 'sliding scales' to downplay one factor because of a strong position on another factor."); *Fourth Circuit Adopts New Injunction Standard* (Aug. 6, 2009), http://www.mcguirewoods.com/Client-Resources/Alerts/2009/8/Fourth-Circuit-Adopts-New-Injunction-Standard.aspx (last visited Oct. 1, 2015). Some later commentary concurs with this interpretation. *See, e.g.*, Weisshaar, *supra* note 12, at 1049 ("The most natural reading of *Winter* is that it requires a sequential test . . . . *Winter*'s articulation of the traditional preliminary injunction test contains four factors, joined by semicolons and the conjunction 'and.' Typically, this sort of formulation indicates a list where all of the elements are required.").

163. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 23–24 (2008).

164. *Id.* (emphasis added).

165. *See* Weisshaar, *supra* note 12, at 1028 ("The fact that the movants' failure to prevail on the public-interest factor was sufficient, by itself, to doom their quest for a preliminary injunction suggests that the *Winter* court was performing a sequential test.").

166. 556 U.S. 418, 423 (2009).

167. *Id.* at 434–35. Although the Court in *Nken* was analyzing a stay pending appeal

opinion, apparently wanted to make it clear that the familiar test was to be applied sequentially: "When considering success on the merits and irreparable harm, courts cannot dispense with the *required showing* of one simply because there is strong likelihood of the other."[168]

As discussed previously, a plain reading of "likely" indicates there is more evidence for than against or, in other words, there is greater than a 50% chance.[169] This interpretation is supported by *Black's Law Dictionary*, which defines "likely" as "apparently true or real; probable."[170] Although the definition of "probable" in the current version of *Black's Law Dictionary* is unhelpful—as it defines "probable" as "likely to exist, be true, or happen,"[171] a circular argument—a previous edition of *Black's* defined "probable" as, *inter alia*, "having more evidence for than against,"[172] i.e., more than a 50% chance. As also discussed previously, "is likely" should be equated with more than a 50% probability for both the irreparable-injury and success-on-the-merits prongs of the four-factor test.[173] Under the rules of legal text construction, terms appearing in the same statute, or in the same contract paragraph, or within a multi-part test, are generally understood to have the same meaning.[174]

Interpreting "is likely" as requiring more than a 50% probability also is consistent with characterizing a preliminary injunction

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and not a preliminary injunction, it pointed out:

> There is substantial overlap between [the factors governing a stay pending appeal] and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

Id. at 434 (citing *Winter*, 555 U.S. at 24).

168. *Id.* at 438 (Kennedy, J., concurring) (emphasis added).

169. *See supra* notes 144–48 and accompanying text.

170. BLACK'S LAW DICTIONARY, *supra* note 54, at 1069.

171. *Id.* at 1395.

172. BLACK'S LAW DICTIONARY 1201 (6th ed. 1990). In this 1990 edition of *Black's*, "likely" is defined simply as "probable," making reference to the definition of "probable" logical. *Id.* at 925 (citing to People v. Randall, 711 P.2d 689, 692 (Colo. 1985), for the proposition that "[l]ikely is word [sic] of general usage and common understanding, broadly defined as of such nature or so circumstantial *as to make something probable and having better chance of existing or occurring than not*") (emphasis added)).

173. *See supra* note 152 and accompanying text.

174. *See id.*

as an "extraordinary remedy."[175] Because preliminary relief necessarily bypasses due process, a movant at the preliminary relief phase arguably should be required to satisfy at least the same standard of proof as at the permanent relief phase.[176] The standard for issuing a permanent injunction at the trial on the merits—after full due process—is a preponderance of the evidence, i.e., greater than 50%.[177] A movant therefore should be required to satisfy at least this same standard in order to be granted extraordinary relief.[178] Otherwise, a party with a known weak case could seek preliminary relief understanding that it will not prevail at the trial on the merits, thereby increasing expenses and wasting judicial resources.[179]

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175. *See* Weisshaar, *supra* note 12, at 1053 ("A court should not be able to alter the relative positions of the parties, sometimes dramatically, without the movant first establishing that he is at least likely to prevail on the merits. The [sliding-scale] test is therefore in tension with the traditional characterization of preliminary injunctions as rare, extraordinary remedies."); *see also* Black, *supra* note 25, at 26 ("Under [the sequential approach], preliminary injunctions are considered extraordinary and drastic remedies that should not be granted lightly."); Crawford, *supra* note 44, at 441 (pointing out the Anti-Federalists' concern that allowing federal courts equity jurisdiction would allow chancellors "to decide as their conscience, their opinions, their caprice, or their politics might dictate" and Alexander Hamilton's response that "the great and primary use of a court of equity [will be] to give relief in extraordinary cases" (quoting Fed. Farmer No. 15, Jan. 18, 1788, *in* 2 THE COMPLETE ANTI-FEDERALIST 322–23 (Herbert J. Storing ed., 1981)); THE FEDERALIST No. 83, at 569 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

176. *See* Denlow, *supra* note 1, at 532 ("It is difficult to understand why a party who is seeking the 'very serious remedy' of an injunction should be held to a significantly lower standard on the merits than the party would have to establish at a trial on the merits. . . . A party should be required to make out at least a 50% chance of winning before a preliminary injunction is granted."); *see also* Crawford, *supra* note 44, at 438 ("The requirements that must be met in order to enjoin another party from commencing a specific action serve as a vital protection against the potential error of issuing such an order prior to all the facts being established."). The rationale of the burden of proof being consistent with an extraordinary remedy later was confirmed by the U.S. Supreme Court in *Winter*, although the Court admittedly was referring to whether the movant was likely to suffer irreparable harm in the absence of preliminary relief and not whether the movant was likely to succeed on the merits. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.").

177. *See supra* note 113.

178. *See* Denlow, *supra* note 1, at 532 ("If a party must show at least a 50% chance of prevailing, then the decision on the preliminary injunction helps the parties evaluate their positions. Requiring a higher standard is particularly important in those cases in which full-blown evidentiary hearings are conducted because the proofs are generally substantially similar between a full-blown preliminary injunction and a trial on the merits.").

179. *See id.* at 538.

A sequential evaluation of the four factors makes a sliding-scale analysis inappropriate and, if "is likely" is interpreted as more than a 50% probability, a sliding-scale analysis—as well as the Leubsdorf/Posner formula—is unnecessary.[180] A very narrow reading of *Winter*, however, limits its holding to concluding that a mere "possibility of irreparable harm" is insufficient to satisfy the federal preliminary injunction four-part test, as a "possibility" is insufficient to make irreparable injury "likely," however "likely" is defined.[181] Such a narrow holding implies that more than a possibility, but perhaps less than a 50% probability, might be sufficient to find a factor to be "likely" and leaves room for the continued existence of a sliding-scale evaluation.[182]

b. The Post-*Winter* Sliding-Scale Preliminary Injunction Test

Another Ninth Circuit opinion, *Alliance for the Wild Rockies v. Cottrell*, interpreted *Winter* as allowing a sliding-scale preliminary injunction analysis.[183] Alliance sought a preliminary injunction to stop a timber salvage sale proposed by the U.S. Forest Service, and the district court denied the preliminary relief, holding that Alliance failed to demonstrate the requisite likely irreparable injury and success on the merits.[184] The Ninth Circuit reversed the district court's ruling because the lower court failed to apply the "serious-questions" test, and ordered that the district court issue a preliminary injunction.[185] The circuit court held: "'Serious questions going to the merits' and a balance of hardships that tips sharply towards the [movant] can support issuance of a preliminary injunction, so long as the [movant] also

180. If there were both more than a 50% chance of success on the merits and more than a 50% chance of irreparable harm, there would be no need to use a sliding-scale analysis; the sliding scale is only necessary when one of the factors is weak, which almost certainly is not the case if that factor is more likely than not to be true. Similarly, because the Leubsdorf-Posner formula implies a sliding-scale approach necessitated when one of the probabilities is less than 50%, a sequential analysis makes the formula irrelevant.

