DOING THE PUBLIC A DISSERVICE: BEHAVIORAL ECONOMICS AND MAINTAINING THE STATUS QUO

ALISON M. NEWMAN†

ABSTRACT

When deciding whether to grant a preliminary injunction or a stay pending appeal, courts consider, among other factors, whether granting the preliminary injunction or stay would disserve the public interest. In the context of individual-rights cases, courts often experience pressure to remedy the alleged constitutional harms immediately. However, behavioral-economic concepts demonstrate that such quick action can negatively affect society as a whole. Specifically, granting a right and then taking it away, as happens when a lower court grants a right and is reversed on appeal, results in a net loss to society. Using the recent same-sex marriage litigation, this analysis demonstrates that to avoid disserving the public interest, courts should consider the behavioral-economic effects of loss aversion and the endowment effect within the public-interest factor of the tests for preliminary relief and should attempt to maintain the status quo until the decisions are final.

INTRODUCTION

In headline-grabbing individual-rights cases, there is always a sense of urgency—there is an alleged unjust constitutional violation and it needs to be rectified immediately. Even before a judgment is final or the litigants have exhausted their appeals, one's first reaction is to right the wrong immediately. However, the tests for both a preliminary injunction and a stay pending appeal require consideration of the public interest. Often this factor is overlooked or summarily discussed.

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However, behavioral-economic concepts of loss aversion and the endowment effect show that the uncertainty that can follow from quick action can be worse for society as a whole. In deciding whether to grant a preliminary injunction or stay a permanent injunction pending appeal, courts should consider this uncertainty's possible effects within the existing analytical framework and seek to maintain the status quo until a final decision is rendered. This concept can be illustrated by examining one of the major individual-rights issues in recent memory: same-sex marriage.

With few exceptions,[1] state and federal trial-court decisions since *United States v. Windsor*[2] have struck down state provisions outlawing same-sex marriage as unconstitutional.[3] However, courts have

1. *See, e.g.*, Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 925 (E.D. La. 2014) ("It would no doubt be celebrated to be in the company of the near-unanimity of the many other federal courts that have spoken to this pressing issue, if this Court were confident in the belief that those cases provide a correct guide.").

2. United States v. Windsor, 133 S. Ct. 2675 (2013).

3. Rosenbrahn v. Daugaard, No. 4:14-cv-4081, 2015 WL 144567, at *11 (D.S.D. Jan. 12, 2015); Campaign for S. Equality v. Bryant, No. 3:14-cv-818, 2014 WL 6680570, at *40–41 (S.D. Miss. Nov. 25, 2014); Rolando v. Fox, 23 F. Supp. 3d 1227, 1236 (D. Mont. 2014); Condon v. Haley, 21 F. Supp. 3d 572, 589 (D.S.C. 2014); Lawson v. Kelly, No. 14-622-cv, 2014 WL 5810215, at *10 (W.D. Mo. Nov. 7, 2014); McGee v. Cole, Civ. A. No. 3:13-24068, 2014 WL 5802665, at *10 (S.D.W. Va. Nov. 7, 2014); Marie v. Moser, No. 14-cv-2518, 2014 W 5598128, at *22 (D. Kan. Nov. 4, 2014); Guzzo v. Mead, No. 14-cv-200, 2014 WL 5317797, at *9 (D. Wyo. Oct. 17, 2014); Majors v. Horne, 14 F. Supp. 3d 1313, 1315–16 (D. Ariz. 2014); Hamby v. Parnell, No. 3:14-cv-89, 2014 WL 5089399, at *12 (D. Alaska Oct. 12, 2014); Gen. Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790, 792 (W.D.N.C. 2014), *appeal filed,* No. 14-2225 (4th Cir. Nov. 10, 2014); Love v. Beshear, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. Nov. 6, 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015); Baskin v. Bogan, 12 F. Supp. 3d 1144, 1164–65 (S.D. Ind. 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom.* Bogan v. Baskin, 135 S. Ct. 316 (2014); Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom.* Walker v. Wolf, 135 S. Ct. 316 (2014); Whitewood v. Wolf, 992 F. Supp. 2d 410, 431–32 (M.D. Pa. 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1147 (D. Or. 2014); Latta v. Otter, 19 F. Supp. 3d 1054, 1087 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014), *reh'g denied*, Nos. 14-35420, 14-35421, 12-17668, 2015 WL 12817, at *1 (9th Cir. Jan. 9, 2015); DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015); Tanco v. Haslam, 7 F. Supp. 759, 772 (M.D. Tenn. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015); De Leon v. Perry, 975 F. Supp. 2d 632, 665–66 (W.D. Tex. 2014); Lee v. Orr, No. 13-cv-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.* Rainey v. Bostic, 135 S. Ct. 286 (2014); Brenner v. Scott, 999 F. Supp. 2d 1278, 1292–93 (N.D. Fla. 2014); Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); Wright v. Arkansas, No. 60CV-13-2662, 2013 WL 1908815, at *13

fractured on their treatment of whether to stay their decisions pending appeal. After the Supreme Court issued a stay pending appeal in *Herbert v. Kitchen*,[4] Utah's same-sex-marriage case, most district courts followed suit.[5] Since the Court's denial of certiorari in the same-sex-marriage cases, however, that trend has reversed.[6] And some appellate courts have stepped in when trial courts have failed to stay their decisions, recognizing a constitutional right to same-sex marriage.[7]

Courts have generally cited *Kitchen* when issuing stays in same-sex marriage cases,[8] with some even lamenting that *Kitchen* has forced their hands.[9] However, behavioral-economic concepts reinforce the Supreme Court's short order: according to the theories of loss aversion and the endowment effect,[10] repeatedly disrupting the status quo by granting and withdrawing rights harms society regardless of

(Ark. Cir. Ct. May 9, 2014); Brinkman v. Long, No. 13-cv-32572 (Colo. Dist. Ct. July 9, 2014); Garden State Equality v. Dow, 82 A.3d 336, 368–69 (N.J. Sup. Ct. Law. Div. 2013); Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013).

4. Herbert v. Kitchen, 134 S. Ct. 893, 893 (2014).

5. *See infra* notes 18–48.

6. *See* Josh Blackman, *Is* Herbert v. Kitchen *Still Good Law?*, JOSH BLACKMAN'S BLOG (Oct. 16, 2014), http://joshblackman.com/blog/2014/10/16/is-herbert-v-kitchen-still-good-law ("By denying certiorari on the petition for certiorari from the 10th Circuit, the stay originally granted in Herbert v. Kitchen has been lifted."). Because the Court has since denied stays pending appeal in same-sex-marriage cases, it would appear that *Kitchen* is no longer binding. *See, e.g.*, Order in Pending Case, Parnell v. Hamby, 135 S. Ct. 299, 399 (2014) (denying stay); Order in Pending Case, Otter v. Latta, 135 S. Ct. 345 (2014) (denying stay).

7. Order, Baskin v. Bogan, No. 14-2386 (7th Cir. June 27, 2014); Order, DeBoer v. Snyder, No. 14-1341 (6th Cir. Mar. 25, 2014); Order, DeBoer v. Snyder, No. 14-1341 (6th Cir. Mar. 22, 2014).

8. *See Bostic*, 970 F. Supp. 2d at 484 ("In accordance with the Supreme Court's issuance of a stay in *Kitchen v. Herbert*, and consistent with the reasoning provided in *Bishop*[*v. Rainey*], this Court s[t]ays execution of this injunction pending the final disposition of any appeal to the Fourth Circuit Court of Appeals."); *Bishop*, 962 F. Supp. 2d at 1296 ("In accordance with the U.S. Supreme Court's issuance of a stay in . . . [*Herbert v. Kitchen*], the Court stays execution of this injunction pending the final disposition of any appeal to the Tenth Circuit Court of Appeals."). In light of the denial of cert in the case, scholars have already begun questioning whether *Herbert* remains good law. *See supra* note 6.

9. *See* Order at 3–4, DeBoer v. Snyder, No. 14-1341 (6th Cir. Mar. 25, 2014) (White, J., dissenting) (noting that the Supreme Court's short order in *Herbert v. Kitchen* "provides little guidance" and that the Court's four-factor test for an injunction did not warrant a stay); Order at 3, Latta v. Otter, No. 14-35420 (9th Cir. May 20, 2014) (Hurwitz, J., concurring) ("I concur in the order granting the stay pending appeal . . . solely because I believe that the Supreme Court, in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), has virtually instructed courts of appeals to grant stays in the circumstances before us today. If we were writing on a cleaner slate, I would conclude that application of the familiar factors in *Nken v. Holder*, 556 U.S. 418, 434 (2009), counsels against the stay requested by the Idaho appellants.").

10. *See infra* Part III.B–C.

which outcome a given person or society as a whole prefers. This logic has applications beyond the same-sex-marriage realm.[11] For instance, challengers of state abortion restrictions usually ask for preliminary injunctions to prevent the laws from going into effect.[12] While these cases are litigated, such restrictions should be prevented from taking effect in order to maintain the prelitigation status quo until there is a final decision. To do otherwise ignores the practicalities of the situation. Behavioral-economic concepts, which some legal scholars argue should be taken into consideration,[13] indicate that granting and then withdrawing a right elicits a different effect on utility than never having granted the right at all. These effects should be considered within the established test for preliminary injunctions. That framework need not be modified in this context, as societal utility losses can be measured under the public-interest prong.[14]

Part I provides background on the current state of same-sex-marriage litigation in the United States. Part II reviews the law on preliminary injunctions and stays pending appeal. Part III explains loss aversion and the endowment effect. Part IV applies that analysis to the same-sex-marriage cases currently working their way through courts across the country, showing that the repeated granting and withdrawal of a right works to the detriment of society as a whole regardless of one's opinions on the merits. Part V discusses further applications of the concept, specifically in the context of abortion restrictions.

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11. *See infra* Part V.

12. *See, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632, 639 (W.D. Tex. 2014) (considering the plaintiff's motion for a preliminary injunction). For purposes of this analysis, a preliminary injunction preventing a law from going into effect is functionally identical to a stay of a ruling pending appeal. Both serve to delay legal change, regardless of whether the source is legislative or judicial.

13. *See, e.g.*, Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1771–72 (1998) (explaining that the endowment effect and loss aversion undermine the central tenets of traditional law and economics); Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 833 (2012) (arguing that due to loss aversion the law should favor withholding over withdrawing a right). *See generally* Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225 (1991) (discussing the endowment effect's potential applications to legal policy).

14. *Cf. generally* James Powers, Note, *A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard*, 92 TEX. L. REV. 1027 (2014) (arguing that courts should not consider status quo bias outside the current test for preliminary injunctions).

I. SAME-SEX MARRIAGE IN THE UNITED STATES

Same-sex marriage has grown astonishingly quickly. In 2003, Massachusetts became the first state to allow same-sex marriage,[15] and in the twelve years since, same-sex marriage has been approved in an unprecedented forty-five other states and the District of Columbia.[16]

Forty-six states and the District of Columbia have approved same-sex marriage in trial courts, although many of the court decisions are currently being appealed: thirty-four states did so by court decision (Alabama,[17] Alaska,[18] Arizona,[19] Arkansas,[20] California,[21] Colorado,[22] Connecticut,[23] Florida,[24] Idaho,[25] Indiana,[26]

15. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970–71 (Mass. 2003).

16. *See infra* notes 23–63.

17. Searcy v. Strange, No. 14-208-CG-N, 2015 WL 328728, at *5 (S.D. Ala. Jan. 23, 2015) (striking down a state statute and state constitutional amendment on due-process and equal-protection grounds).

