Modern American Remedies: Cases and Materials Fifth Edition

2022 Teachers' Update

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PREFACE

This Update includes decisions through the end of the Supreme Court's term on June 30, 2022. As in the main volume, quotations appearing in this Update remove internal quotation marks and citations without notice for ease of reading. Always check the original source before quoting material reprinted here. Unless otherwise noted, citations to statutes are as they existed in spring 2022.

Students, just as no one expects you to memorize all the information in the main volume, no one expects you to memorize all the recent decisions. But reviewing recent developments helps give you a sense of the field and its trajectory. The continuing flow of remedies litigation, especially in the Supreme Court of the United States, illustrates the continuing importance of these issues and the remarkable variety and novelty with which they appear.

We are grateful to Timothy Duong, Patrick Randall, David Plick, and Sammy Zeino for excellent research assistance.

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CHAPTER TWO

PAYING FOR HARM: COMPENSATORY DAMAGES

A. The Basic Principle: Restoring Plaintiff to His Rightful Position

Page 15. At the end of note 2, add:

2. The rightful position. . . .

The Supreme Court endorsed the rightful position standard in Babb v. Wilkie, 140 S. Ct. 1168, 1178 (2020): "'Remedies generally seek to place the victim of a legal wrong . . . in the position that person would have occupied if the wrong had not occurred.' R. Weaver, E. Shoben, & M. Kelly, Principles of Remedies Law 5 (3d ed. 2017)." The context was a holding that a discrimination plaintiff could not get reinstatement or damages for loss of employment unless the discrimination was the but-for cause of plaintiff losing the job.

The Restatement Third, Torts: Remedies §2 (Tentative Draft 1, Am. L. Inst. 2022), sets forth the rightful position standard in the context of tort claims: "A plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy or remedies that will place that plaintiff, as nearly as possible, in the position the plaintiff would have occupied if the tort had not been committed. This basic principle is implemented by more specific rules, some of which limit or extend its reach." The casebook editors are the Reporters for this new Restatement.

B. Value as the Measure of the Rightful Position

Page 22. At the end of note 1, add:

1. The appeal. . . .

The plaintiffs eventually settled with their property insurers for $4.1 billion and with the aviation defendants for $95 million. The insurers also sued the aviation defendants, asserting that they were subrogated to the plaintiff's claims against them; the insurers eventually settled with the aviation defendants for $1.2 billion. These developments are reviewed in In re September 11 Litigation, 328 F.Supp.3d 178, 181-183 (S.D.N.Y. 2018), which rejected plaintiffs' claims to a share of what the insurers recovered from the aviation defendants. For subrogation in this context, see Notes on the Collateral-Source Rule, in the main volume at 98-102.

Page 34. At the end of note 4, add:

4. Pets. . . .

The Washington pets case was dismissed and apparently settled. Thomas v. Cannon, 2018 WL 7107615 (9th Cir. Nov. 1, 2018).

D. Consequential Damages

Page 57. At the end of note 5, add:

5. More analytic definitions. . . .

At its 2022 Annual Meeting, the American Law Institute approved a Tentative Draft that provides in the black letter:

(a) Distinctions between immediate and consequential damages, between direct and consequential damages, and between general and special damages are ill-defined and do not affect the availability or measurement of damages in tort.

(b) Subject to the rules of [the rest of this Restatement], a plaintiff who establishes a defendant's liability in tort is entitled to compensation both for any harm suffered from the immediate effects of the tortious conduct and for any harm suffered later as a further consequence of that conduct or its immediate effects.

Restatement (Third) of Torts: Remedies §4 (Am. L. Inst. Tentative Draft No. 1, 2022). The Comments to this section review the many inconsistent ways in which these terms are used. Approval by the ALI, and whether this provision will have any influence on courts, are two very different questions.

Page 57. At the end of note 6, add:

6. Lost profits. . . .

There is a somewhat similar holding in Stern Oil Co. v. Brown, 908 N.W.2d 144 (S.D. 2018). Plaintiff bought gasoline from ExxonMobil and resold it, under a long-term contract, to defendant's two convenience stores. Plaintiff profited by marking up the price it had paid to ExxonMobil, by charging to transport the gasoline to defendant's stores, and by regularly getting a prompt-payment discount from ExxonMobil. Defendant repudiated the contract and quit buying gasoline from plaintiff.