181. *See, e.g.*, Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (equating *Winter*'s "likely to succeed on the merits" factor with "a plausible claim on the merits"); *see also* Love, *supra* note 110, at 708–12 (discussing the "serious questions" approach adopted by the Second, Seventh, and some Ninth Circuit courts post-*Winter*).

182. *See* Weisshaar, *supra* note 12, at 1035–42.

183. 632 F.3d 1127, 1134 (9th Cir. 2011).

184. *Id.* at 1128–29.

185. *Id.* at 1135.

shows a likelihood of irreparable injury and that the injunction is in the public interest."[186] Although the *Alliance* court acknowledged *Winter*'s requirement to satisfy all four factors, making the test somewhat stricter than the Ninth Circuit's pre-*Winter* test,[187] the court was willing to equate "serious questions" with "likely to succeed on the merits" as long as the balance of equities tips sharply toward the movant.[188] The court also noted that the *Winter* Court did not expressly reject a sliding-scale approach.[189]

Courts finding that *Winter* does not preclude a sliding-scale analysis, including the *Alliance* court,[190] rely in part on Justice Ginsburg's dissent in *Winter*, where she interpreted the majority's silence on the "sliding-scale" issue as not precluding the continued use of the approach:

> Flexibility is a hallmark of equity jurisdiction. "The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould [sic] each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, *courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today.*[191]

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186. *Id.*

187. Prior to *Winter*, the Ninth Circuit could issue a preliminary injunction if there were serious questions going to the merits and the balance of hardships tipped sharply towards the movant; in such a situation, review of the other two factors was not required. *See, e.g., id.* at 1131 (describing the "serious questions" approach as "one alternative on a continuum" of pre-*Winter* preliminary injunction tests).

188. *See id.* Other federal courts of appeals adhering to a sliding-scale analysis post-*Winter* are the First Circuit (Braintree Labs., Inc. v. Citigroup Global Mkts., Inc., 622 F.3d 36, 42–43 (1st Cir. 2010)), Second Circuit (Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010)), and Seventh Circuit (Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 795 (7th Cir. 2013)). As one commentator noted, prior to *Winter* many of the other circuits "were already considering the four traditional factors and applied a sliding scale test inconsistently, if at all, and thus were not directly affected by *Winter*." Bates, *supra* note 151, at 1538.

189. *Alliance*, 632 F.3d at 1131 ("The majority opinion in *Winter* did not, however, explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions employed by this circuit and others.").

190. *See, e.g., id.* at 1132.

191. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (emphasis added) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).

Flexibility under a sliding-scale approach could, for instance, account for the inability to adequately develop the merits at a truncated preliminary relief hearing in order to predict likelihood of success[192] or allow for preliminary relief to prevent undeniable irreparable injury despite a weak likelihood of success on the merits.[193]

Later in her dissent, Justice Ginsburg used "likely" several times in a fashion that arguably was intended to downplay its significance and dilute the common definition of the adverb "likely," which when employed in such a grammatical fashion—e.g., to say something "is likely"—indicates greater than a 50% chance.[194] Specifically, she used "likely" in a manner that implied a smaller probability of occurrence: twice as an adjective ("this likely harm" and "the likely, substantial harm to the environment") and once modified by "sufficiently" ("[i]f such injury is sufficiently likely").[195] Some commentators found that Chief Justice Roberts's failure to respond to Justice Ginsburg's statement, on behalf of the majority, just as significant.[196] In fact, however, the majority

192. *See* Vaughn, *supra* note 89, at 875.

193. *See id.* at 866 ("Because the factors [in a sequential test] cannot be traded off against each other, even a crushing and certain specter of harm will not overcome a weak showing on the merits.").

194. *Winter*, 555 U.S. at 53–54 (Ginsburg, J., dissenting).

195. *Id.* Admittedly, when "likely" is used as an adjective, it plainly means more than a 50% probability—just as "is likely" does—although its impact as an adjective perhaps is not as precise as when it is used as an adverb. It also is unclear what "sufficiently likely" connotes, although it arguably is intended to decrease the minimum quantum required—to something less than 50%—from that when "likely" is used alone or as an adverb.

196. *See* Love, *supra* note 110, at 707–08.

> [I]t is highly significant that Chief Justice Roberts chose not to respond to Justice Ginsburg's observation regarding the viability of the "sliding scale" test, especially since he devoted a lengthy footnote to setting forth his responses to both the concurring and dissenting opinions in Winter .... [T]he Supreme Court might be willing to approve a 'sliding scale' test which requires proof that the [movant] is likely to suffer irreparable harm in the absence of preliminary injunctive relief, but which does not require proof that the [movant] is likely to succeed on the merits.

Id.; *see also* Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010) ("If the Supreme Court had meant for [*Winter*, *Nken*, or its other post-*Winter* preliminary injunction case] to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself.... We have found no command from the Supreme Court that would foreclose the application of our established 'serious questions' standard as a means of assessing a movant's likelihood of success on the merits ...."). Such a reading, however, ignores a plain reading of *Winter*'s "likely to succeed" prong.

dismisses Justice Ginsburg's dissent summarily, as the bulk of the dissent "is devoted to the merits," and the majority points out that "we do not address the underlying merits of [the movant's] claims."[197] Further, just because the majority chooses not to comment on a remark made in a dissent does not indicate that the majority somehow adopts the remark through omission; it is basic hornbook law that a dissenting opinion has no precedential value, and the majority's choice not to respond to a comment in a dissenting opinion is even further removed.[198] Significantly, federal courts of appeals that believe that the sliding-scale analysis survives *Winter* often offer a post-*Winter* articulation of the four-part test that uses the word "likelihood" instead of "likely," ignoring the express *Winter* formulation or, alternatively, arguably desperate to buttress the shaky foundation of the sliding-scale analysis.[199]

Courts advocating a post-*Winter* sliding-scale test also sometimes interpret language in the *Winter* majority opinion as supportive of a balancing approach.[200] In *Winter*, the Supreme Court stated: "In exercising their sound discretion, courts of equity should pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction."[201] As one court opined regarding this language, "the Court implied that balanc-

197. *Winter*, 555 U.S. at 31, 31 n.5. Professor Laycock questions whether, in light of the majority's finding that the movant failed to satisfy the public-interest factor, "all the rest [is] dictum." LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 444.

198. Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 208, 209 (2008) (commenting that "[i]f a dissent created the law, it would not be styled as a dissent" and that "dissents have no legally binding force and are necessarily dicta").

199. *See, e.g.*, Braintree Labs., Inc. v. Citigroup Global Mkts., Inc., 622 F.3d 36, 42–43 (1st Cir. 2010); Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010); Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 795 (7th Cir. 2013). Of note, most post-*Winter* cases in these circuits state the *Winter* test verbatim—with the "is likely" language—but then revert to using "likelihood of success" and/or "likelihood of irreparable injury" during their actual analyses. It arguably is understandable that a circuit court—laden with significant history using a given four-part test—would attempt to reconcile *Winter* with the preliminary injunction test it had used previously. As one commentator responded to the Second Circuit's post-*Winter* refusal to abandon its sliding-scale test, "the Second Circuit sidestepped Supreme Court precedent in an effort to sustain five decades of its own jurisprudence." Crawford, *supra* note 44, at 467.

200. *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011).

201. *Winter*, 555 U.S. at 24 (emphasis added) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).

ing is appropriate when it indicated that 'particular regard' should be paid to 'the public consequences in employing the extraordinary remedy of injunction.'"[202] Some courts have gone so far as to claim that elimination of the sliding-scale test would deprive them of their "longstanding discretion" to issue preliminary injunctions, which they believe the Supreme Court did not intend.[203]

c. The Fourth Circuit's Post-*Winter* Preliminary Injunction Test

As discussed previously, the Fourth Circuit prior to *Winter* analyzed preliminary injunction petitions using the *Blackwelder* test, a threshold analysis where satisfaction of only two of the four factors could support preliminary injunctive relief.[204] The *Blackwelder* analysis is similar to the "serious questions" sliding-scale approach used by the Ninth Circuit prior to *Winter*. After *Winter*, the Fourth Circuit therefore had the same options as the Ninth Circuit when analyzing preliminary injunctions: modify its existing sliding-scale test to incorporate *Winter*'s undisputed requirement to analyze all four factors or abandon the sliding-scale analysis altogether.

The first post-*Winter* preliminary injunction case presented to the Fourth Circuit was *The Real Truth About Obama, Inc. v. Federal Election Commission*, which was decided in 2009.[205] There, Real Truth challenged the constitutionality of certain Federal Election Commission regulations and sought a preliminary injunction prohibiting the agency from enforcing the challenged regulatory provisions against Real Truth and others similarly situated; this would allow Real Truth to engage in activities that

202. *Alliance*, 632 F.3d at 1132 (quoting *Winter*, 555 U.S. at 24). This interpretation by the Ninth Circuit is arguably strained.

203. *See, e.g.*, *Citigroup*, 598 F.3d at 35 (indicating that the Second Circuit had been applying its sliding-scale test for "the last five decades"); Save Strawberry Canyon v. Dep't of Energy, No. C 08-03494 WHA, 2009 U.S. Dist. LEXIS 38180, at *8–9 (N.D. Cal. Apr. 22, 2009) ("It would be most unfortunate if the Supreme Court . . . had eliminated the longstanding discretion of a district judge to preserve the *status quo* with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least 'serious questions' going to the merits are raised . . . .").

204. *See supra* note 116–23 and accompanying text.

205. 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), *aff'd*, The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 607 F.3d 355 (4th Cir. 2010) (*per curiam*).

otherwise might be in violation of the regulations without fear of penalties.[206] After the district court denied the requested preliminary relief, Real Truth appealed.[207]

The Fourth Circuit's interpretation of *Winter* was in stark contrast to other federal courts of appeals that had weighed in, resulting in a clear repudiation of *Blackwelder*.[208] Noting that a preliminary injunction is an extraordinary remedy, the court—invoking terminology from *Winter*—then stated: "Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by 'a clear showing' that, among other things, it is likely to succeed on the merits at trial."[209] The court then declared that "the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction" and pointed out that "all four requirements must be satisfied."[210] The court went on to state:

> Indeed, the Court in *Winter* rejected a standard that allowed the [movant] to demonstrate only a "possibility" of irreparable harm because that standard was "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon *a clear showing* that the [movant] is entitled to such relief.[211]

The Fourth Circuit then identified four substantive reasons why the *Blackwelder* standard "stands in fatal tension" with *Winter*.[212] First, "[t]he *Winter* requirement that the [movant] clearly demonstrate that it will *likely succeed* on the merits is far stricter than the *Blackwelder* requirement that the [movant] demonstrate only a grave or serious *question* for litigation,"[213] although the Fourth Circuit did not define "likely" in terms of a definitive percentage. Second, *Winter* requires that the movant make a *clear showing* of irreparable harm absent preliminary relief, whereas

206. *Id.* at 345.

207. *Id.*

208. *See id.* at 344–45 ("Because of its differences with the *Winter* test, the *Blackwelder* . . . test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.").

209. *Id.* at 345 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)).

210. *Id.* at 346.

211. *Id.* (emphasis added).

212. *Id.* at 346–47.

213. *Id.*

Blackwelder merely required that the movant's irreparable harm *outweigh* that of the non-movant and allowed only a *possibility* of irreparable harm upon a strong showing of probability of success.[214] Third, *Winter* makes it clear that courts should pay particular attention to public consequences, whereas *Blackwelder* does not always require consideration of the public interest.[215] And fourth, *Winter* "articulates four requirements, each of which must be satisfied as articulated," as opposed to the "flexible interplay" between all of the factors allowed by *Blackwelder*, "for all four [factors] are intertwined and each affects in degree all the others."[216] The court then reiterated in a subsequent decision the idea that "*Winter* articulates four requirements, each of which must be satisfied as articulated."[217]

The Fourth Circuit thereby rejected its prior sliding-scale test and indisputably interpreted *Winter* as requiring a sequential analysis. The court summarized its holding: "Because of its differences with the *Winter* test, the *Blackwelder* . . . test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts."[218] In short, whereas the vast majority of other federal circuit post-*Winter* decisions staunchly maintained a foothold on some form of sliding-scale analysis, the Fourth Circuit jettisoned the *Blackwelder* sliding-scale analysis and adopted a sequential test consistent with a plain reading of *Winter*.[219]

Overall, the arguments supporting adoption of a sequential preliminary injunction analysis—including a plain reading of *Winter*, subsequent U.S. Supreme Court decisions implying a sequential approach, and a preliminary injunction being an "extraordinary" remedy—appear to outweigh those advocating a sliding-scale approach such as the one in Justice Ginsburg's dissent

214. *Id.* at 347.

215. *Id.*

216. *Id.* (alteration in original).

217. *Id.* The Fourth Circuit stated: "[C]ourts considering whether to impose preliminary injunctions must *separately* consider each *Winter* factor." Pashby v. Delia, 709 F.3d 307, 321 (4th Cir. 2013) (emphasis added).

218. *Real Truth*, 575 F.3d at 347.