18. *See* Hamby v. Parnell, No. 3:14-cv-89, 2014 WL 5089399, at *12 (D. Alaska Oct. 12, 2014) (striking down state statutes and a state constitutional amendment on due-process and equal-protection grounds).

19. *See* Majors v. Horne, 14 F. Supp. 3d 1313, 1315–16 (D. Ariz. 2014) (striking down state statutes and a state constitutional amendment on equal-protection grounds).

20. *See* Wright v. Arkansas, No. 60CV-13-2662, 2014 WL 1908815, at *13 (Ark. Cir. Ct. May 9, 2013) (striking down a state statute and state constitutional amendment on right-to-privacy and equal-protection grounds). This decision was stayed by the state supreme court pending appeal. Formal Order, Smith v. Wright, No. CV-14-427 (Ark. May 16, 2014).

21. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010) (striking down a state constitutional amendment on federal due-process and equal-protection grounds), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 130 S. Ct. 2652 (2013).

22. *See* Brinkman v. Long, No. 13-cv-32572, at *48 (Colo. Dist. Ct. July 9, 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds). The trial court stayed its decision pending appeal. *Id.*

23. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 476–81 (Conn. 2008) (permitting same-sex marriage on state constitutional equal-protection grounds).

24. *See* Brenner v. Scott, 999 F. Supp. 2d 1278, 1292–93 (N.D. Fla. 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds).

25. *See* Latta v. Otter, 19 F. Supp. 3d 1054, 1087 (D. Idaho 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds), *aff'd*, 771 F.3d 456 (9th Cir. 2014), *reh'g denied*, Nos. 14-35420, 14-35421, 12-17668, 2015 WL 12817, at *1 (9th Cir. Jan. 9, 2015).

26. *See* Baskin v. Bogan, 12 F. Supp. 3d 1144, 1164–65 (S.D. Ind. 2014) (striking down a state statute on federal equal-protection and due-process grounds), *aff'd*, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom.* Bogan v. Baskin, 135 S. Ct. 316 (2014). The Seventh Circuit stayed the district court's decision pending appeal. Order, Baskin v. Bogan, No. 14-2386 (7th Cir. June

Iowa,[27] Kansas,[28] Kentucky,[29] Massachusetts,[30] Michigan,[31] Mississippi,[32] Missouri,[33] Montana,[34] Nevada,[35] New Jersey,[36] New Mexico,[37] North Carolina,[38] Ohio,[39] Oklahoma,[40] Oregon,[41] Pennsylvania,[42] South

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27, 2014). Because the Supreme Court denied certiorari in the case, the district court's ruling went into effect. *See Bogan*, 135 S. Ct. at 316 (denying certiorari).

27. *See* Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (permitting same-sex marriage on state equal-protection grounds).

28. Marie v. Moser, No. 14-cv-2518, 2014 WL 5598128, at *22 (D. Kan. Nov. 4, 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds).

29. *See* Bourke v. Beshear, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. Nov. 6, 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015). The district court stayed its decision pending the state's appeal. Love v. Beshear, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014).

30. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–71 (Mass. 2003) (permitting same-sex marriage on state equal-protection grounds).

31. *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (striking down a state constitutional amendment on federal equal-protection and due-process grounds), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015). The Sixth Circuit stayed the district court's decision pending appeal. Order, DeBoer v. Snyder, No. 14-1341 (6th Cir. Mar. 22, 2014).

32. Campaign for S. Equality v. Bryant, No. 3:14-cv-818, 2014 WL 6680570, at *40–41 (S.D. Miss. Nov. 25, 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds). The district court's decision was stayed by the Fifth Circuit pending appeal. Campaign for S. Equality v. Bryant, 773 F.3d 55, 58 (5th Cir. 2014).

33. Lawson v. Kelly, No. 14-622-cv, 2014 WL 5810215, at *10 (W.D. Mo. Nov. 7, 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds).

34. Rolando v. Fox, 23 F. Supp. 3d 1227, 1236 (D. Mont. 2014) (striking down a state statute and state constitutional amendment on federal equal-protection grounds).

35. Latta v. Otter, 771 F.3d 456, 476–77 (9th Cir. 2014) (striking down state statutes and constitutional amendments on federal equal-protection grounds), *rev'g* Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012).

36. *See* Garden State Equal. v. Dow, 82 A.3d 336, 368–69 (N.J. Super. Ct. Law Div. Feb. 21, 2013) (permitting same-sex marriage on federal equal-protection grounds).

37. *See* Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013) (permitting same-sex marriage on state equal-protection grounds).

38. *See* Gen. Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790, 792 (W.D.N.C. 2014) (striking down state statutes on due-process and equal-protection grounds), *appeal filed*, No. 14-2225 (4th Cir. Nov. 20, 2014).

39. Henry v. Himes, 14 F. Supp. 3d 1036, 1061 (S.D. Ohio 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015).

40. *See* Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1297 (N.D. Okla. 2014) (striking down a state constitutional amendment on federal equal-protection and due-process grounds), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*,

Carolina,[43] South Dakota,[44] Tennessee,[45] Texas,[46] Utah,[47] Virginia,[48] West Virginia,[49] Wisconsin,[50] and Wyoming[51]); eight states and the District of Columbia[52] did so by legislation (Delaware,[53] Hawaii,[54]

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135 S. Ct. 271 (2014). The Tenth Circuit stayed its decision pending the state's petition for certiorari to the Supreme Court. *Bishop v. Smith*, 760 F. Supp. 2d at 1096. Because the Supreme Court denied certiorari in the case, the ruling went into effect. *Smith*, 135 S. Ct. 271, 271 (2014).

41. *See* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1147 (D. Or. 2014) (striking down a state statute and state constitutional amendment on federal equal-protection and due-process grounds).

42. *See* Whitewood v. Wolf, 992 F. Supp. 2d 410, 431–32 (M.D. Pa. 2014) (striking down a state statute on federal equal-protection and due-process grounds).

43. Condon v. Haley, 21 F. Supp. 3d 572, 589 (D.S.C. 2014) (striking down a state statute and constitutional amendment on federal equal-protection and due-process grounds).

44. Rosenbrahn v. Daugaard, No. 4:14-cv-4081, 2015 WL 144567, at *11 (D.S.D. Jan. 12, 2015) (striking down a state statute and constitutional amendment on federal equal-protection and due-process grounds).

45. *See* Tanco v. Haslam, 7 F. Supp. 3d 759, 771–72 (M.D. Tenn. 2014) (granting a preliminary injunction preventing the enforcement of a state constitutional amendment and state statute against the plaintiffs on federal equal-protection and due-process grounds), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-571, 2015 WL 213650 (U.S. Jan. 16, 2015). The district court's ruling applies only to the six plaintiffs in the case. *Id.* at 772.

46. *See* De Leon v. Perry, 975 F. Supp. 2d 632, 665–66 (W.D. Tex. 2014) (striking down a state constitutional amendment on federal equal-protection and due-process grounds). The district court stayed its decision pending the state's appeal to the Fifth Circuit. *Id.* at 665.

47. *See* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013) (permitting same-sex marriage on federal equal-protection grounds), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014). The Supreme Court stayed the district court's decision pending the state's appeal to the Tenth Circuit. Order in Pending Case, Herbert v. Kitchen, 134 S. Ct. 893, 893 (2014). Because the Supreme Court denied certiorari in the case, the ruling will go into effect. *Kitchen*, 135 S. Ct. at 265.

48. *See* Bostic v. Rainey, 970 F. Supp. 2d 456, 483–84 (E.D. Va. 2014) (striking down a state constitutional amendment on federal equal-protection and due-process grounds), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.* Rainey v. Bostic, 135 S. Ct. 286 (2014). The district court stayed its decision pending the state's appeal to the Fourth Circuit. *Id.* at 484. The Supreme Court then stayed the Fourth Circuit's decision pending the state's petition for certiorari. McQuigg v. Bostic, 135 S. Ct. 32, 32 (2014). Because the Supreme Court denied certiorari in the case, the ruling will go into effect. *Rainey*, 135 S. Ct. at 286.

49. McGee v. Cole, Civ. A. No. 3:13-24068, 2014 WL 5802665, at *10 (S.D.W. Va. Nov. 7, 2014) (striking down a state statute on federal equal-protection and due-process grounds).

50. *See* Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014) (striking down a state constitutional amendment on federal equal-protection and due-process grounds), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom*. Walker v. Wolf, 135 S. Ct. 316 (2014). The district court stayed its decision pending the state's appeal to the Seventh Circuit. Wolf v. Walker, No. 14-cv-64, 2014 WL 2693963, at *7 (W.D. Wis. June 13, 2014). Because the Supreme Court denied certiorari in the case, the ruling will go into effect. *Walker*, 135 S. Ct. at 316.

51. Guzzo v. Mead, No. 14-cv-200, 2014 WL 5317797, at *9 (D. Wyo. Oct. 17, 2014) (striking down a state statute based on federal equal-protection grounds).

52. D.C. CODE § 46-401 (Supp. 2014).

Illinois,[55] Minnesota,[56] New Hampshire,[57] New York,[58] Rhode Island,[59] and Vermont[60]); and three did so by popular vote (Maine,[61] Maryland,[62] and Washington[63]). More than half of the American population now lives in a state in which same-sex marriage is legal.[64]

II. THE LAW ON PRELIMINARY INJUNCTIONS AND STAYS PENDING APPEAL

To receive a preliminary injunction, the plaintiff must satisfy four factors: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[65] Lower courts disagree on whether these factors

53. DEL. CODE ANN. tit. 13, § 129 (West Supp. 2012).

54. HAW. REV. STAT. § 572-1 (West 2014).

55. 750 ILL. COMP. STAT. ANN. 80/10 (West Supp. 2014).

56. MINN. STAT. ANN. § 517.01 (West Supp. 2014).

57. N.H. REV. STAT. ANN. § 457:1-a (LexisNexis Supp. 2013).

58. N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2014).

59. R.I. GEN. LAWS § 15-1-1 (2013).

60. VT. STAT. ANN. tit. 15, § 8 (2010).

61. *See* BUREAU OF CORPS., ELECTIONS, & COMM'NS, NOVEMBER 6, 2012, REFERENDUM ELECTION TABULATIONS: COUNTY AND STATEWIDE TOTALS (2012), *available at* http://www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html (approving same-sex marriage with 52.7 percent of the vote).

62. *See* STATE BD. OF ELECTIONS, 2012 PRESIDENTIAL GENERAL ELECTION RESULTS (2012), *available at* http://www.elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html (approving same-sex marriage with 52.4 percent of the vote).

63. *See* WASH. SEC'Y OF STATE, NOVEMBER 06, 2012 GENERAL ELECTION RESULTS (2012), *available at* http://vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples.html (approving same-sex marriage with 53.7 percent of the vote).

64. Nate Silver & Allison McCann, *Same-Sex Marriage Is Now Legal for a Majority of the U.S.*, FIVETHIRTYEIGHT (Oct. 6, 2014, 12:27 PM), http://fivethirtyeight.com/datalab/same-sex-marriage-is-now-legal-for-a-majority-of-the-u-s. Because some federal appellate decisions striking down bans on same-sex marriage apply to other states' prohibitions, this number is expected to rise. For example, the Tenth Circuit's reasoning in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), applies to similar laws in Wyoming and Colorado, which as of the denial of certiorari had not allowed same-sex marriage. *See* Guzzo v. Mead, No. 14-cv-200, 2014 WL 5317797, at *9 (D. Wyo. Oct. 17, 2014) (granting a preliminary injunction under *Herbert* and *Bishop*). With those additional states taken into account, this number should increase to approximately 60 percent. Silver & McCann, *supra*.

65. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Although the tests for granting a preliminary injunction and staying an injunction are similar, "the differences in posture mean that the two tests are not identical." 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND

should be considered on a sliding scale, in which some factors can be weaker provided that others are sufficiently strong, or considered strictly, requiring that each of the four factors be found by a preponderance of the evidence.[66] Currently, only the Fourth Circuit uses the strict reading.[67]

The circuit split over the reading of the test for a preliminary injunction stems from the Supreme Court's decision in *Winter v. Natural Resources Defense Council*,[68] in which the Court considered whether to grant an injunction prohibiting the Navy from performing training exercises until after an environmental study had been completed.[69] The Court stated that "[a] plaintiff seeking a preliminary injunction *must* establish" the four factors.[70] The Fourth Circuit has interpreted this mandatory language to mean that each individual factor must be established by a preponderance, not that the factors must collectively be balanced.[71] *Winter* overturned the Ninth Circuit's rather extreme sliding-scale approach, which had permitted the grant of a preliminary injunction with only a possibility of irreparable harm as long as there was a strong likelihood of success on the merits.[72] Other circuits have concluded that a different formulation of the sliding scale is still permissible under *Winter*.[73]

PROCEDURE § 3954 (4th ed. 2008). Because the common element of the public interest is the main focus of this analysis, the two tests can be considered together.

66. *See* Rachel A. Weisshaar, Note, *Hazy Shades of* Winter*: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1032–48 (2012) (reviewing the current circuit split).

67. *See* Pashby v. Delia, 709 F.2d 307, 320–21 (4th Cir. 2013) ("[I]n light of *Winter*, this Court recalibrated that test, requiring that each preliminary injunction factor be 'satisfied as articulated.'" (quoting The Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, Citizens United v. FEC, 558 U.S. 310 (2010), *aff'd* The Real Truth About Obama, Inc. v. FEC, 607 F.3d 355 (4th Cir. 2010) (per curiam))); *The Real Truth About Obama, Inc.*, 575 F.3d at 347 (replacing the balance-of-hardship test in light of *Winter*).

68. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

69. *Id.* at 12.

70. *Id.* at 20 (emphasis added).

71. Pashby v. Delia, 709 F.2d 307, 320–21 (4th Cir. 2013).

72. *Winter*, 555 U.S. at 21 (rejecting the Ninth Circuit's holding "that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm" (citations omitted)).

73. *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011) (noting that "some version of the sliding scale test" could survive *Winter*); Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) ("How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." (citations omitted)).

To grant a stay of an injunction pending appeal, a court must find that four factors balance in the proponent's favor: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm without the stay, (3) the threatened injury outweighs any damage the stay may cause the other party, and (4) the stay will not disserve the public interest.[74] According to most circuits, "A high probability of success on the merits is not always required; the greater the harm worked by the judgment the lower the required showing of probable success."[75] Although these elements closely resemble the test for issuing a permanent injunction, the two are not identical.[76]

The likelihood of irreparable injury can be conceptualized in two ways. First, it could be the same overall likelihood of irreparable injury used in deciding whether to issue an injunction. Alternatively, it could be the likelihood of irreparable injury due to the delay that a stay would cause. In individual-rights cases, this distinction is unlikely to matter: when an individual constitutional right is infringed, the injury is irreparable and happens continuously.[77] The balance of hardships could similarly be framed as either the overall balance or the balance attributable only to the stay. Again, the distinction will likely not matter: since it is an individual constitutional violation, the balance of hardships is not especially relevant because plaintiffs suffer a continuous violation of their rights. In individual-rights cases, the public-interest factor is arguably the most important.[78]

Because the factors considered in granting a stay are nearly identical to those considered in granting an injunction, the decisions under the two tests often line up. In considering whether to grant a permanent injunction, the public interest is not always especially

74. WRIGHT ET AL., *supra* note 65, § 3954 (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

75. *Id.* at n.28.

76. *Id.* The test for issuing a permanent injunction is that (1) the plaintiff has suffered an irreparable injury, (2) remedies at law are inadequate, (3) the balance of hardships weighs in the plaintiff's favor, and (4) an injunction would not disserve the public interest. eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

77. *See* Beatrice Catherine Franklin, Note, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. REV. 623, 634–45 (2014) (describing the circuit split over whether courts presume irreparable harm for constitutional violations).

78. In other circumstances, courts have noted that "the public interest is a factor to be strongly considered." Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). *Lopez* considered the restoration of disability benefits to Social Security recipients, *id.* at 1433–34, but the same logic would apply to violations of individual constitutional rights, given their likely societal effects.

important; the focus is instead on the likelihood of success and irreparable harm. The Supreme Court has stated that in evaluating a request for a stay, the "most critical" factors are the appellant's likelihood of success on the merits and whether he would suffer irreparable harm if the stay were not granted.[79] However, under *Winter*, a court still "must" consider all four factors.[80]

In contrast, in deciding whether to grant a stay or a preliminary injunction, different considerations are important than in deciding whether to grant permanent injunctions: by their nature, the former decisions are temporary and subject to change in the near future. The public-interest prong is not the same for preliminary and permanent relief, including the decision to stay—that prong directs courts to consider whether there are "policy considerations that bear on whether the order should issue."[81] Therefore, if a temporary stay or preliminary injunction could have some effect on the public that a permanent injunction would not, the court's decision could change. Under the Fourth Circuit's strict approach, the probability of a preliminary injunction not disserving the public interest could drop below a preponderance, and the injunction would not be granted. Under the balancing test, however, the balance could shift away from granting a preliminary injunction or denying its stay.

Three circuits have recognized that temporary relief could harm society because it changes the legal landscape without a final judgment. The Tenth Circuit applies a heightened standard for granting preliminary relief when that relief would change the status quo.[82] The Second and Ninth Circuits impose a heightened burden for mandatory as opposed to prohibitory injunctions and define mandatory injunctions as those that change the status quo.[83] In each

79. Nken v. Holder, 556 U.S. 418, 434 (2009).

80. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

81. *See* 11A WRIGHT ET AL., *supra* note 65, § 2948.4.

82. *See* SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991) ("[Injunctions that disturb the status quo] are disfavored and they require that the movant satisfy an even heavier burden of showing that the four factors listed above weigh heavily and compellingly in movant's favor before such an injunction may be issued."), *overruled on other grounds*, O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (en banc).

83. *See* Sunward Elecs., Inc v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004) (applying a heightened standard when the "injunction sought is mandatory—i.e., it will alter, rather than maintain, the status quo"); Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (noting that mandatory injunctions, which alter the status quo, are "particularly disfavored" (quoting Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979))).

of these situations, the effect of a temporary change is considered as something separate from the existing four-factor test for preliminary relief.[84] All three circuits distinguish between temporary and permanent relief, which the current test for whether to grant a stay does not explicitly account for. However, when combined with developments in the realm of behavioral economics and its better understanding of seemingly irrational behavior, these considerations of the societal effects fit neatly within the final prong of the preliminary-relief tests.

III. THE ENDOWMENT EFFECT AND LOSS AVERSION

Behavioral-economic principles help explain why the temporary nature of preliminary injunctions can disserve the public interest even when a permanent injunction would not. According to the theories of loss aversion and the endowment effect, people value rights more highly once they possess them; changing the status quo through preliminary injunctions and later restoring it would therefore disserve the public interest. It is easy to argue that if a person did not possess a right in the first place, nothing is lost by reverting to the initial state of affairs. That argument is an oversimplification—behavioral-economic research shows that people value rights more highly once they actually possess them and that they feel losses more strongly than gains.[85] Therefore, giving someone a right and then taking it away results in a net loss to his utility.

A. The Coase Theorem

The starting point for any analysis of the efficient allocation of rights is the Coase Theorem, which derives from Professor Ronald H. Coase's 1960 paper, "The Problem of Social Cost."[86] The Coase Theorem states that in the absence of transaction costs, the initial allocation of property rights does not matter, as people will be able to bargain around that allocation and will always reach the efficient

84. For a criticism of this approach, see generally Powers, *supra* note 14.

85. Although the economic literature typically focuses on tangible goods, this effect has been shown to apply to legal rights. *See* JUDD HAMMACH & GARDNER M. BROWN, JR., WATERFOWL AND WETLANDS: TOWARDS BIOECONOMIC ANALYSIS 26 (1974) (finding that duck hunters would pay an average of $247 to obtain the right to keep a particular area of wetlands undeveloped, but if they already possessed that right, they would demand an average of $1044 to sell it).

86. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

result.[87] However, when there are transaction costs, as there typically are in real-world situations, those costs can be prohibitively high, and the initial allocation of property rights will change the final allocation.[88]

The theorem has been applied outside of the realm of tangible property. For instance, introductory microeconomics students often analyze a simple problem: *A* and *B* are roommates; *A* is a smoker, *B* is not.[89] *B* values having a smoke-free apartment at $100, while *A* values his right to smoke at $90. *A* currently possesses a "right to smoke." If *B* does not want him to smoke, he will have to pay *A* a certain amount of money to keep him from smoking. Because *B* values his right to a smoke-free apartment more highly than *A* values the right to smoke in the apartment, there is some amount of money (between $90 and $100) that *B* can pay *A* to keep him from smoking. If *B* pays *A* $90, A is in the same position he was in—he can no longer smoke in the apartment, but he has $90 to offset his $90 loss. *B* is $10 better off—he paid $90 to gain a $100 benefit. In this limited world, societal value has increased by $10.

Now suppose that *B* possesses the right to a smoke-free apartment. Here, no transaction would take place because the most *A* would be willing to pay to be able to smoke is $90, the value he places on the right. *B* would not accept less than $100 to give up the right. In the absence of transaction costs or other barriers to bargaining, the same efficient allocation of property rights would be reached regardless of the initial allocation.

The presence of transaction costs can cause inertia, with parties maintaining the initial allocation even when it is not the most efficient.[90] In the same-sex-marriage context, supporters of traditional marriage were initially allocated a legal right. While they continue to possess the right, the above analysis would suggest either that traditional marriage is efficient or, more likely, that transaction costs

87. *Id.* at 2–7.

88. *Id.* at 15–17.

89. *See, e.g.*, HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 648–50 (8th ed. 2010) (discussing this problem). This problem is also often framed as one roommate who wishes to play loud music while the other prefers silence.

90. Imagine, for instance, that it would cost $15 to create a contract between the two. If *A* were initially allocated the right, *B* would need to pay him $90 for the right plus the $15 transaction cost. The $105 cost would exceed what *B* would be willing to pay, and the right would remain with *A*. Note that this is an inefficient outcome—society as a whole gains if *B* possesses the right.

in the form of political barriers are too high to move from the initial allocation.

B. The Endowment Effect

The simple proposition embodied in the Coase Theorem—that in the absence of transaction costs scarce resources will be allocated to those who value them most—does not seem to accurately reflect behavior. The "endowment effect," a term coined by Professor Richard Thaler in 1980,[91] better reflects reality. In its simplest form, it describes the hypothesis that people assign a higher value to things based merely on the fact that they own them, challenging the assumption of the rational-economic actor. The endowment effect suggests that, contrary to the Coase Theorem, the initial endowment can matter even absent transaction costs: the initial allocation of a legal entitlement will affect trading and bargaining because the possessor of the right will value it more.[92] Therefore, the entitlement should be initially allocated to the person who values it more highly. Otherwise, the individual who owns the entitlement may be unwilling to trade it even if that would lead to the efficient outcome. Using the above roommate example, assume that the objective value of *A*'s right to smoke—the amount he would be willing to pay *B* for the right—is $90, and that *B* is willing to pay $100 to buy that right from *A*. However, because of the endowment effect, if *A* were initially allocated the right, his subjective valuation of the right, and therefore the payment he would require to give it up, would be higher. If that valuation exceeded $100, no trade with *B* would take place because *B* would not pay more than $100 for the right to a smoke-free apartment.