The issue was about the prompt-payment discount. Defendant said loss of this discount was consequential damages, because the discount arose out of the contract with ExxonMobil and not the contract he had breached. He had not known about it at the time of contracting, so he could not be liable for it. The court held that these were direct damages, because they were inherent in the pricing structure in the contract between plaintiff and defendant. Direct damages need not be foreseeable under Hadley v. Baxendale, because they are presumed to be foreseeable. Defendant knew that plaintiff expected a profit from its gasoline sales, and that plaintiff would lose that profit if defendant quit buying. That was enough; contracting parties need not disclose the details of their profit margins to each other. The opinion cites *Biotroniks*, and two other cases recognizing that lost profits might sometimes be direct damages, but finding them consequential on the facts presented.

E. Limits on Damages

1. The Parties' Power to Specify the Remedy

Page 82. At the end of note 5, add:

5. Another confidentiality agreement. . . .

Daniels (legally known as Stephanie Clifford) sued in a California court for a declaration that the hush money agreement was not enforceable. After removing to federal court, the defendants, including President Trump, signed covenants not to sue under the agreement in an effort to moot the case. The effort succeeded, and the court never addressed the enforceability of the liquidated damages provision or any other part of the agreement. The court dismissed for lack of subject matter jurisdiction and remanded to state court defendants' claim that they were entitled to recover

the $130,000 they had paid Daniels for her silence. Clifford v. Trump, 2019 WL 3249597 (C.D. Cal. Mar. 7, 2019). The state court also dismissed the action as moot. It denied costs but awarded Clifford $44,100 in attorneys' fees under a provision in the contract, as interpreted under a California statute. Clifford v. Trump, 2020 WL 4938460 (Cal. Super. Ct. Aug. 17, 2020).

2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources

Page 100. At the end of note 6, add:

6. Matching the collateral source with the damage. . . .

New York's highest court clarified (or limited) *Oden* in Andino v. Mills, 106 N.E.3d 714 (N.Y. 2018). The court in *Andino* held that a retired New York City police officer's accident disability retirement benefits were a collateral source that a court must offset against the injured retiree's jury award for future lost earnings and pension. "*Oden* does not require a direct match between the jury's damage award and the collateral source in the sense that there must be an exact dollar equivalence, but only that the collateral source replace a category of loss reflected in the jury award." *Id.* at 721. The disability pension in *Oden* did not match lost salary, because plaintiff was free to work while receiving that pension. But in *Andino*, plaintiff was not free to work while receiving a disability pension, until she reached normal retirement age. So the disability pension replaced lost salary up to normal retirement age and replaced regular pension after normal retirement age.

5. The Requirement of Reasonable Certainty

Page 133. At the end of note 7, add:

7. Missing evidence. . . .

After the appeals court provided a roadmap for plaintiff to prove lost future earning capacity, and the plaintiff followed that map at the second trial, the second jury on remand awarded $5.3 million in damages. Licudine v. Cedars-Sinai Medical Center, 242 Cal. Rptr. 3d 76 (Ct. App. 2019). Plaintiff unsuccessfully appealed the denial of prejudgment interest and defendant did not appeal the second award.

F. Taxes, Time, and the Value of Money

1. The Impact of Taxes

Page 141. At the end of note 2, add:

2. Payroll taxes. . . .

The Supreme Court appears to have resolved the dispute in BNSF Railway Co. v. Loos, 139 S. Ct. 893 (2019). Michael Loos, a BNSF employee, was injured on the job. He sued under the FELA, and a jury awarded him $126,212.78, of which $30,000 was attributable to wages lost during the time Loos was unable to work. The Court held that FELA damages awarded for lost wages are taxable as compensation under the Railroad Retirement Tax Act, 26 U.S.C. §3201 *et seq*. That Act, and its companion, the Railroad Retirement Act, 45 U.S.C. §231 *et seq.*, create a separate retirement system for railroad workers that substitutes for Social Security. BNSF was required to withhold $3,765 in railroad retirement taxes from the judgment. And contrary to the

assumption in note 2 in the main volume, the Court strongly implied that Social Security taxes would be treated the same way. Justices Gorsuch and Thomas dissented.