219. *See generally* Weisshaar, *supra* note 12, at 1016.

and the "traditional" role of flexibility in equity. In addition to arguably being the most faithful interpretation of *Winter*, the Fourth Circuit's opinion in *Real Truth* most likely is the one that would be followed by Virginia courts looking to apply federal law.[220]

III. THE EVOLUTION OF VIRGINIA TEMPORARY INJUNCTION LAW

Unlike federal preliminary injunctive relief, which has both preliminary injunctions and temporary restraining orders, preliminary injunctive relief in Virginia is in the form of "temporary injunctions."[221] Although temporary injunctions also encompass *ex parte* emergency injunctive proceedings, which are analogous to federal temporary restraining orders,[222] this article focuses only on the equivalent of federal preliminary injunctions, i.e., injunctions issued after notice to the defendant and prior to the trial on the merits. Virginia commentators sometimes refer to Virginia temporary injunctions as "preliminary injunctions," "interlocutory injunctions," or "ancillary injunctions,"[223] but there are no such designations in the Virginia Code.[224]

As with federal preliminary injunction law, statutory guidance regarding Virginia temporary injunction law is vague and broad.[225] Although temporary injunctions are discussed in the

220. Because the Fourth Circuit has jurisdiction over Virginia, hears appeals from Virginia federal district courts, and commonly interprets Virginia law, Virginia state courts relying on federal law normally look to Fourth Circuit law (or law from Virginia's federal district courts, which are bound to follow Fourth Circuit law).

221. *See* VA. CODE ANN. §§ 8.01-620 to -634 (Repl. Vol. 2015). In addition to temporary injunctions, Virginia courts also can issue shorter term restraining orders "in cases of great emergency." 10A MICHIE'S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, INJUNCTIONS § 2 (Repl. Vol. 2011) [hereinafter MICHIE'S]; *cf.* KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE 252 (5th ed. 2008) ("The temporary injunction is distinguished from a restraining order, in that a restraining order stays the proceeding for a briefer period and often is granted while a temporary injunction is being sought.").

222. FED. R. CIV. P. 65(b); VA. CODE ANN. § 8.01-629 (Repl. Vol. 2015) (granting the chancellor discretion to issue an injunction without notice to the non-movant).

223. *See, e.g.*, W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 7.05 (4th ed. 2005 & Supp. 2012); VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § 8.06[3] (2014–15 ed. Matthew Bender) [hereinafter VIRGINIA CIVIL BENCHBOOK] (referring to "Temporary/preliminary injunction").

224. *See* VA. CODE ANN. §§ 8.01-620 to -634 (Repl. Vol. 2015); *see also* COSTELLO, *supra* note 107, § 13.08 ("[O]ne may hear the federal phrase 'preliminary injunction' in some discourse; today, its reference in Virginia can only be to the statutory temporary injunction.").

225. *See* VA. CODE ANN. §§ 8.01-620 to -634 (Repl. Vol. 2015).

Virginia Code, the statutory requirements largely reaffirm the "traditional equitable remedy of long standing."[226] The most substantive code section states: "No temporary injunction shall be awarded unless the court shall be satisfied of the [movant's] equity."[227] The Virginia chancellor's equitable discretion extends to deciding whether notice to the non-movant is required before proceeding and the duration of the temporary injunction.[228] Similar to federal law,[229] the Virginia Code requires that the movant post an injunction bond "to pay the costs and damages sustained by any party found to have been incorrectly enjoined."[230] A few specific temporary injunction scenarios are addressed by statute,[231] although such situations arguably also could be addressed by traditional equity practice absent statutory authority.[232]

A. *Equitable Discretion*

As in early American equitable courts, chancellors in Virginia have broad discretion to dole out justice.[233] With little statutory guidance, Virginia practitioners seeking preliminary injunctive relief often search for judicial direction to flesh out the law, looking for both analogous cases and any evaluative "tests" that might apply. In Virginia, however, the relevant case law on tem-

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226. BRYSON, *supra* note 223, § 7.05.

227. VA. CODE ANN. § 8.01-628 (Repl. Vol. 2015).

228. *Id.* §§ 8.01-624, -625, -629 (Repl. Vol. 2015).

229. *See* Fed. R. Civ. P. 65(c).

230. VA. CODE ANN. § 8.01-631 (Repl. Vol. 2015).

231. *See, e.g.*, *id.* § 8.01-622 (Repl. Vol. 2015) (addressing an injunction to prevent the sale, removal, or concealment of specific property until final judgment); *id.* § 8.01-622.1 (Repl. Vol. 2015) (addressing an injunction to prevent assisted suicide); *id.* § 8.01-623 (Repl. Vol. 2015) (addressing an injunction against a decree that is subject to a bill of review).

232. Stated differently, even without specific temporary injunction statutes a movant in these situations likely would be able to satisfy the case law criteria for issuance of a temporary injunction. Of note, however,

> [w]hen a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional prerequisites, *i.e.*, irreparable harm and lack of an adequate remedy at law, before the injunction can issue. All that is required is proof that the statute or regulation has been violated.

Va. Beach S.P.C.A., Inc. v. S. Hampton Rds. Veterinary Assoc., 229 Va. 349, 354, 329 S.E.2d 10, 13 (1985).

233. *See* VA. CODE ANN. § 8.01-628 (Repl. Vol. 2015) (requiring only that the court be satisfied with the plaintiff's equity).

porary injunctions is sparse.[234] Because the Supreme Court of Virginia is particularly reluctant to publish decisions, there are areas of Virginia law on which the court is silent; when deciding cases in which there is no applicable Virginia law, Virginia courts in the past have looked to federal law for guidance.[235] Federal courts deciding cases on which Virginia courts have not weighed in also sometimes add to the body of case law available to Virginia practitioners.[236] In fact, on occasion federal courts have pronounced, without the benefit of Virginia case law, that federal law and Virginia law in a given area are similar and have applied federal law to Virginia cases, as was done with respect to preliminary injunctive relief.[237]

A temporary injunction, like a federal preliminary injunction, is considered an extraordinary remedy.[238] While federal courts were developing their multiple-factor tests to evaluate preliminary injunctions, Virginia courts evaluating temporary injunctions generally looked at some combination of "the likelihood of the [movant's] ultimate success on the merits, irreparable injury to the [movant] should it not be granted or to the [non-movant] should it be granted, and the existence of an adequate remedy at common law."[239] The requirement to prove both irreparable injury and inadequacy of a legal remedy is puzzling; as courts and commentators have pointed out, the two elements constitute a distinction without a difference.[240] An injury is irreparable because

234. *See* Davenport & Heslinga, *supra* note 162, at 4 (noting that during the 30 years after the *Blackwelder* decision, "Virginia circuit courts . . . did not get clear guidance from the Supreme Court of Virginia, which did not issue an opinion concerning [temporary] injunctions.").

235. *See, e.g.*, Heritage Contracting, L.L.C. v. Vasquez, 81 Va. Cir. 161, 165–66 (2010) (Fairfax County) (whether filing for bankruptcy severed a joint tenancy); Commonwealth v. Prieto, 75 Va. Cir. 212, 214–18 (2008) (Fairfax County) (whether a presentence interview constitutes a "critical stage" of a criminal proceeding for Sixth Amendment purposes); *see also infra* Part III.C.