"[T]he main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up."[93] This distinction arises because people view opportunity costs and out-of-pocket costs differently. An opportunity cost is the value of the best option forgone when a choice has to be made between mutually exclusive alternatives. Out-of-pocket costs refer to the costs incurred by losing something in one's possession. Though rational economics would

91. Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 44 (1980).

92. Cass R. Sunstein, *Behavioral Analysis of the Law*, 64 U. CHI. L. REV. 1175, 1179 (1997).

93. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197 (1991).

dictate that opportunity costs be perceived as equivalent to out-of-pocket costs by a rational actor, experiments have shown that not to be the case.[94] People view out-of-pocket costs as losses and opportunity costs as forgone gains.[95] Therefore, out-of-pocket costs, potential losses, are more heavily weighted because people are typically loss-averse.[96]

The endowment effect has been noted as being somewhat intuitive.[97] For example, even before serious experimental evidence of the effect existed, companies were using it to their advantage. When faced with charges levied on credit-card transactions, credit-card company representatives argued for those extra charges to be framed as discounts for using cash instead of charges for using credit cards.[98] If customers view not receiving the cash discount as an opportunity cost of using the card but view a surcharge as an out-of-pocket charge, this distinction makes sense.[99] The discount is a potentially

94. *See infra* notes 100–09 and accompanying text.

95. *Id.*

96. *Id.*

97. *See* Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1737 (1998) ("[T]he greatest force of the endowment effect in legal analysis may be to bolster the law's insight that aspirations are not the same as ownership . . . ."). Oliver Wendell Holmes, Jr. similarly observed that it is in a person's nature to value something he owns more highly than something he hopes for. *See id.* (citing Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("It is the nature of a man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."")). Additionally, scholars have connected the endowment effect to emotional rather than cognitive factors, offering four potential emotional explanations for the endowment effect. Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 33–35 (2007). The first is pure loss aversion, in which losing something "simply hurts more" than not having it at all. *Id.* at 34 (quoting Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1251–52 (2003)). This explanation is based on an illogical bias—losing something and not gaining it at all register differently emotionally. *Id.* The second is attachment, in which the endowment effect stems from the simple fact that owning something adds sentimental or other value that is more than the thing's objective value as a commodity. *Id.* The third is regret avoidance, in which giving up a right is more likely to cause regret in the future than is never having possessed it. *Id.* The fourth is the disutility of selling, in which the endowment effect is caused by an aversion to participating in a sale, particularly if the sale involves commodifying a right that the seller does not believe can be appropriately commodified. *Id.*

98. *See FCBA Two-Tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearing Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Hous. and Urban Affairs*, 94th Cong. 4 (1975) (statement of Jeffrey M. Bucher, Board of Governors of the Federal Reserve System) ("Critics argued that a surcharge carries the connotation of a penalty on credit card users while a discount is viewed as a bonus to cash customers.").

99. Thaler, *supra* note 91, at 45.

forgone gain, while the surcharge is seen as a loss. The framing, of course, has absolutely no effect on consumers' bottom line—either way they have paid the fee. Depending on the phrasing, however, consumers will view the charge as either a loss or a forgone gain.

The classic example of the endowment effect arises from a series of experiments performed by Professors Daniel Kahneman, Jack Knetsch, and Richard Thaler.[100] Half of the subjects were given coffee mugs worth six dollars.[101] These mugs were arbitrarily distributed to every other participant.[102] The participants were then told to bargain over the mugs.[103] In the absence of any endowment effect, economic theory would dictate that half of the mugs would be traded from those who valued them less to those who valued them more.[104] However, very few of the mugs were actually traded because the median seller demanded $5.25 to trade, while the median buyer was willing to pay only $2.25 to $2.75 to acquire a mug.[105] Those who possessed the mugs valued them approximately twice as highly as those who did not.[106] Notably, this effect was evident even though the participants possessed the mugs for a very short period before bargaining began.[107] The authors concluded that each owner of a mug valued it more highly for no other reason than that he owned it.[108] Additionally, the short time period between participants' receipt of the mugs and the opportunity to trade suggests the existence of an "instant endowment effect," by which a person's subjective value of an item increases substantially as soon as he is given the object.[109]

C. Loss Aversion

One explanation for the endowment effect is loss aversion, which refers to the economic observation that the loss of something an

100. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1325 (1990).

101. *Id.* at 1330.

102. *Id.*

103. *Id.*

104. *Id.* at 1328.

105. *Id.* at 1332.

106. *Id.* at 1343–44.

107. *Id.* at 1342. It has since been shown that the endowment effect is stronger the longer a person possesses an item. Arlen, *supra* note 13, at 1771 n.19 (citing Michael A. Strahilevitz & George Loewenstein, 25 J. CONSUMER RES. 276, 285 (1998)).

108. Kahneman et al., *supra* note 100, at 1342.

109. *Id.*

individual owns has more of a negative effect than gaining it has a positive effect.[110] Loss aversion and the endowment effect can be illustrated through a simple example offered by Kahneman, Knetsch, and Thaler.[111] In their example, an economist friend of the authors had purchased wine that appreciated to two hundred dollars from ten dollars at the time of purchase.[112] The economist would drink some of the wine but was "neither . . . willing to sell the wine at the [current] price nor buy an additional bottle at that price."[113] This example demonstrates that people demand a much higher price to give up an object they own than they would be willing to pay to acquire it.[114] This behavior cannot be explained by rational-economic principles unless there is some other effect at work.

Although people are ordinarily risk-averse, they have been shown to be risk-seeking in choices between losses, irrationally choosing a gamble over a sure value when the gamble has an equal or lesser expected value. In an experiment conducted by Professors Kahneman and Amos Tversky, subjects were offered a choice between a sure loss of 3000 and an 80 percent chance of losing 4000.[115] Under rational economics, each subject would be expected to consider the expected value of each choice and select the option with the higher expected value.[116] The expected value of a loss of 3000 is –3000. The expected value of the gamble is –3200.[117] Therefore, the value of the sure loss, –3000, is greater than the expected value of the gamble, –3200, so the subject would be expected to prefer the sure loss. The majority of subjects nonetheless preferred the gamble, demonstrating risk-seeking behavior in choices between negative options.[118]

In choices between gains, in contrast, people are risk-averse, preferring a sure gain to a gamble with the same or an even higher

110. *Id.* at 1342–46.

111. Kahneman et al., *supra* note 93.

112. *Id.* at 194.

113. *Id.*

114. *Id.*

115. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 266 (1979).

116. The expected value is the sum of all possible outcomes weighted by their probabilities.

117. The expected value is the probability of the loss, 0.8, times the expected loss, 4000, added to the probability of no loss, 0.2, times zero. Thus, EV = (0.8)(4000) + (0.2)(0) = –3200.

118. Kahneman & Tversky, *supra* note 115, at 268.

expected value.[119] A risk-averse person will choose a sure gain of 3000 over an 80 percent chance of receiving 3750 even though the expected value of the gamble is also 3000 and a rational actor would be indifferent between the options. Using the same numbers as above, a person who is sufficiently risk-averse will choose a sure gain of 3000 over a gamble with an expected value of 3200 even though the gamble has a higher expected value than the sure gain.

Loss aversion describes this phenomenon—the risk-seeking behavior of choosing a gamble that has a larger expected loss over a smaller but sure loss indicates, with the latter option, the fact that a person has no chance of avoiding the loss is affecting his judgment. In other words, the negative effect of that choice on a person's utility is enhanced because there is no way that he can avoid the loss.

Additionally, loss aversion means that a person's reaction to an event depends on whether he views it as a loss or a gain. "[W]hether an event 'codes' as a loss or a gain depends not on simple facts but on a range of contextual factors, including how the event is framed."[120] For example, the status quo is typically the reference point for gains and losses, "but it is possible to manipulate the frame so as to make a change 'code' as a loss rather than a gain, or vice versa."[121] Consider the credit-card example from above.[122] The credit-card companies were advocating that the charge for using a credit card be framed as a discount for using cash rather than as a fee for using the card. Regardless of how the charge is framed, the final result is the same: people who pay with credit cards pay more than those who pay with cash. A cash discount does not feel like a loss to credit-card users; it is instead perceived as a forgone gain. If, however, the payment were framed as a charge for using a card, the consumer would view it as a loss because he would be paying more than the baseline cost paid by cash consumers.

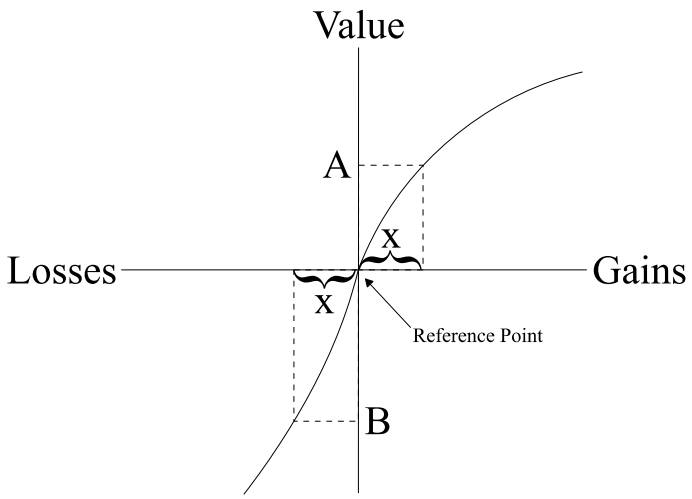
119. *Id.* at 269.

120. Sunstein, *supra* note 92, at 1180.

121. *Id.*

122. *See supra* notes 98–99 and accompanying text.

Figure 1: Value Function



Loss aversion manifests itself graphically[123] as the value function in Figure 1.[124] The objective value of the change in the individual's stock of goods and services, including his legal rights, is shown on the *x*-axis, and the subjective value to the individual is shown on the *y*-axis. If people were entirely rational, the two tails of the graph would mirror each other: a loss or gain of some objective value would result in a subjectively valued loss or gain of the same magnitude. From an initial starting point at the origin, the reference point, a gain of magnitude x increases the subjective value to the person by A. From the same reference point, a loss of magnitude x will decrease the value by $B > A$.[125] The magnitude of B is greater than the magnitude of A because a certain amount gained has less of a positive effect than that same amount lost has a negative effect. This relationship is shown in Figure 1 as the difference in slope over the course of the value function. For a change of x from the reference point, a loss has

123. The graphs merely serve to illustrate the concepts discussed and do not reflect specific empirical data.

124. Scholars have offered multiple justifications for the endowment effect. *See, e.g.*, W. Michael Hanemann, *Willingness to Pay and Willingness to Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635, 645–46 (1991) (offering a neoclassical account of the effect); Carey K. Morewedge, Lisa L. Shu, Daniel T. Gilbert & Timothy D. Wilson, *Bad Riddance or Good Rubbish? Ownership and Not Loss Aversion Causes the Endowment Effect*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 947, 950 (2009) (offering an attachment explanation).

125. *See* Thaler, *supra* note 91, at 41–43 (deriving the value function).

a larger effect on subjective value than a gain. Therefore, the slope of the "losses" tail of the value function in the bottom left quadrant is steeper than the slope of the "gains" tail.