3. The Net Present Value of Future Damages

Page 159. At the end of note 14, add:

14. Lessons learned?. . . .

Robert Rabin uses Feinberg's administration of the 9/11 Victims' Compensation Fund as a jumping off point for considering the tort system and alternatives for handling natural and human-caused disasters. Robert Rabin, *Some Thoughts on Compensation and Remedial Relief for Disasters in the American Legal System*, 115 Nw. U.L. Rev. 306 (2020). He concludes: "Arguably, the most effective strategies for compensating disaster victims are mixed, hybrid approaches that combine backstop public assistance—a more effective FEMA—with first-party public/private insurance in *natural disaster* scenarios (involving primarily property loss); and public assistance coupled with tort in scenarios of *responsible party disasters*." *Id*. at 321.

G. Damages Where Value Cannot Be Measured in Dollars

2. The Controversy over Tort Law

Page 193. At the end of note 2, add:

2. Damage caps. . . .

After many failed attempts, California reformers successfully pushed the California Legislature to update its $250,000 cap on "noneconomic" damages in medical malpractice cases. The limit had been in place since 1975, and had it been adjusted for inflation it would have risen to $1.3 million by 2022. The limit in cases not involving death will increase to $350,000 in 2023, and then by $40,000 a year until it reaches $750,000 in 2033, and then by two percent per year thereafter. In wrongful death cases, the limit will increase to $500,000 in 2023 and then by $50,000 a year until it reaches $1 million in 2033, and then by two percent a year beginning in 2034. 2022 Cal. Legis. Serv. ch. 17, to be codified at Cal. Civil Code §3333.2.

Page 194. At the end of note 6, add:

6. Counting jurisdictions. . . .

More recently the Kansas court overruled an earlier decision and struck down a $250,000 cap on "noneconomic damages" for personal injury. Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

3. Dignitary and Constitutional Harms

Page 216. After note 5, add:

6. Civil rights claims under Spending Clause statutes. The Supreme Court held that a plaintiff alleging disability discrimination by a medical provider and suing under the Rehabilitation Act and the Affordable Care Act cannot recover damages for emotional distress. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022). The relevant anti-discrimination provisions of these statutes apply only to defendants who accept federal funds. The Court has held

that submitting to regulation in exchange for funding forms a sort of contract, so that the appropriate remedies for violation are contract remedies. Barnes v. Gorman, 536 U.S. 181 (2002), summarized at 572 of the main volume and holding that punitive damages are unavailable.

Relying on *Barnes*, the Supreme Court held that emotional distress damages are generally not available in contract, and that it did not have to follow the exception for contracts where breach is especially likely to cause emotional distress because that exception was not the consensus among jurisdictions applying contract law. Therefore, the recipient of federal funds was not on notice of the potential liability. The Supreme Court's decision will likely apply to other Spending Clause statutes, including Title VI on racial discrimination and Title IX on sex discrimination in education. Justices Breyer, Sotomayor, and Kagan dissented.

Page 221. At the end of note 2, add:

2. Proving the damages. . . .

Apart from the occasional plaintiff who succeeds in proving emotional distress, *Carey* has given rise to a large body of law that greatly favors government defendants. Government employees who are fired without the procedures they were promised, and a wide range of other plaintiffs who lose alleged rights or government benefits without a hearing, generally must prove that they would have succeeded at the hearing in order to collect more than nominal damages. A recent example is Nnebe v. Daus, 306 F. Supp. 3d 552, 557 & n.1 (S.D.N.Y. 2018), awarding nominal damages for summary revocation of taxi-driver licenses. The Second Circuit remanded the case for the trial court to consider a question related to class certification. Nnebe v. Daus, 931 F.3d 66, 88 n.26 (2d Cir. 2019). The court wrote that while it did not "express [any] view on the class certification and damages issues, [it] note[s] that the deprivation of a hearing alone does not necessarily proximately cause a loss of income, since a hearing in a particular case may well have led to a continued suspension in any event."

A few state courts have rejected *Carey* in cases of employees fired without the procedures promised in their employment contract. The Utah court feared that under *Carey*

> the employer could discharge an employee summarily and then omit or delay the contractual termination procedures with impunity so long as it was in possession of evidence which, when ultimately provided, would justify the discharge. In that circumstance, the employee, without notice of the reason for his dismissal and without any opportunity to refute the charges, would remain in an indefinite and painful state of limbo, uncertain about his ultimate right to reinstatement or back pay.