236. *See, e.g.*, *In re* Anderson, No. 95-15419-SSM, 1997 Bankr. LEXIS 2480, at 22–25 & n.15 (Bankr. E.D. Va. Sept. 2, 1997) (whether acceptance and recordation of a deed in lieu of foreclosure operates as a satisfaction of the underlying indebtedness); *In re* Meyer, 206 B.R. 410, 415–16 (Bankr. E.D. Va. 1997) (whether certain transactions constitute fraudulent or voluntary conveyances).

237. *See infra* note 252 and accompanying text.

238. *See, e.g.*, MICHIE'S, *supra* note 221, § 2.

239. *See* BRYSON, *supra* note 223, § 7.05 (citing cases).

240. *See, e.g.*, Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 356 n.9 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974) ("The very thing which makes an injury 'irreparable' is the fact that no remedy exists to repair it."); Bradfute W. Daven-

there is no adequate remedy at law, and to require both irreparable injury and an inadequate legal remedy is redundant.[241] A leading remedies commentator suggests that a better way to view the two concepts—and to draw a distinction with at least some difference—is to evaluate *whether the injury is irreparable* when referring to the requirement for interim relief pending final judgment, e.g., when evaluating a temporary injunction, and to evaluate *whether there is an adequate remedy at law* when referring to the choice of remedies at final judgment.[242]

B. *Preserving the Status Quo*

Virginia courts, like most federal courts addressing petitions for preliminary injunctions, both claim that the purpose of a temporary injunction is to preserve the status quo and have a particulary reluctance to issue mandatory temporary injunctions.[243] As discussed previously, such a declaration has some initial appeal.[244] If the movant undertakes to alter the then-existing status quo via a mandatory injunction, the preliminary injunctive relief is especially disfavored; if, on the other hand, the movant seeks to preserve the status quo via a prohibitory injunction, such a situation arguably is more acceptable.[245] Consistent with this rationale, the leading commentator on Virginia remedies points out that a movant must satisfy a higher burden when seeking a mandatory, as opposed to a prohibitory, temporary injunction,[246] although he

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port, *Factors Involved in Granting and Denying Preliminary Injunctions in Virginia State Courts*, 30 THE VA. BAR ASSOC. NEWS J. 8, 9–10 (2004) (discussing cases); *see also* LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 381 (pointing out that "both phrases derive from the same history").

241. According to Professor Laycock:

> It is hornbook law that equity will not act if there is an adequate remedy at law . . . . Another formulation of the rule is that equity will act only to prevent injury that is irreparable—*i.e.*, irreparable at law. Despite occasional attempts to distinguish these statements, they are simply two formulations of the same rule.

LAYCOCK, CASES AND MATERIALS, *supra* note 11, at 380.

242. *Id.* (citing OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 59 (2d ed. 1984)).

243. *See* MICHIE'S, *supra* note 221, § 88; *see also* COSTELLO, *supra* note 107, § 13.08 ("Temporary injunctions are to be issued only in emergency situations, *i.e.*, where the status quo between the parties will change materially unless the injunction issues.").

244. *See supra* Part II.A.

245. *See id.*

246. *See* COSTELLO, *supra* note 107, § 13.08[1] ("If [the movant] requests a mandatory injunction, a 'strong and imperious necessity' for immediate relief must be shown. This

apparently recognizes that the distinction may merely be one of semantics.[247]

As also discussed previously, there is no justification for different burdens incident to the type of preliminary relief sought, as the definition of the status quo can be manipulated and the nonmovant's liberty is enjoined regardless of the type of injunction issued.[248] There also is no basis for a bifurcated preliminary injunctive relief analysis, where the court both analyzes the impact of the relief sought on the status quo and applies some separate preliminary injunction test.[249] Instead of some talismanic incantation proclaiming that the purpose of preliminary relief is to maintain the status quo, a better introductory statement would be that "[t]he purpose of the preliminary injunction is to prevent a situation that will become irremediable due to the time it takes to prepare for [the permanent injunction] trial,"[250] and then rely on a temporary injunction test to analyze whether preliminary injunctive relief serves this purpose. In short, there is no need to refer to the status quo in a proper temporary injunction test.

C. *Virginia Courts Look to Federal Law*

In the absence of specific guidance from the Virginia legislature and the Supreme Court of Virginia, courts within the Commonwealth handed down temporary injunction decisions that lacked consistency.[251] In 1988, when evaluating a federal preliminary in-

necessity is substantially more than the irreparable injury which is the typical subject of the basic petition for injunction. It is also more than an averment that the defendant is about to disturb the status quo between the parties before the court can reach the underlying action which is the usual standard for entry of a prohibitory temporary injunction." (quoting Virginian Ry. Co. v. Echols, 117 Va. 182, 184, 83 S.E. 1082, 1083 (1915))); *see also* BRYSON, *supra* note 223, § 7.05 ("Only in the rare and most compelling case will a judge grant a mandatory [temporary] injunction." (citing *Echols*, 117 Va. at 184–85, 83 S.E. at 1083; Carpenter v. Gold, 88 Va. 551, 14 S.E. 329 (1892))); MICHIE'S, *supra* note 221, § 88 ("The courts are more loathe to grant preliminary mandatory injunctions than prohibitory ones, and the former will only be awarded in cases of strong and imperious necessity.").

247. *See* COSTELLO, *supra* note 107, § 13.08[1] ("Counsel can ask that defendant be required to dam his creek or, more wisely, that defendant be prohibited from further flooding of [the movant's] land.").

248. *See supra* Part II.A.

249. *See supra* notes 58–63 and accompanying text.

250. Denlow, *supra* note 1, at 537.

251. *See* Davenport, *supra* note 240, at 8 ("In Virginia state courts, the law concerning the award of temporary injunctions is muddy. The problem arises from the lack of a clear statutory or judicial pronouncement on the standards to be applied.").

junction related to an underlying claim that the defendant had violated a Virginia statute, the United States Court of Appeals for the Fourth Circuit stated, "there is no great difference between federal and Virginia standards for preliminary injunctions" and "[b]oth draw upon the same equitable principles."[252] Significantly, the Supreme Court of Virginia has never affirmed this approach,[253] although many Virginia courts implicitly have relied on the Fourth Circuit's proclamation[254] and have applied federal preliminary injunction law when analyzing Virginia temporary injunctions.[255] Notably, Virginia trial court judges are provided a reference source that clearly endorses this practice.[256]

As the evolution of preliminary injunction law within the federal circuit courts of appeals progressed, the Fourth Circuit decided *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.* in 1977.[257] In light of the absence of clarity in Virginia temporary injunction law,[258] the lack of Supreme Court of Virginia precedent that Virginia can look to federal law when Virginia law is silent, and the Fourth Circuit's declaration that

252. Capital Tool and Mfg. v. Maschinefabrik Herkules, 837 F.2d 171, 173 (4th Cir. 1988).

253. *See* Davenport, *supra* note 240, at 8 & n.6.

254. *See, e.g.*, Fettig v. Touchstone Dev., 54 Va. Cir. 357, 358 (2001) (Loudoun County); Goldbecker v. Fairfax Cty. Bd. of Supervisors, 37 Va. Cir. 584, 586 n.2 (1994) (Spotsylvania County); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 28 Va. Cir. 220, 221–22 (1992) (Charlottesville City).