IV. BEHAVIORAL ECONOMICS AND THE DECISION TO STAY SAME-SEX-MARRIAGE RULINGS

When a right is granted and then withdrawn, the endowment effect and loss aversion are implicated.[126] These behavioral-economic effects demonstrate that, regardless of where society stands on a particular issue, courts' flip-flopping on whether a right exists is detrimental to both sides. Courts should consider this foreseeable harm to the public interest when deciding whether to grant a preliminary injunction or stay a decision in individual-rights cases.

When plaintiffs sue to enjoin the government from enforcing laws that allegedly infringe their constitutional rights, district courts should consider the effect of disturbing the status quo before a final decision is rendered. This would prevent courts from causing societal utility losses through their reversals and would prevent the uncertainty that accompanies those reversals. In individual-rights cases, such as those involving same-sex marriage, plaintiffs generally sue for an injunction barring the government from enforcing the challenged constitutional provision or statute, or request a preliminary injunction preventing it from going into effect while the suit progresses. Importantly for courts, the timing of an injunction affects social utility. In these contentious cases, appeals are nearly inevitable and both sides are often willing to take the case to the highest authority they can, certainly to the court of appeals and, most likely, a petition for certiorari to the Supreme Court.[127] Therefore, the likelihood of the district courts having the last word on the issue is virtually nil.[128] In other words, uncertainty and change are essentially

126. While one can—and proponents of California's Proposition 8 did—argue that withdrawing the name is not withdrawing anything of value, courts have repeatedly held that the name "marriage" means something. *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012) ("We need consider only the many ways in which we encounter the word 'marriage' in our daily lives and understand it, consciously or not, to convey a sense of significance."), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

127. *See, e.g.*, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting) ("[T]he underlying legal question . . . is a difficult question. It is a question, I believe, that at least four Members of this Court will wish to consider irrespective of the Fifth Circuit's ultimate decision.").

128. The Court has not issued a stay in cases in which the state has declined to defend its same-sex-marriage ban, *see, e.g.*, Order in Pending Case, Nat'l Org. for Marriage v. Geiger, 134

inevitable in individual-rights litigation, a reality of which the courts are well aware.[129]

In *Kitchen v. Herbert*,[130] a federal district court in Utah held that the state's constitutional amendment banning same-sex marriage violated the federal Constitution.[131] Hours later, same-sex marriages began to be performed in Utah.[132] The state's requests for a stay from the district court[133] and the Tenth Circuit[134] were both denied. The state then filed an application in the Supreme Court to stay the district court's judgment pending appeal to the Tenth Circuit.[135] The application was referred to the full Court and granted without explanation.[136] Same-sex marriage was legal in Utah for nineteen days, and over 1300 marriage licenses were issued to same-sex couples.[137] It is unclear how many of those couples performed their marriage ceremonies before the stay, but "news reports put the number at over 1000."[138] The state subsequently declared that it will not recognize

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S. Ct. 2722, 2722 (2014) (denying stay); Press Release, Or. Dep't of Justice, Statement of Or. Att'y Gen. Ellen Rosenblum on the Subject of Pending Litigation Challenging Same-Sex Marriage Ban (Feb. 20, 2014), *available at* http://www.doj.state.or.us/releases/Pages/2014/rel022014.aspx ("[T]he Oregon Department of Justice will not defend the prohibition in our state's constitution against marriages between people of the same sex."), presumably because under *Hollingsworth*, no one would have standing to do so, *see Hollingsworth*, 133 S. Ct. at 2668 (holding that private parties did not have standing to take over the defense of a same-sex-marriage ban from the state).

129. *See, e.g.*, Brinkman v. Long, No. 13-cv-32572, at *48 (Colo. Dist. Ct. July 9, 2014) ("[T]he Court finds that a stay is necessary to avoid the instability and uncertainty which would result in the state of Colorado if the Court did not stay its ruling and for the orderly administration of justice." (footnote omitted)).

130. Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

131. *Id.* at 1216.

132. Erik Eckholm, *Federal Judge Rules that Same-Sex Marriage Is Legal in Utah*, N.Y. TIMES, Dec. 21, 2013, at A11.

133. Order on Motion To Stay at *1, Kitchen v. Herbert, No. 2:13-cv-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013).

134. Order Denying Emergency Motion for Stay and Temporary Motion for Stay at *2, Kitchen v. Herbert, No. 2:13-cv-217, 2013 WL 6697874 (10th Cir. Dec. 24, 2013).

135. Application to Stay Judgment Pending Appeal, Herbert v. Kitchen, No. 13A687 (U.S. Dec. 31, 2013).

136. Order in Pending Case, Herbert v. Kitchen, 134 S. Ct. 893, 893 (2014). The order appears to have been supported by every member of the Court, as it was not accompanied by any dissents. Lyle Denniston, *Court Stops Utah Gay Marriages*, SCOTUSBLOG (Jan. 6, 2014, 10:34 AM), http://www.scotusblog.com/2014/01/court-stops-utah-gay-marriages.

137. Evans v. Utah, 21 F. Supp. 3d 1192, 1197 (D. Utah 2014).

138. *Id.*; Robert Barnes, *Supreme Court Halts Same-Sex Marriages in Utah Pending Appeal*, WASH. POST (Jan. 6, 2014, 2:32 PM), http://www.washingtonpost.com/politics/supreme-court-

same-sex marriages performed before the stay,[139] and the legal status of those licenses issued after the stay is unclear.[140] Couples married in Utah before the stay were granted a preliminary injunction against the state requiring that Utah recognize their marriages as legally valid.[141]

The Supreme Court stayed the district court's decision[142] until it denied certiorari in the case.[143] This uncertainty over the legal status of marriages performed before the Supreme Court's issuance of a stay existed solely because the district court did not stay its decision and the Supreme Court's stay did not occur immediately. Had the stay been immediate, no marriages would have been performed, and the failure to issue a stay would not have caused further litigation. Examining the societal effects of the district court's decision under both rational- and behavioral-economic frameworks demonstrates that courts can avoid societal loss by considering loss aversion and the endowment effect in deciding whether to issue temporary relief.

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halts-same-sex-marriages-in-utah-pending-appeal/2014/01/06/b1af9794-76e9-11e3-b1c5-739e63e9c9a7_story.html.

139. *See* Press Release, Utah Office of the Att'y Gen., Utah Att'y Gen. Sean D. Reyes Official Statement (Jan. 8, 2014), *available at* http://attorneygeneral.utah.gov/2014/01/08/utah-attorney-general-sean-d-reyes-official-statement ("We are unable to reach a legal conclusion as to the ultimate validity of marriage between persons of the same sex who completed their marriage ceremony in Utah between Dec [*sic*] 20, 2013 and Jan. 6, 2014. That question remains unanswered and the answer will depend on the result of the appeal process.").

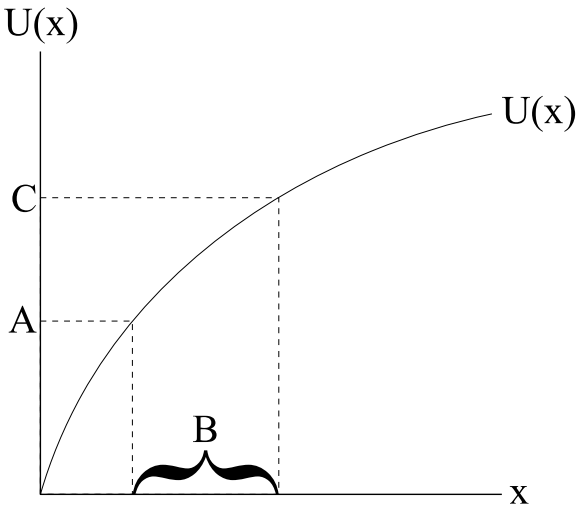
140. *See* Jacob Gershman, *So What Happens to the Same-Sex Marriage Licenses Issued in Utah?*, WALL ST. J. LAWBLOG (Jan. 6, 2014, 2:39 PM), http://blogs.wsj.com/law/2014/01/06/so-what-happens-to-the-same-sex-marriage-licenses-issued-in-utah (describing the similar circumstances in California and New Mexico and noting that "[w]hen similar situations have come up in other states, gay couples have remained legally married even when other gay couples were prevented from joining them"). Because the Supreme Court denied certiorari in *Herbert*, it seems that Utah must honor those marriages. Herbert v. Kitchen, 135 S. Ct. 265, 265 (2014).

141. *Evans*, 2014 WL 2048343, at *21. In Colorado, the courts took a slightly different approach when the clerk for Boulder County continued to issue same-sex marriage licenses even when under a court order to stop. The court allowed the clerk to continue to issue the licenses but ordered the clerk to "provide reasonable notice to prospective and past recipients of same-sex marriage licenses that the validity of their marriages is dependent upon whether a court would find that [the clerk] had authority to allow same-sex marriages." Colorado v. Hall, No. 2014-cv-30833, at *23 (Colo. Dist. Ct. July 10, 2014), *aff'd*, No. 2014-CA-1368 (Colo. App. July 24, 2011), *cert. granted*, No. 2014-SC-582 (Colo. Sup. Ct. July 29, 2014). The Colorado Supreme Court granted a stay when it granted certiorari in the case. Colorado v. Hall, No. 2014-SC-582 (Colo. Sup. Ct. July 29, 2014).

142. Herbert v. Evans, 135 S. Ct. 16, 16 (2014).

143. Herbert v. Kitchen, 135 S. Ct. 265, 265 (2014).

Figure 2: Utility of Supporters of Same-Sex Marriage Under Rational Economics



A. Rational Economics and the Decision to Stay

1. *The Effect on Supporters of Same-Sex Marriage.* Under rational economics, withholding a right, granting that right, and then withdrawing it would make no difference in terms of utility—it is the final state of affairs that matters. Figure 2 shows a standard utility function, *U(x)*,[144] in which *x* represents an individual's stock of goods and services, including his legal rights. If an individual's initial utility level is *A*, withholding the right to same-sex marriage would keep him at utility level *A*. If the state instead permitted same-sex marriage, that individual's utility would increase by *B* to *C*. If the state then withdrew the right, his utility would decrease from *C* by *B* and fall back to *A*. Therefore, under rational economics, these shifts would have no overall effect on utility.