Piacitelli v. Southern Utah State College, 636 P.2d 1063, 1069 (Utah 1981). We owe these examples, and greater awareness of the volume of government-employee cases, to Stephen Yelderman, *Damages for Privileged Harms*, 106 Va. L. Rev. 1569 (2020). The idea is that the suspension in *Carey* was likely "privileged," because unless the student could have prevailed at the hearing, the school could have inflicted that harm without violating the law. Compare Justice Frankfurter's argument about *Bigelow*, in the main volume at 130.

CHAPTER THREE

PUNITIVE REMEDIES

A. Punitive Damages

1. Common Law and Statutes

Page 240. At the end of note 8, add:

8. Other federal claims. . . .

The Court in *Exxon* permitted the award of punitive damages under the general maritime law (though it was equally divided on whether a corporation could be held vicariously liable for managerial conduct). In Dutra Group v. Batterton, 139 S. Ct. 2275 (2019), however, the Court held that punitive damages were not available in some maritime cases. Batterton, who worked on Dutra Group's vessel, suffered a disabling injury to his hand, and he brought an "unseaworthiness" claim, which today has evolved into a kind of strict liability claim. The Court rejected punitive damages for unseaworthiness claims, holding the historic lack of punitive damages in such cases "practically dispositive."

In Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020), the Supreme Court unanimously upheld the imposition of $4.3 billion in punitive damages against the Republic of Sudan for its actions in materially supporting the 1998 Al Qaeda terrorist bombings of United States embassies in Kenya and Tanzania. At the time of the bombings, the Foreign Sovereign Immunities Act barred punitive damages claims even against states that were sued for violating federal law by supporting acts of terrorism. Congress later changed federal law to expressly allow punitive damages in such cases. Sudan argued as a matter of statutory interpretation that the amended law could not be applied retroactively. The Court disagreed, noting that Congress in its later statutes clearly and expressly authorized punitive damages in suits for past state-sponsored terrorist conduct. Sudan had argued against retroactivity citing constitutional concerns; the Court responded that Sudan should have raised any constitutional arguments directly.

2. The Constitution

Page 253. At the end of note 3, add:

3. Ratios again. . . .

A new study of 167 punitive damages awards over $100 million each finds that the ratios imposed in cases such as *Campbell* give little predictability to the award of punitive damages in these cases. Benjamin J. McMichael & W. Kip Viscusi, *Bringing Predictability to the Chaos of Punitive Damages*, Ariz. St. L.J. (forthcoming 2022), *draft available*, https://papers.ssrn.com/abstract_id=3991214. The authors suggest a set ratio of 3:1 except for cases involving personal injury or death.

Page 253. After note 5, add:

5.1. The Johnson & Johnson litigation. Consumer products manufacturer Johnson & Johnson has been plagued by lawsuits alleging that its baby powder causes cancer. J&J says its product is

safe and that the lawsuits are based on bad science, but it has taken the product off the market in the United States. It still sells its baby powder elsewhere in the world.

In Ingham v. Johnson & Johnson, 608 S.W.3d 663 (Mo. Ct. App. 2020), the court upheld $25 million in compensatory damages for each of 20 women—$500 million in total—who said they had used J&J's baby powder and contracted ovarian cancer as a result. The court also upheld punitives equal to 5.72 times compensatories against J&J, plus another 1.8 times compensatories against a subsidiary. The subsidiary was liable to all the plaintiffs, J&J to only some, so the total judgment is more than $1.6 billion. Thousands of other claims remain outstanding.

The court said ratios of punitives to compensatories considerably greater than one were justified, despite the large compensatories, because J&J's behavior had been highly reprehensible, and because J&J's vast net worth—$63.2 billion—made large judgments necessary to deter. The state supreme court declined to take the case, and the Supreme Court denied J&J's cert petition. 141 S. Ct. 2716 (2021).

Page 254. At the end of note 6.a, add:

a. The Florida tobacco litigation. . . .

The Supreme Court again refused to hear an appeal raising due process claims related to the use of factual findings from the class action against the tobacco companies in individual follow-on cases. Philip Morris USA Inc. v. Boatwright, 217 So. 3d 166 (Fla. Dist. Ct. App. 2017), *cert. denied*, 139 S. Ct. 1263 (2019). As of early 2019, about 2,300 individual cases remained from the former *Engle* class members. Martina Barash, *Philip Morris, Other Tobacco Companies Rebuffed Again by SCOTUS*, Bloomberg L. (Feb. 25, 2019). The Eleventh Circuit upheld as not excessive a verdict of $15.8 million in compensatory damages and $25.3 million in punitives, divided between two tobacco companies. Kerrivan v. R.J. Reynolds Tobacco Co., 953 F.3d 1196 (11th Cir. 2020). The opinion collects other large verdicts in *Engle* follow-on cases for purposes of comparative review.