255. *See infra* notes 261–62 and accompanying text.

256. *See* VIRGINIA CIVIL BENCHBOOK, *supra* note 223, § 8.06[3][b] (citing *Winter* and outlining the *Winter* preliminary injunction test in the section covering evaluation of temporary injunctions). The *Benchbook* is a reference text, produced by Virginia circuit court judges at the direction of the Virginia Supreme Court, that is provided to Virginia circuit court judges as a resource. *Id.* at iii. Pre-*Winter* editions of the *Benchbook* cited *Blackwelder* and outlined the *Blackwelder* preliminary injunction test. *See, e.g.*, 1-7 VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § VI[C][2] (2008–09 ed. Matthew Bender).

257. 550 F.2d 189 (4th Cir. 1977); *see supra* Part II.B.2.

258. *See, e.g.*, Prof'l Heating and Cooling, Inc. v. Donald G. Smith and Freedom Mech., Inc., 64 Va. Cir. 313, 314 (2004) (Norfolk City) ("I am not aware of any decision of the Supreme Court of Virginia on the issue."); Danville Historic Neighborhood Assn. v. City of Danville, 64 Va. Cir. 83, 83 (2004) (Danville City) (noting that "the state Supreme Court has not yet delineated the standard to be applied in granting or denying a preliminary injunction"); HotJobs.com v. Digital City, Inc., 53 Va. Cir. 36, 39 (2000) (Fairfax County) (pointing out that "the Virginia Supreme Court has not set forth standards for granting or denying a preliminary injunction"); Christian Def. Fund v. Stephen Winchell & Assocs., Inc., 47 Va. Cir. 148, 149 (1998) (Fairfax County) ("The Virginia Supreme Court has not yet decided a case that delineates the standards to be applied in granting or denying a preliminary injunction."); Seniors Coal., Inc. v. Seniors Found., Inc., 39 Va. Cir. 344, 349 (1996) (Fairfax County) (same).

federal and Virginia standards for preliminary relief are similar, numerous Virginia circuit courts adopted the *Blackwelder* test.[259] After *Blackwelder* was decided, Virginia preliminary injunctive relief law unfortunately remained confused.[260] Several Virginia circuit courts subsequently cited to the preliminary injunction test enunciated in *Rum Creek Coal Sales, Inc. v. Caperton*,[261] although *Rum Creek Coal* simply relied on *Blackwelder*,[262] and some courts relied on the prior inconsistent Supreme Court of Virginia cases.[263]

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259. *See, e.g.*, Midgette v. Arlington Props., 83 Va. Cir. 26, 28 (2011) (Chesapeake City); Owens v. City Council, 75 Va. Cir. 91, 101 (2008) (Norfolk City); Long & Foster Real Estate, Inc. v. CLPF—King St. Venture, L.P., 74 Va. Cir. 87, 89 (2007) (Alexandria City); S. Auburn, L.P. v. Old Auburn Mills, L.P., 68 Va. Cir. 145, 145 (2005) (Loudoun County); Int'l Limousine Serv., Inc. v. Reston Limousine & Travel Serv., 68 Va. Cir. 84, 85–86 (2005) (Loudoun County); Hardinge, Inc. v. Buhler, 72 Va. Cir. 39, 39 (2006) (Amherst County); Wilson v. Henry Cty. Zoning Appeals Bd., 68 Va. Cir. 317, 317–18 (2005) (Henry County) (citing Child Evangelism v. Montgomery County, 373 F.3d 589, 593 (4th Cir. 2004) and E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 828 (4th Cir. 2004) (which "follow[ed] *Blackwelder*"); Villalobos v. City of Norfolk, 62 Va. Cir. 158, 158–59 (2003) (Norfolk City); Democratic Party of Va. v. State Bd. of Elections, 1999 Va. Cir. LEXIS 551, at *4 (1999) (Richmond City); Cubic Toll Sys., Inc. v. Va. Dep't of Transp., 37 Va. Cir. 522, 522 (1993) (Fairfax County); *In re* Smith, 1999 Va. Cir. LEXIS 743, at *5–6 (1999) (Loudoun County); Newell Indus. Corp. v. Lineal Techs., 43 Va. Cir. 412, 413 (1997) (Roanoke City); MFS Network Techs., Inc. v. Commonwealth, 33 Va. Cir. 406, 408–09 (1994) (Richmond City); Plate v. Kincannon Place Condo. Unit Owners' Ass'n Bd. of Dirs., 30 Va. Cir. 323, 325 (1993) (Fairfax County).

260. *See* Davenport, *supra* note 240, at 8 ("Virginia circuit courts have therefore . . . been left largely to their own devices and have applied conflicting tests to requests for relief. The result has been an uneven analysis of requests for temporary injunctions, based on circuit courts' use of principles applicable to permanent injunctions in state courts or temporary injunctions in federal courts.").

261. 926 F.2d 353 (4th Cir. 1991), *overruled by* The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), *aff'd*, The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 607 F.3d 355 (4th Cir. 2010) (per curiam); *see, e.g.*, Danville Historic Neighborhood Ass'n v. City of Danville, 64 Va. Cir. 83, 83–84 (2004) (Danville City); SmartMail Servs. v. Ellis, 66 Va. Cir. 507, 509 (2003) (Chesterfield County); AmCor.Com, Inc. v. Stevens, 56 Va. Cir. 245, 250 (2001) (Warren County); Fund for Animals v. State Bd. of Elections, 53 Va. Cir. 405, 407 (2000) (Richmond City); HotJobs.com v. Digital City, Inc., 53 Va. Cir. 36, 39 (2000) (Fairfax County); Riverton Inv. Corp. v. Econ. Dev. Auth., 50 Va. Cir. 404, 411 (1999) (Warren County); Christian Def. Fund v. Winchell & Assocs., Inc., 47 Va. Cir. 148, 149 (1998) (Fairfax County); Seniors Coal., Inc. v. Seniors Found., Inc., 39 Va. Cir. 344, 349 (1996) (Fairfax County).

262. *See Real Truth*, 575 F.3d at 346 ("[I]n *Rum Creek Coal*, we reiterated [the *Blackwelder* standard] that the 'hardship balancing test applies to determine the granting or denial of a preliminary injunction.'") (quoting *Rum Creek Coal Sales, Inc.*, 926 F.2d at 359)).