2. *The Effect on Opponents of Same-Sex Marriage.* The situation for opponents of same-sex marriage is the opposite. A judicial decision permitting same-sex marriage would cause an opponent's

144. For a description and derivation of a standard utility curve, see VARIAN, *supra* note 89, at 54–67, 226–29.

Figure 3: Utility of Opponents of Same-Sex Marriage Under Rational Economics

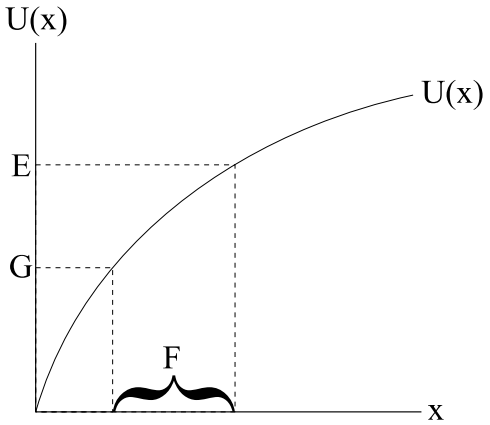
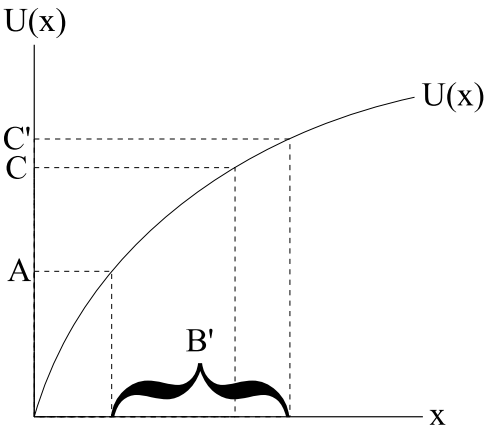


Figure 4: The Effect of the District Court's Ruling in Favor of Same-Sex Marriage on the Utility of Supporters

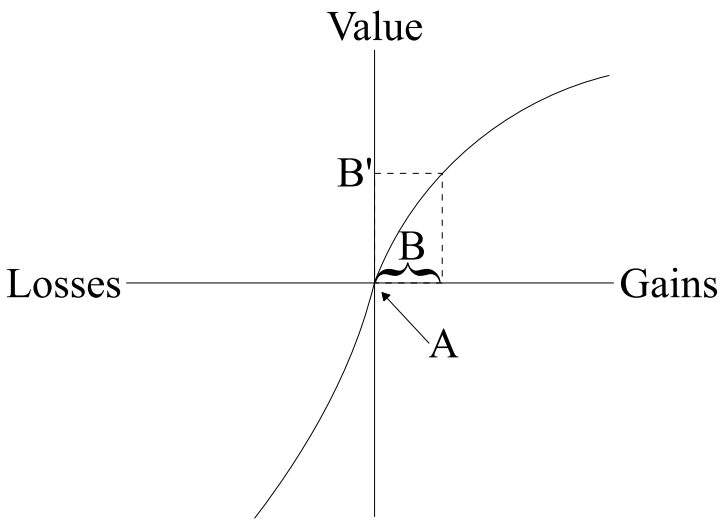


stock of "goods" in Figure 3 to fall by *F*, the objective value of the right, causing the opponent's utility to fall from *E* to *G*. Staying the decision would cause utility to increase back to *E*. A final decision permitting same-sex marriage would cause utility to fall back to *G*.

B. Behavioral Economics and the Decision to Stay

1. *The Effect on Supporters of Same-Sex Marriage*. On the other hand, accounting for the endowment effect and loss aversion changes the utility analysis on both sides of the issue. In Figure 4, if initial

Figure 5: Value Function of Supporters of Same-Sex Marriage



utility is *A*, withholding the right to same-sex marriage would keep utility at *A* because it is the loss of a potential gain, an opportunity cost.[145] Once same-sex marriages were permitted, one would expect an increase in "goods" by *B* to cause utility to increase to *C* as it does under rational-economic analysis.[146] However, the endowment effect suggests that once a person possesses a right like same-sex marriage, he will value it more than rational economics would suggest.[147] If in value terms, the right to same-sex marriage is worth *B*, Figure 5 shows that the gain would be worth $B' > B$ to that person. Thus, although a right may be worth only *B* when measured objectively, once someone possesses that right the endowment effect dictates that he will value it at *B'*.[148] As Figure 5 shows, an increase in the value of goods to *B'* increases utility to $C' > C$, the person's utility without consideration of the endowment effect.

145. *See* Figure 2. There is, of course, a strong argument that withholding the right to same-sex marriage can make someone feel like an outcast in society, decreasing his utility because he no longer feels like an equal member of society. *See* George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 738–39 (2000) (discussing the effects on an individual's utility when he does not feel accepted in society).

146. *See* Figure 2.

147. *See supra* Part III.

148. Kahneman & Tversky, *supra* note 115, at 279.

Figure 6: Effect of the Stay on Utility of Supporters of Same-Sex Marriage

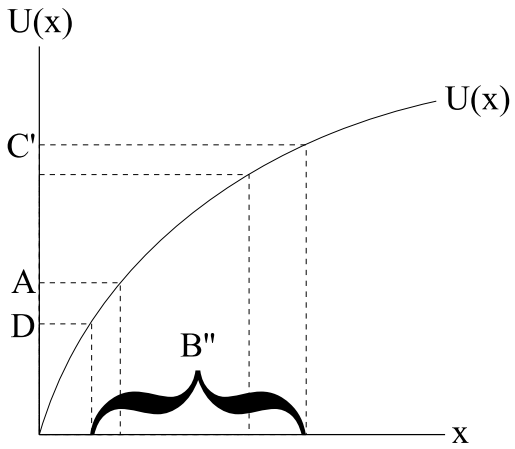
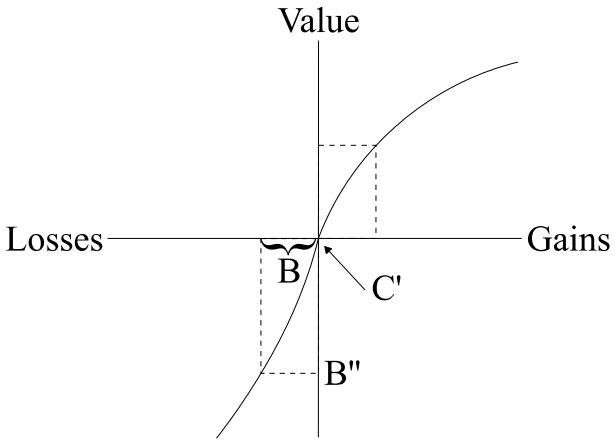


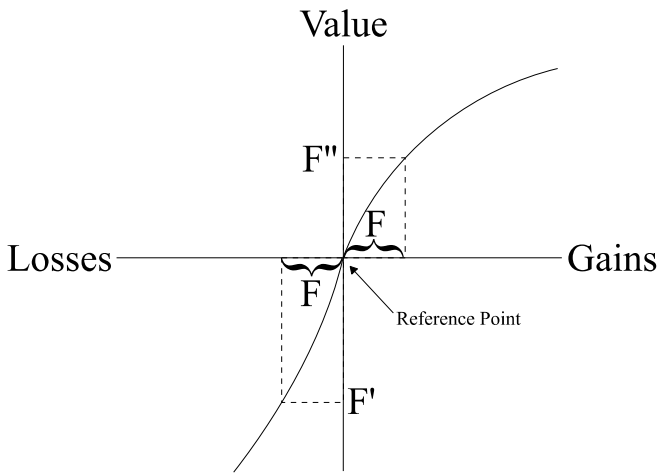
Figure 7: Value Function of Supporters of Same-Sex Marriage



Loss aversion has an effect when a right is withdrawn. In Figure 6, utility is now at *C'*. Rational economics dictates that utility would fall by the same amount by which it increased, thereby falling by *B'* back to *A*. Still, the withdrawal of a right would likely code as a loss and implicate the endowment effect. Withdrawal of the right to same-sex marriage would certainly code as a loss for its supporters.[149] Therefore, as shown in Figure 7, a loss of objective value *B* would

149. *See supra* notes 120–21 and accompanying text.

Figure 8: Value Function for Opponents of Same-Sex Marriage



decrease the subjective value by $B'' > B'$. As shown in Figure 6, the individual's stock of entitlements would fall by B'', causing his utility to fall from C' to $D < A$. Whether the final value is compared to a person's initial, pre-same-sex-marriage utility or to his utility after the right to same-sex marriage was granted, his utility has fallen.

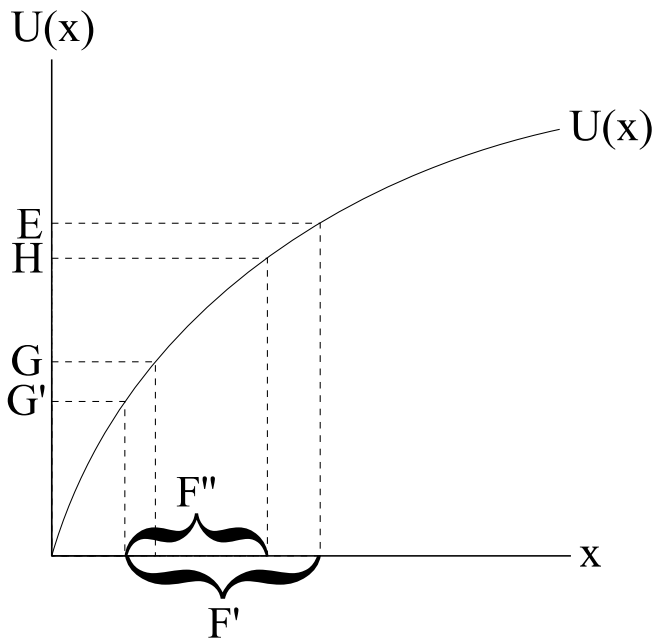
Granting the right to same-sex marriage would increase supporters' stock of goods and services by B', as shown in Figure 4. As shown in Figure 6, because $B' < B''$,[150] overall utility is less than C' but greater than A and D. Therefore, although the individual has the same entitlements as immediately after the right to same-sex marriage was granted, his overall utility is lower from losing the right and gaining it back.

2. *The Effect on Opponents of Same-Sex Marriage*. These findings do not entail a net societal utility loss because not everyone reacts the same way to the same events. For opponents of same-sex marriage, granting the right to same-sex marriage would likely code as a loss, and reinstating the traditional definition of marriage would code as a gain.

The endowment effect would, as with supporters of same-sex marriage, change the analysis. The value function for opponents of same-sex marriage is shown in Figure 8. For those opponents, granting the right to same-sex marriage would likely code as a loss.

150. *See* Figure 6.

Figure 9: Utility of Opponents of Same-Sex Marriage



Under the rational-economic analysis, opponents of same-sex marriage would be returned to their initial level of utility[151] and, as shown in Figure 9, utility would fall from *E* to *G'* < *G*. When a stay is issued and same-sex marriage again becomes illegal, Figure 9 shows that the resulting gain of *F''* < *F'* would be smaller than the loss experienced due to the initial granting of the right to same-sex marriage. Opponents' utility would increase from *G'* to *H* < *E*. Therefore, both proponents and opponents of same-sex marriage will have lost utility before the reinstatement of same-sex marriage.

Because losses are felt more heavily than gains, once a person loses something he values, merely returning it cannot restore him to his former level of utility. Once opponents of same-sex marriage lost what they viewed as a right to the traditional definition of marriage, reinstating that right was not enough to put them back in the same place. Granting same-sex marriages would, as before, code as a loss, causing utility to fall by *F'* from *H* to below *G'*.

151. *Cf.* Figure 3.

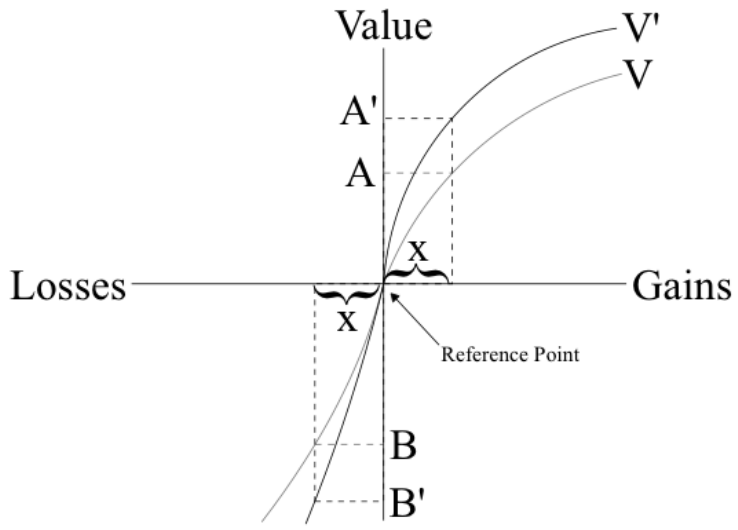
3. *Underlying Assumptions of the Analysis*. The above analysis relies on three key assumptions. First, it assumes that all individuals within a group have the same value and utility functions. This is a simplifying assumption and is common in economic analysis even though it may not accurately reflect reality. It is well known that some people value certain rights more than others, particularly when the rights have such a large effect on a subgroup of the total population.