B. Other Punitive Remedies

2. Civil Penalties Payable to the Government

Page 270. At the end of note 4, add:

4. The Excessive Fines Clause. . . .

d. Against the states. In Timbs v. Indiana, 139 S. Ct. 682 (2019), the Supreme Court unanimously held that the Eighth Amendment's Excessive Fines Clause is incorporated against the states, meaning that defendant could invoke the Clause to challenge the penalties imposed on him. The Court called the protection against excessive fines

> a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money."

Id. at 689 (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)). The Stuarts were the absolutist British kings of the seventeenth century who provoked two revolutions and one regicide. Simon Jenkins, *A Short History of England: The Glorious Story of a Rowdy Nation* 132-146 (New York: Public Affairs, 1st ed. 2011). Indiana did not argue seriously against incorporation. Instead, it argued that the Court should overrule *Austin*'s holding that in rem forfeitures fall within the Clause's protection when they are at least partially punitive. The Court held that this question was not properly before it.

Timbs was caught transporting a small quantity of illegal drugs in his Land Rover, and he forfeited the vehicle. On remand, the Indiana Supreme Court first held that the forfeiture was at least partially punitive, and it remanded to the trial court to determine if the forfeiture was proportionate under a multifactor test. State v. Timbs, 134 N.E.3d 12 (Ind. 2019). On the state's ensuing appeal, the court held that forfeiture of a $35,000 asset, which was defendant's only significant asset, was disproportionate to the offense and therefore excessive. The court agreed with Timbs that the seriousness of the offense should be measured by the sentence actually imposed rather than the statutory maximum. State v. Timbs, 169 N.E.3d 361 (Ind. 2021). For commentary on the appropriate test, see Wesley Hottot, *What Is An Excessive Fine? Seven Questions to Ask After* Timbs, 72 Ala. L. Rev. 581 (2021).

The Supreme Court of Washington held that Seattle violated the Excessive Fines Clause when it seized a truck in which a homeless man was living. The city towed the truck for being parked in the same spot for more than 72 hours. It issued a $44 ticket and charged $946 for the alleged cost of towing the truck. A magistrate waived the ticket and reduced the towing fee to $547. The Supreme Court of Washington held that the clause applied and that *Timbs* requires the court to take account of his personal financial circumstances in considering whether the fine is excessive. City of Seattle v. Long, 493 P.3d 94 (Wash. 2021). *Timbs* quoted Blackstone to that effect but did not decide the question. The state supreme court also quoted Blackstone.

CHAPTER FOUR

PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF

A. The Scope of Injunctions

1. Preventing Wrongful Acts

Page 288. After note 4, add:

5. The continuing battle over universal injunctions. As states and other opponents of the Trump Administration sought nationwide or universal injunctions against Trump Administration policies, both Vice President Mike Pence and Attorney General Bill Barr spoke out against nationwide injunctions, and the Trump Administration asked the Supreme Court to block or limit their use. The Trump Department of Justice also issued a memorandum instructing DOJ lawyers to oppose their use. Memorandum from the Attorney General, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018).

Echoing Justice Thomas's concurring opinion in *Trump*, Justice Gorsuch, joined by Justice Thomas, expressed serious doubts about the power of courts to issue universal injunctions:

> Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.
>
> It has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice. As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions. Rather than spending their time methodically developing arguments and evidence in cases limited to the parties at hand, both sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes, and all based on expedited briefing and little opportunity for the adversarial testing of evidence.
>
> This is not normal. Universal injunctions have little basis in traditional equitable practice. Their use has proliferated only in very recent years. And they hardly seem an innovation we should rush to embrace. By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions. The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process.

> The rise of nationwide injunctions may just be a sign of our impatient times. But good judicial decisions are usually tempered by older virtues.
>
> Nor do the costs of nationwide injunctions end there. There are currently more than 1,000 active and senior district court judges, sitting across 94 judicial districts, and subject to review in 12 regional courts of appeal. Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide. The risk of winning conflicting nationwide injunctions is real too. And the stakes are asymmetric. If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice—possibly for good, or just as possibly for some indeterminate period of time until another court jumps in to grant a stay. And all that can repeat, *ad infinitum*, until either one side gives up or this Court grants certiorari. What in this gamesmanship and chaos can we be proud of?