263. *See, e.g.*, Goldbecker v. Fairfax Cty. Bd. of Sup'rs, 37 Va. Cir. 584, 586 (1994) (Fairfax County) (citing Virginia cases requiring the movant to show "a reasonable likelihood of succeeding on the merits of the case" and that he "will suffer irreparable harm un-

With Virginia circuit courts more and more frequently relying upon federal preliminary injunction law to decide temporary injunction cases, the Supreme Court of Virginia was afforded the opportunity to expressly condone or reject this approach in 2008. In *Levisa Coal Co. v. Consolidation Coal Co.*, a mineral estate owner sought a temporary injunction to prevent a competing mining company from storing the competing company's excess water on other property.[264] By the time the case worked its way to the state supreme court, the issue of a temporary injunction was moot, and the court instead remanded the case for possible issuance of a permanent injunction.[265] The court noted in a footnote that the non-movant in lower court had urged application of the *Blackwelder* test; the court then stated: "In the posture of this appeal it is not necessary to address that issue, and we express no view upon the matter."[266] Instead of opining regarding Virginia courts' reliance on federal law, the Supreme Court of Virginia deliberately declined to express its opinion on the subject. The court did, however, reiterate some "well established principles" regarding temporary injunctions, citing only Virginia case law, for the propositions that "the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case,"[267] and that "unless a party is entitled to an injunction pursuant to a statute, a party must establish the 'traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law' before a request for injunctive relief will be sustained."[268]

Despite receiving no guidance from the Supreme Court of Virginia, Virginia circuit courts continued to apply the Fourth Circuit's *Blackwelder* preliminary injunction analysis to proposed

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less the injunction is granted and that [he has] no adequate remedy at law"); Health and Racquet Club, Inc. v. Fitness Today of Charlottesville, 29 Va. Cir. 61, 70 (1992) (Albemarle County) (citing a Virginia case requiring the movant to "demonstrate that the injury which it would suffer if the injunction were not granted would be grievous and material and would not be adequately reparable in money damages"). As one commentator notes, "While many Virginia circuit courts purport to adhere to the *Blackwelder* test, some courts nevertheless apply their own unique standards in determining whether to grant relief." Davenport, *supra* note 240, at 9.

264. 276 Va. 44, 662 S.E.2d. 44 (2008).

265. *Id.* at 60, 63, 662 S.E.2d at 53–54.

266. *Id.* at 60 n.6, 662 S.E.2d at 53, n.6.

267. *Id.* at 60, 662 S.E.2d at 53.

268. *Id.* at 61, 662 S.E.2d at 53 (quoting Va. Beach S.P.C.A., Inc. v. S. Hampton Rds. Veterinary Assoc., 229 Va. 349, 354, 329 S.E.2d. 10, 13 (1985)).

temporary injunctions.[269] Since the Fourth Circuit decided *Real Truth About Obama, Inc. v. Federal Election Commission*, which interpreted the U.S. Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.* and rejected the *Blackwelder* sliding-scale approach,[270] most Virginia courts have evaluated temporary injunctions using the *Real Truth* sequential analysis.[271] Consistent with this, Virginia judges presented with petitions for temporary injunctions currently are referred to the *Winter* four-factor test and instructed to apply the test sequentially, as the Fourth Circuit did in *Real Truth*.[272]

IV. A RECOMMENDED APPROACH TOWARD VIRGINIA TEMPORARY INJUNCTION LAW

Although Virginia courts often have relied on Fourth Circuit preliminary injunction law, litigants and judges understandably are unsure whether this is a sound practice in light of the Supreme Court of Virginia's decision not to endorse or prohibit the practice.[273] If the Supreme Court of Virginia ultimately rejects re-

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269. *See supra* note 259 and accompanying text.

270. 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), *aff'd*, The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 607 F.3d 355 (4th Cir. 2010) (*per curiam*).

271. *See, e.g.*, Wings, LLC v. Capitol Leather, LLC, 88 Va. Cir. 83, 89 (2014) (Fairfax County); McEachin v. Bolling, 84 Va. Cir. 76, 77 (2011) (Richmond City); Strong Found. Youth Initiative LLC v. Ashford, 2009 Va. Cir. LEXIS 140, at *1 (2009) (Richmond City). Of note, several Virginia treatises still improperly cite to *Blackwelder* and to cases that relied on *Blackwelder*. *See, e.g.*, MICHIE'S, *supra* note 221, § 88; COSTELLO, *supra* note 107, § 13.08[1]; *but see id.* n.107 (noting, in a recently added footnote, that the author's discussion of *Blackwelder* "should be considered in light of . . . *Winter*").

272. VIRGINIA CIVIL BENCHBOOK, *supra* note 223, § 8.06[3][b] (citing Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008)). According to the Benchbook:

> The four factors should be applied using the following principles:
>
> [A] Each of the four requirements must be satisfied as articulated;
>
> [B] All four factors must be clearly shown;
>
> [C] The balance-of-hardship (as in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977) is no longer to be applied);
>
> [D] There is no adjustment to the requirements by balancing them under a relaxed standard;
>
> [E] Emphasis is placed on the public interest requirement by directing that particular regard for public consequences should be paid.

Id. § 8.06[3][b][iii].

273. As one Virginia commentator remarked: "I have the sense that more than one such state-court judge has fumed over the apparent refusal of the Supreme Court to issue an opinion that lets trial judges know how they're supposed to decide such requests." L. Steven Emmert, *Virginia's Standard for Granting Preliminary Injunctions (Why Isn't*

liance on federal law, Virginia temporary injunction law still will be unsettled based on existing state law. Courts invariably would embark on a quixotic quest through a quagmire of equitable principles and analyses involving some combination of a movant's likelihood of success on the merits, irreparability of injury without preliminary relief, and—despite the redundancy—adequacy of a legal remedy. If, on the other hand, the Supreme Court of Virginia endorses the practice of adopting federal preliminary injunction law, it is not clear on what federal law Virginia courts should rely with respect to both the role of preserving the status quo and interpretation of the four-part test enunciated in *Winter*. Courts might apply a separate test to evaluate preservation of the status quo, might or might not apply a heightened standard for mandatory injunctions, and could choose to apply the traditional four factors either sequentially or using some variant of a sliding-scale test. Although one could argue that the absence of a clear test for issuance of a Virginia temporary injunction preserves the court's traditional broad equitable powers, such judicial discretion does little to guide litigants and the courts. As one Virginia appellate attorney commented, although there may be "benefits of flexibility in some instances, . . . a set of established rules would be significantly better for bench and bar than is the current state of uncertainty."[274]

With these considerations in mind, progress toward a proposed test for Virginia temporary injunctions is possible. Presenting an opportunity for the Supreme Court of Virginia to implement such a test is a bit more problematic, however. The dearth of Virginia appellate temporary injunction law is partly explained by Virginia procedure, which primarily produces unpublished decisions in this area of the law because temporary injunction appeals—if not mooted due to time sensitivity—are not heard by the entire court.[275] Virginia appellate attorney Steve Emmert nevertheless

There One?) (Aug. 13, 2013), virginia-appeals.com/virginias-standard-for-temporary-injunctions/#ve3yk7xviko (last visited Oct. 1, 2015) [hereinafter Emmert, *Virginia's Standard*].

274. *See id.*

275. *See* L. Steven Emmert, *The Other Shoe Drops—Fourth Circuit Jettisons* Blackwelder (Aug. 6, 2009), virginia-appeals.com/fourth-circuit-jettisons-blackwelder#ve3x2rxviko (last visited Oct. 1, 2015) ("[T]he reason there's not much temporary-injunction caselaw on the Virginia books is procedural, not philosophical; such injunctions are always evaluated by a panel of three justices, not by the entire court. Hence those orders are virtually always unpublished.").

lays out some possible pathways for promulgation of a test for Virginia temporary injunctions: (1) the Supreme Court of Virginia could elect to consider a petition for review of a temporary injunction as a full court and opt to publish the decision; (2) the court could promulgate a rule for inclusion in the Rules of Supreme Court of Virginia that expressly articulates the standard; or (3) although not preferred, the legislature could enact a statute that pronounces the standard.[276] Given the current uncertainties, the Supreme Court of Virginia—via case law or rule—should consider adopting a test for Virginia temporary injunctions.