Second, this analysis assumes that the objective value of each group member's definition of marriage is the same. It is certainly possible that this objective value might be significantly higher for one side than for the other. For example, if proponents value the right to same-sex marriage more highly than opponents value the traditional definition of marriage, then banning same-sex marriage will not necessarily increase societal utility even if a larger percentage of the population opposes same-sex marriage. The endowment effect and loss aversion would still apply, but in a state that constitutionally prohibits same-sex marriage, the vote might be closely split. In California, for example, same-sex marriage was outlawed with 52.3 percent of the vote; the 47.7 percent who voted against Proposition 8 could have lost something of such great value, and felt that loss to such a high degree, that Proposition 8's passage resulted in a net loss to society, in this case, the state of California. [152] The percentage approval alone, therefore, may not be the best indication of what maximizes societal utility. If the value to proponents of same-sex marriage were high enough, even an 80 percent vote against same-sex marriage may not mean that societal utility increased as a result.

Third, this analysis assumes that all people have the same value function regardless of which group they are in and that the gain or loss of each person's definition of marriage has the same objective value. In addition, the above analysis has not taken into account that these value functions could have different shapes across groups. If supporters of same-sex marriage had significantly steeper value functions, a loss or gain of the same objective magnitude as an opponent's loss or gain would have a larger effect on supporters'

152. DEBRA BOWEN, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008).

Figure 10: Different Value Functions



utility. The effects of this assumption are shown in Figure 10. The original value function *V* is shown in gray. A steeper value function *V'* is shown in black. An individual with value function *V'* would feel both gains and losses more severely than an individual with value function *V*.

Therefore, if supporters of same-sex marriage had a value function of *V'* while opponents had a value function of *V*, supporters would feel the loss of same-sex-marriage rights much more strongly than opponents would feel the loss of their preferred definition of marriage and would feel the gain much more strongly if same-sex marriage were then reinstated. Thus, even with the same objective value on each side of the debate, a majority vote does not necessarily mean that societal utility has increased. If supporters' value function *V'* is sufficiently steeper than opponents', a win for opponents with just over 52 percent of the vote would not lead to an increase in utility. The gain felt by opponents of same-sex marriage, even as a majority, would not be enough to offset supporters' loss. Again, this could result in a net societal loss even if the majority has experienced a gain. On the other hand, if the gain to opponents of same-sex marriage were large enough, the loss to supporters would be overcome.

C. Societal Implications of a Behavioral-Economic Analysis

This analysis has at least two implications. First, the repeated switching of a right from one side to the other results in a net loss to society, regardless of which side is correct from a policy perspective. Each time a right is taken away and then returned, an individual has lost utility. The same is true if a right is gained and then lost. Therefore, regardless of the initial entitlements or what proportion of people fall into each category, the act of switching a right from one side to the other and back causes a loss to society. This is most easily seen in Figure 9; each iteration of granting and then withdrawing a right caused utility to fall by the amount corresponding to the difference between *F'* and *F''*.[153]

Second, each change's ultimate effect on societal utility is unclear and would depend on a number of variables and unpredictable second-order effects,[154] including the relative number of proponents and opponents of same-sex marriage, how strongly their convictions were held, and how pronounced the endowment effect was in each case. Calculating the overall societal effects of the withdrawal of a right would be a complex endeavor, one that judges should certainly not wade into.

In the same-sex-marriage context, there is an added element of complexity. Both sides view themselves as possessors of a right, which will not be true in all individual-rights cases. If only one side sees itself as possessing a right, the effects on society of each change will be lessened. Once each side has been granted its definition of marriage, changing that definition codes as a loss. Though repeated switching would surely lead to an overall societal loss, it is unclear what overall effect the first shock to the system, granting the right to same-sex marriage (a gain for supporters and a loss for opponents) would have on society. The percentage of the population on either side of an issue is not necessarily the best indicator of societal utility.[155] Typically, a couple's decision to marry is not so time-sensitive that a stay pending an appeal will prevent them from ever

153. The same is true if the right is taken away and then reinstated. The order of the changes does not matter in this context.

154. For example, one such variable would be a federal constitutional amendment banning same-sex marriage.

155. *See supra* text accompanying note 152.

marrying; moreover, any injury that the stay causes can be fixed through a final ruling from the court allowing the couple to marry.[156]

The issue of what happens once a right is granted and then withdrawn is complicated. Fortunately, it is also easily avoidable. The Utah district court's actions implicated the endowment effect because the court ignored it: had the court considered how temporarily allowing couples to marry might have affected the public interest, the balance of factors might have tipped the other way. A more effective approach in these cases would be that taken by lower courts following the Supreme Court's issuance of a stay in *Kitchen*. For example, in *De Leon v. Perry*,[157] the Western District of Texas held that Texas's constitutional amendment banning same-sex marriage could not withstand even rational-basis review.[158] However, while the court struck down the amendment and granted a preliminary injunction, it also stayed its decision pending appeal to the Fifth Circuit.[159]

Because the district court in *Kitchen* did not stay its decision for the inevitable appeal, it allowed same-sex marriages to be performed in Utah until the Supreme Court granted a stay. The district court's refusal to stay its decision spawned a second lawsuit to clarify the validity of marriages performed before the Supreme Court's stay went into effect.[160] In *De Leon*, the state of Texas caught on to this issue, noting in its brief in opposition that "[a] preliminary injunction would . . . produce innumerable legal and practical problems."[161] The

156. There are certain situations in which a stay would so harm particular plaintiffs that it should not be granted. One such case arose out of Indiana: the Seventh Circuit ordered the state to recognize one same-sex marriage on an emergency basis because one of the partners was terminally ill. Order, Baskin v. Bogan, No. 14-2386 (7th Cir. July 1, 2014); *see also* Baskin v. Bogan, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014) (granting a preliminary injunction upon finding irreparable harm because the plaintiff was rapidly approaching the average survival time for ovarian cancer).

157. De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014).

158. *Id.* at 662–63. The court sidestepped the issue of whether heightened scrutiny was warranted because it found that the amendment failed even rational-basis review. *See id.* at 652 ("[T]he Court finds it is not necessary to apply heightened scrutiny to Plaintiffs' equal protection claim since Texas' ban on same-sex marriage fails even under the most deferential rational basis level of review."). Instead, the court saw it as "[l]ikely [that] the Fifth Circuit, and eventually the United States Supreme Court, will weigh in on this issue with clear instructions." *Id.*

159. *Id.* at 666.

160. Complaint at 2, Evans v. Utah, No. 2:14-cv-55 (D. Utah Jan. 21, 2014).

161. State Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 26, *De Leon*, 975 F. Supp. 2d 632 (No. 5:13-cv-982).

state favorably cited the Ninth Circuit's decision in *Perry v. Brown*[162] to stay the district court's injunction, claiming that "[t]he wisdom of these decisions is clear: because of the practical ramifications of temporary injunctive relief, a district court should not permit the commencement of same-sex marriages when reasonable doubt exists that the district court's preliminary ruling will remain the law."[163] It is difficult to argue that these cases are clear-cut with little chance of reversal. The state also noted that the "[p]laintiffs do not even acknowledge, much less offer a solution to, this serious problem with their requested interim relief."[164]

Possibly, the plaintiffs did not offer a solution because the solution should have been obvious—stay the injunction until a final decision is rendered. The *De Leon* plaintiffs may have been correct that the same-sex-marriage ban caused them continuing irreparable harm that outweighed any potential harm the defendants could have suffered.[165] However, failing to stay a preliminary injunction granting same-sex couples the right to marry disserves the public interest, which should weigh against granting an injunction. Irrespective of which side is "correct" or what level of scrutiny applies, the endowment effect and loss aversion demonstrate that switching back and forth between legal regimes disserves the public interest by reducing overall utility. These behavioral-economic concepts therefore weigh in favor of maintaining the status quo until litigation has concluded.

Consideration of the behavioral-economic effects would not be dispositive in every case. Rather, it would bear on the analysis of only one of the four factors: whether preliminary relief would disserve the public interest. Depending on which formulation of the *Winter* test[166] a court uses, consideration of loss aversion and the endowment effect could change its decision. Under the sliding-scale approach,[167] the probability of reversal would also enter into the analysis of whether a

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162. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 130 S. Ct. 2652 (2013).

163. State Defendants' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 161, at 27–28.

164. *Id.* at 28.

165. *See* Plaintiffs' Opposed Motion for Preliminary Injunction Enjoining Defendants from Enforcing Texas' Same-Sex Marriage Ban at 47, *De Leon*, 975 F. Supp. 2d 632 (No. 5:13-cv-982) (arguing this point).

166. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

167. *See supra* note 73 and accompanying text.

stay or preliminary injunction would disserve the public interest: if reversal is highly likely, it is also more likely that loss aversion and the endowment effect will inflict greater societal losses. Additionally, in individual-rights cases, lower probabilities of reversal may still be enough to cause the public-interest factor to weigh strongly in one direction or the other—people value their rights highly, and they could experience significant losses when those rights are withdrawn.[168] Under the strict formulation of the *Winter* test,[169] in which each factor must be proven by a preponderance, behavioral-economic considerations would almost certainly have an effect on the legal outcome. Therefore, depending on the weight given to this analysis, a court might be persuaded that a preliminary injunction or stay would disserve the public interest.[170]

The district courts are already recognizing that the Supreme Court's issuance of a stay in *Kitchen*[171] indicates a preference for waiting for a final decision.[172] Unfortunately, the Court's short order failed to give lower courts any reasoned guidance. Subsequently, the Court declined to issue stays in same-sex-marriage cases only when a state refused to defend its law and no one would have standing to do

168. This translates to a steeper value function. *See* Figure 10.

169. *See supra* note 71 and accompanying text.

170. This would affect only temporary relief because in the case of a final, permanent injunction there is not the same risk that the district court causes a societal loss.

171. Order in Pending Case, Herbert v. Kitchen, 134 S. Ct. 893 (2014) (No. 13A687).

172. *See, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) ("In accordance with the Supreme Court's issuance of a stay in *Herbert v. Kitchen*, and consistent with the reasoning provided in *Bishop* and *Bostic*, this Court stays execution of this preliminary injunction pending the final disposition of any appeal to the Fifth Circuit Court of Appeals." (citations omitted)); Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) ("In accordance with the U.S. Supreme Court's issuance of a stay in a nearly identical case on appeal from the District Court of Utah to the Tenth Circuit Court of Appeals, the Court stays execution of this injunction pending the final disposition of any appeal to the Tenth Circuit Court of Appeals." (citation omitted)), *aff'd sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, No. 14-136, 2014 WL 3854318 (Oct. 6, 2014)); Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) ("In accordance with the Supreme Court's issuance of a stay in *Kitchen v. Herbert*, and consistent with the reasoning provided in *Bishop*, this Court s[t]ays execution of this injunction pending the final disposition of any appeal to the Fourth Circuit Court of Appeals."), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, No. 14-225, 2014 WL 4230092 (Oct. 6, 2014). In 2004, some members of the Tenth Circuit invoked behavioral-economic concepts in the context of granting a preliminary injunction. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1016–17 (10th Cir. 2004) (en banc) (McConnell, J., concurring) (discussing the importance of maintaining the status quo based on loss aversion and the endowment effect), *aff'd and remanded sub nom.* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

so.[173] The apparent reason for the Court's preference appeared to be stability—a concern that, as same-sex-marriage cases work their way through the courts, temporary relief might disserve the public interest.