Department of Homeland Security v. New York, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring in the grant of a stay).

Scholarly debate continues as well. See, for example, Howard Wasserman, *Congress and Universal Injunctions*, 43 Cardozo L. Rev. De Novo 187 (2021); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020); Samuel Bray, *A Response to the Lost History of the "Universal" Injunction*, Yale J. Reg.: Notice & Comment (Oct. 6, 2019); Mila Sohoni, *A Reply to Bray's Response to The Lost History of the "Universal" Injunction*, Yale J. Reg.: Notice & Comment (October 10, 2019); Michael T. Morley, *Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni*, 72 Ala. L. Rev. 239 (2020); Howard Wasserman, *"Nationwide" Injunctions are Really "Universal" Injunctions and They are Never Appropriate,* 22 Lewis & Clark L. Rev. 335 (2018). The Colorado Law Review has published a symposium with six articles on nationwide injunctions, beginning at 91 U. Colo. L. Rev. 779 (2020).

The Supreme Court ducked the issue in Department of Homeland Security v. Regents of the University of California, 140 S. Ct. 1891 (2020). This was the decision vacating the Trump Administration's repeal of regulations protecting from deportation young adults who were brought into the country as children and who lacked legal immigration status. Two lower courts had issued nationwide injunctions against enforcement of the repeal; a third lower court simply vacated the repealing regulation under the Administrative Procedure Act. The Supreme Court affirmed this third judgment, and said that because the repeal had been vacated, it was "unnecessary to examine the propriety of the nationwide scope of the injunctions" in the other two cases. *Id.* at 1916 n.7. Justice Ginsburg, joined by Justice Sotomayor, endorsed the power to "set aside agency action" as a basis for universal injunctions in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2412 n.28 (2020) (Ginsburg, J., dissenting).

A large fraction of federal policies subject to legal challenge are initiated by agencies issuing regulations subject to the Administrative Procedure Act. If vacating such a regulation has the same effect as a nationwide injunction, but is not subject to the same analysis, this would seem to open an enormous loophole in any efforts the Court may make to limit nationwide injunctions. Professor Harrison addresses this potential loophole in John C. Harrison, *Section 706 of the Administrative*

Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies, 37 Yale J. Reg. Bulletin 37 (2020).

A footnote in a Supreme Court case discussing the severability of an unconstitutional provision of a federal law barring automated "robocalls" to cell phones, except calls attempting to recover debt owed to the government, suggests another limitation on the debate of universal injunctions:

> The term "invalidate" is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, however, when it "invalidates" a law as unconstitutional, the Court of course does not formally repeal the law from the U.S. Code or the Statutes at Large. Instead, in Chief Justice Marshall's words, the Court recognizes that the Constitution is a "superior, paramount law," and that "a legislative act contrary to the constitution is not law" at all. Marbury v. Madison, 1 Cranch 137, 177 (1803). The Court's authority on this front "amounts to little more than the negative power to disregard an unconstitutional enactment." Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).
>
> Justice THOMAS's thoughtful approach to severability . . . would simply enjoin enforcement of a law as applied to the particular plaintiffs in a case. Under either the Court's approach or Justice THOMAS's approach, an offending provision formally remains on the statute books (at least unless Congress also formally repeals it). Under either approach, the formal remedy afforded to the plaintiff is an injunction, declaration, or damages. One difference between the two approaches is this: Under the Court's approach, a provision is declared invalid and cannot be lawfully enforced against others. Under Justice THOMAS's approach, the Court's ruling that a provision cannot be enforced against the plaintiff, plus executive respect in its enforcement policies for controlling decisional law, plus vertical and horizontal *stare decisis* in the courts, will mean that the provision will not and cannot be lawfully enforced against others. The Court and Justice THOMAS take different analytical paths, but in many cases, the different paths lead to the same place.

Barr v. American Association of Political Consultants, 140 S. Ct. 2335, 2351 n.8 (2020). This was written in the context of a Supreme Court decision, which of course has instant and nationwide effect as precedent. The opinion of a single district judge is not binding precedent on anybody, and the government does not necessarily accept such a decision as a governing rule of law. The government will comply with the terms of an injunction, and it matters whether those terms protect the plaintiff in the case or everyone similarly situated.