A. *Federal Preliminary Injunction Law Should Serve as a Starting Point for a Virginia Temporary Injunction Law Test*

In establishing a test for issuance of Virginia temporary injunctions, the Supreme Court of Virginia should look to federal preliminary injunction jurisprudence as a starting point, as the applicable federal case law is fully developed, the analysis is well reasoned, and the goals and procedures of preliminary injunctions are analogous to those of temporary injunctions. The long-established four factors by which federal preliminary injunctions are evaluated make a great deal of sense, despite being inconsistently applied by the federal circuit courts of appeals, and those factors, therefore, should form the basis for a Virginia temporary injunction test. Additionally, application of a four-factor test would not diminish the equitable reach of the court or the traditional discretion afforded chancellors; rather, such a test would simply provide a framework upon which equitable principles could be applied in a consistent, logical, and arguably predictable manner.[277]

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276. Emmert, *Virginia's Standard*, *supra* note 273. According to Emmert, legislative action is not the preferred route for establishing a temporary injunction test because, at least in his experience, "when the legislature micromanages the courts' decision-making process (as contrasted with matters of civil procedure, for example), you often get unintended consequences." *Id.*

277. *Compare supra* note 239 and accompanying text (the traditional equitable criteria test applied by Virginia courts) *with supra* note 132 and accompanying text (the *Winter* four-factor test); *see also* Vaughn, *supra* note 89, at 870 ("The optimal standard is based on a theory of bounded discretion . . . . [T]his standard allows the judge flexibility and discretion within the confines of a uniform standard, the terms of which have been openly defined to cover only the legitimate concerns of decisionmaking.").

Such a four-factor preliminary injunctive test should be applied as a sequential test—as the Fourth Circuit Court of Appeals did in *Real Truth*—because that is arguably the most faithful reading of *Winter*, and it is consistent with the accepted principle that preliminary injunctive relief is an extraordinary remedy.[278] Such a sequential test requires evaluation of each of the four factors separately, thereby making reference to the Leubsdorf/Posner formulation unnecessary.[279] Aligning the Virginia temporary injunction and the Fourth Circuit preliminary injunction analyses also would result in consistent state and federal preliminary injunctive relief standards in Virginia.[280] The Virginia test, through its wording, should reflect *Winter*'s admonition that a movant must make "a clear showing" that extraordinary relief is warranted.[281] Within the four-factor test, "is likely" therefore should be interpreted consistent with its plain meaning, i.e., greater than 50%. With respect to Virginia courts' evaluation of both irreparable injury and inadequacy of a legal remedy, the irreparable injury prong of the four-part test subsumes an inadequate-remedy-at-law analysis, making separate irreparability and inadequacy inquiries unnecessary.[282]

B. *A Recommended Test for Virginia Temporary Injunctions*

In light of the above, formulation of a recommended test for issuance of Virginia temporary injunctions is possible. Contrary to current guidance, a Virginia court's analysis of preliminary injunctive relief should be independent of whether the movant is seeking a mandatory or prohibitory injunction; there should be no separate burden of proof. In fact, an evaluation of the status quo need not be conducted at all because there is no need for a separate "status quo" test. If Virginia courts want to continue to articulate a "purpose" for temporary injunctions, such a purpose

278. *See supra* Part II.B.3.c.

279. Although recognizing that Virginia courts rely on federal preliminary injunction law when evaluating Virginia temporary injunctions, Professor Costello in his book on Virginia remedies continues to discuss the Leubsdorf-Posner formula, which arguably is inapplicable to a sequential test such as that adopted by the Fourth Circuit in *The Real Truth About Obama, Inc. v. Federal Election Commission*. *See* COSTELLO, *supra* note 107, § 13.08[1].

280. *See supra* note 220 and accompanying text.

281. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

282. *See supra* notes 239–42 and accompanying text.

should be re-fashioned to indicate that a temporary injunction is designed—via evaluation using the four-factor test—to minimize the irreparable harm to the parties until completion of a trial on the merits.

Under the recommended Virginia temporary injunction test, the movant must establish that: (1) he has more than a 50% likelihood of succeeding at the trial on the merits, i.e., receiving a permanent injunction; (2) he has more than a 50% probability of suffering irreparable harm prior to the trial on the merits if the temporary injunction is not granted; (3) the harm to the movant prior to the trial on the merits if the temporary injunction is not granted is greater than the harm to the non-movant prior to the trial on the merits if the temporary injunction is granted; and (4) the public interest does not outweigh the possible irreparable harm to the movant prior to the trial on the merits if the temporary injunction is not granted.

CONCLUSION

Equity has played an important role in American jurisprudence, and it continues to serve as an effective weapon in the litigator's arsenal. The chancellor's discretion to fashion remedies unique to the circumstances, based on what he or she perceives to be fair and just, often is needed to address complex situations in which there is no adequate remedy at law. Although equitable discretion is important, its flexibility must be balanced with some degree of predictability and consistency. Virginia litigants seeking preliminary injunctive relief—what the courts have deemed to be an extraordinary remedy—have a particularly strong argument for such predictability in the interests of efficiency, uniformity, and the liberty interests at stake.

A four-part test is used to decide whether to issue federal preliminary injunctions. Although judicial application of the four factors has been inconsistent despite some guidance from the Supreme Court of the United States, the various approaches taken by federal circuit courts of appeals highlight options for jurisdictions—like Virginia—that have yet to formulate a test for evaluating preliminary injunctive relief.[283] Although some Virginia

283. *See supra* notes 110–11 and accompanying text.

courts have used the preliminary injunction test adopted by the United States Court of Appeals for the Fourth Circuit when evaluating petitions for Virginia temporary injunctions, the Supreme Court of Virginia has not endorsed this approach.[284]

Faced with uncertainty regarding whether the application of federal preliminary injunction law is proper and the lack of a consistent Virginia approach to evaluating temporary injunctions, Virginia litigants are ill-equipped to serve their clients properly. Clear guidance for issuance of Virginia temporary injunctions is needed. When presented with the proper opportunity, the Supreme Court of Virginia should consider articulating how Virginia trial courts should evaluate petitions for temporary injunctions. The temporary injunction test proposed in this article (the "Proposed Test") is modeled after the preliminary injunction test adopted by the Fourth Circuit. The Proposed Test is consistent with the purpose of temporary injunctions, is independent of any effect on the status quo between the parties, and is faithful to guidance provided by the Supreme Court of the United States regarding analysis of preliminary injunctive relief. The Proposed Test therefore is a solid candidate for consideration by the Supreme Court of Virginia and, if adopted, will guide both litigants and Virginia courts when evaluating Virginia temporary injunctions.

284. *See supra* note 273 and accompanying text.

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