Later, however, the Supreme Court changed its tune following the decision to grant certiorari in several same-sex-marriage cases.[174] When considering the same-sex-marriage case arising out of Alabama, only two members of the Court were in favor of a stay.[175] The situation in Alabama has been particularly acrimonious. Following the federal district court's ruling that the state's ban on same-sex marriage violated the Equal Protection Clause and Due Process Clause,[176] the chief justice of the state supreme court issued an order to state probate judges instructing them not to adhere to the federal district court's ruling.[177] Initially, most counties refused to issue marriage licenses to same-sex couples, but the majority have since begun issuing the licenses.[178]

Justice Thomas, joined by Justice Scalia, saw granting a stay as "reflect[ing] the appropriate respect [the Court] owe[s] to States as sovereigns and to the people of those States who approved those laws."[179] He lamented the Court's denial of the stay "without making any effort to preserve the status quo pending the Court's resolution of a constitutional question . . . ."[180] In a situation where the Court "will resolve the issue at hand in several months,"[181] the two Justices were in favor of maintaining the status quo until a final resolution of the issue.

Justice Thomas stated that he "would have shown the people of Alabama the respect they deserve and preserved the status quo while

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173. *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (holding that private parties do not have standing to take over the defense of a same-sex-marriage law from the state).

174. DeBoer v. Snyder, No. 14-571, 2015 WL 213650, at *1 (Jan. 16, 2015).

175. Strange v. Searcy, No. 14A840, 2015 WL 505563, at *1 (Feb. 9, 2015).

176. Searcy v. Strange, No. 14-208-CG-N, 2015 WL 328728, at *5 (S.D. Ala. Jan. 23, 2015).

177. Roy S. Moore, *State of Alabama—Judicial System: Administrative Order of the Chief Justice of the Supreme Court* (Feb. 8, 2015), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2015/02/CJ-Moore-legal-memo-2-8-14.pdf.

178. Sandhya Somashekhar, *A Majority of Alabama Counties Are Now Issuing Same Sex Marriage Licenses*, WASH. POST, Feb. 13, 2015, http://www.washingtonpost.com/news/post-nation/wp/2015/02/13/a-majority-of-alabama-counties-are-now-issuing-same-sex-marriage-licenses.

179. *Strange*, 2015 WL 505563, at *1.

180. *Id.* at *2.

181. *Id.*

the Court resolves this important constitutional question."[182] In this case, Justice Thomas framed the status quo as the state of Alabama being able to enforce its law until a final determination on the constitutional question by the Supreme Court. As this example shows, when considering behavioral-economic effects, the public-interest prong of the test weighs in favor of maintaining the status quo until a final decision is rendered.

V. ANOTHER APPLICATION: ABORTION RESTRICTIONS

Staying an injunction is not what is truly at issue here—endowment-effect analysis suggests that maintaining the status quo is, in many cases, preferable until a final decision is rendered.[183] This concept applies more broadly than in the same-sex-marriage realm alone. This issue arises most prominently in individual-rights cases in which people's fundamental rights are at issue.[184] In the same-sex-marriage context, if a district court grants an injunction requiring the state to issue same-sex-marriage licenses, it should also stay its ruling pending appeal, maintaining the status quo and preventing a societal utility loss that would otherwise result.

In *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*,[185] some members of the Tenth Circuit recognized that behavioral-economic effects, specifically the endowment effect, should inform

182. *Id.*

183. Naturally, explicit consideration of the status quo would generate argument over what, precisely, the status quo is. *Compare* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting) (framing the status quo as the legal landscape before the enactment of new abortion restrictions), *with id.* at 507 (majority opinion) (framing the status quo as democratically elected officials' ability to enact laws of their choosing). The proper formulation of the status quo is the last actual, peaceable, noncontested status that preceded the pending controversy. 11A WRIGHT ET AL., *supra* note 65, § 2948. The last peaceable moment will typically be the world just before the event that led to the lawsuit. In the context of conferring the right to same-sex-marriage, the last peaceable moment would be a world without same-sex marriage. In the case of a law restricting access to abortion, it would be a world without that law.

184. A similar logic would apply in other individual-rights contexts as well. For instance, in the voting-rights context, restricting access to voting due to a potentially unconstitutional law would weigh in favor of granting the injunction because it disserves the public interest. Similarly, in the Eighth Amendment arena, the fact that dangerous prisoners might need to be commingled while an appeal was pending could persuade a court to stay its decision until a final judgment is rendered.

185. O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004) (en banc), *aff'd and remanded sub nom.* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

the legal analysis of injunctions. With respect to the issuance of preliminary injunctions, the concurrence noted that

> adverse disruptions in the status quo carry along with them the cost and difficulty associated with adjusting to change. These involve not only direct transition costs but also the costs associated with uncertainty, which manifest themselves in a reluctance to invest human or other capital in an enterprise where the returns could disappear at the drop of a judicial hat. Disruption is expensive. When a court requires a change in the status quo only to find that its grant of preliminary relief was mistaken and must be undone, the process is twice as disruptive as when the court preserves the status quo on a preliminary basis and later issues a final judgment requiring the change.[186]

The concurrence properly considered a preliminary injunction's effect on the status quo, but could have couched it more obviously in behavioral-economic principles. "Fundamentally, the reluctance to disturb the status quo prior to trial on the merits is an expression of judicial humility."[187] Not only does "a court bear[] more direct moral responsibility for harms that result from its intervention than from its nonintervention, and more direct responsibility when it intervenes to change the status quo than when it intervenes to preserve it," but also "like the doctrine of *stare decisis*, preserving the status quo serves to protect the settled expectations of the parties."[188]

The logic of the *O Centro* concurrence has since received attention;[189] the Tenth Circuit, even after *Winter*, applies a heightened burden of proof if an injunction would alter the status quo.[190] In determining whether to grant preliminary relief, the proper approach would be to use the existing four-factor framework to consider the effect of any change in the status quo on the public interest. Rather than applying a heightened burden for status-quo-altering stays and preliminary injunctions, that alteration of the status quo can weigh against issuing an injunction because it disserves the public interest. In fact, the Supreme Court has explicitly considered the status quo in

186. *Id.* at 1016–17 (McConnell, J., concurring).

187. *Id.* at 1015.

188. *Id.*

189. *See, e.g.*, Powers, *supra* note 14, at 1029–30 (discussing the case).

190. *See, e.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1293 (D. Colo. 2012) ("If the injunction will . . . alter the status quo . . . the movant must meet a heightened burden." (citing *O Centro*, 389 F.3d at 975, *aff'd*, 542 F. App'x 706 (10th Cir. 2013))).

deciding whether to grant a stay in another context: abortion restrictions.

The Western District of Texas considered a state law requiring abortion providers to have admitting privileges at a hospital within thirty miles of their clinics.[191] The district court held that, although the state had a legitimate interest in promoting the health of both the mother and the fetus, the admitting-privileges provision bore no rational relationship to that interest.[192] The court did not stay its decision.[193] On appeal, the Fifth Circuit granted a stay.[194] The Supreme Court denied a motion to vacate the stay in a divided order.[195] The Fifth Circuit has since reversed the district court's decision.[196] Based on the above analysis, it is tempting to say that the stay was rightly granted, as it allowed the status quo to continue as usual until the final disposition of the case. That conclusion would, however, ignore the realities of the situation. As Justice Breyer noted in dissent, "under the status quo that existed in Texas prior to the enactment of the admitting privileges requirement, women across the State of Texas who needed abortions had a certain level of access to clinics that would provide them."[197] In other words, at the last peaceable moment[198] women in Texas enjoyed a right of access to the clinics, one on which they certainly placed some value. "If allowed to stand, the District Court's injunction would maintain that status quo pending the decision of th[e] case by the Court of Appeals."[199]

The Fifth Circuit should not have granted the stay. By doing so, the court effectively closed abortion clinics across the state when the only existing ruling was the district court's, which found that there

191. The law required that any physician performing an abortion have admitting privileges at a hospital that provides obstetrical or gynecological healthcare services within thirty miles of the place where the abortion took place. TEX. HEALTH & SAFETY CODE ANN. § 171.0031 (West 2014).

192. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 909 (W.D. Tex. 2013), *rev'd in part*, 748 F.3d 583 (5th Cir. 2014), *reh'g denied*, 769 F.3d 330 (5th Cir. 2014).

193. *See id.* (granting the injunction with no mention of a stay).

194. *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 734 F.3d at 419.

195. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 506–07 (2013).

196. *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 748 F.3d at 605.

197. On Emergency Application to Vacate Stay at 3, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 509 (2013) (No. 13A452) (Breyer, J., dissenting).

198. 11A WRIGHT ET AL., *supra* note 65, § 2948.

199. On Emergency Application to Vacate Stay, *supra* note 197, at 3.

was no rational basis for the law.[200] If the district court's decision had instead been affirmed, the clinics would not have magically reopened—the stay would have changed the legal landscape in Texas.

The proper response would have been to allow the clinics to continue to operate normally. Closing the clinics due to a law that is ultimately held to be unconstitutional would certainly weigh in favor of the stay disserving the public interest. Declining to issue stays in such circumstances would prevent the confusion and uncertainty that result from granting and then withdrawing rights. This approach would not implicate the loss-aversion consequences identified above. Instead, society would remain at the status quo until a final judgment was issued. By either not allowing a ruling to change the law or not allowing a potentially unconstitutional law to take effect—and therefore administering only one shock to the legal system—courts can prevent the overall societal loss that happens when a legal right is granted and then taken away.

As the Seventh Circuit put it in its opinion refusing to issue a stay in a similar situation, "It is beyond dispute that the plaintiffs face greater harm irreparable by the entry of a final judgment in their favor than the irreparable harm that the state faces if the implementation of its statute is delayed."[201] This observation affects whether a stay would disserve the public interest—the public interest will always be broader than simply what the state wants, although the state's desires are relevant. Because of the nature of the right being taken away, "delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."[202] Because "[t]he state . . . made no attempt to show an offsetting harm from a delay of a few months in the implementation of its new law (should it be upheld after trial),"[203] the Seventh Circuit rightly declined to grant a stay.

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200. At the time of the case, there were thirty-six abortion clinics in Texas, at least a third of which had to close as a result of the new restrictions. *See* Emergency Application to Vacate Stay at 7, *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 134 S. Ct. 506 (No. 13A452).

201. Planned Parenthood of Wis. v. Van Hollen, 738 F.3d 786, 795 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).

202. *Id.* at 796.

203. *Id.* at 797.

CONCLUSION

Due to the endowment effect and loss aversion, losing something elicits a stronger reaction than gaining it. Courts should explicitly consider this phenomenon under the not-disserving-the-public-interest prong in deciding whether to grant a preliminary injunction or stay a grant of an injunction pending appeal in cases involving individual-rights issues like same-sex marriage. Temporary and permanent relief affect the public interest differently because of the likelihood that the judgment will change. Each reversal of a change in who possesses a right disserves the public interest because people do not value their rights at the rights' objective worth. Although this may not comport with the assumption of the rational-economic actor, courts should consider people's different reactions to losses and gains in deciding whether to grant temporary relief.