More recently, Chief Judge of the Sixth Circuit Jeffrey Sutton weighed in with his skepticism of universal injunctions in a case in which states challenged Biden Administration immigration rules and policies:

> Call them what you will—nationwide injunctions or universal remedies—they seem to take the judicial power beyond its traditionally understood uses, permitting district courts to order the government to act or refrain from acting toward nonparties in the case. The law already has a mechanism for applying a judgment to third parties. That is the role of class actions, and Civil Rule 23 carefully lays out the procedures for permitting a district court to bind nonparties to an action. Nationwide injunctions sometimes give States victories they did not earn and

> sometimes give States victories they do not want. They always sidestep Rule 23's requirements.
>
> Such injunctions create practical problems too. The effect of them is to prevent the National Government from enforcing a rule or executive order without (potentially) having to prevail in all 94 district courts and all 12 regional courts of appeals. They incentivize forum shopping. They short-circuit the decision-making benefits of having different courts weigh in on vexing questions of law and allowing the best ideas to percolate to the top. They lead to rushes to judgment. And all of this loads more and more carriage on the emergency dockets of the federal courts, a necessary feature of any hierarchical court system but one designed for occasional, not incessant, demands for relief.
>
> At a minimum, a district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government. Even if it turns out that the three States in this case are entitled to relief, it is difficult to see why an injunction applicable only to them would not do the trick.

Arizona v. Biden, 41 F.4th 469, 483-484 (6th Cir. 2022) (Sutton, C.J., concurring).

Page 293. At the end of note 9, add:

9. Nominal damages. . . .

The Supreme Court rejected the Eleventh Circuit's rule in Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021). The facts were parallel to those in *Flanagan*. Campus police stopped plaintiff from distributing religious literature outside a college's "free-speech zone." Plaintiff sued for an injunction and damages; the college abandoned its restrictive policy. The lower courts held that the claims for an injunction and nominal damages were moot, and that plaintiff had not adequately pleaded compensatory damages. The cert petition presented only the nominal damages claim, and specifically the question whether a plaintiff loses standing if all that remains is a nominal damages claim for retrospective relief.

On an 8-1 vote, the Court held that the claim for nominal damages was not moot, and that seeking nominal damages satisfies the redressability requirement of Article III standing. Citing this casebook for the proposition that nominal damages were an early way of obtaining a form of declaratory judgment, Justice Thomas for the Court noted that there was no dispute that nominal damages could provide a predicate for seeking prospective relief. "For example, a trespass to land or water rights might raise a prospective threat to a property right by creating the foundation for a future claim of adverse possession or prescriptive easement." *Id.* at 798. But there is a greater dispute in the historical record on whether nominal damages may be used for purely retrospective relief, such as damages. The Court held that the better reading of the history was to allow retrospective claims.

> A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation. See D. Dobbs, Law of Remedies §3.3(2) (3d ed. 2018) (nominal damages are often awarded for a right "not economic in character and for which no substantial non-pecuniary award is available"); see also *Carey v. Piphus* [p. 216 of the main volume—EDS.] (awarding nominal damages for a violation of procedural due process). By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the

> common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.

Id. at 800.

Chief Justice Roberts dissented, and Justice Kavanaugh in a concurring opinion suggested that a defendant could moot a claim for nominal damages by offering plaintiff a dollar. Would such a gambit work? "Time will tell." Douglas Laycock, *Supreme Court Says a Claim for Nominal Damages Avoids Mootness—But When Does That Matter?*, ALI Adviser (Mar. 22, 2021) [https://perma.cc/P5G5-PTH6]. For an argument against allowing this strategy because it would undermine the vindication purpose of some nominal damages awards in §1983 litigation, see Michael L. Wells, Uzuegbunam v. Preczewski*, Nominal Damages, and the Roberts Stratagem*, Ga. L. Rev. (forthcoming 2022), *draft available*, https://papers.ssrn.com/abstract_id=3911184.

On remand, defendants attempted to deposit $1.00 with the court and have the case dismissed as moot. The court denied these motions, citing a number of cases rejecting similar efforts to moot class actions by depositing with the court enough money to compensate the named plaintiff. See note 10 in the main volume. The opinion on remand is Uzuegbunam v. Preczewski, 2021 WL 6752235 (N.D. Ga. Dec. 22, 2021). The case then settled for nominal damages plus attorneys' fees totaling more than $800,000. See the account from plaintiff's lawyers at https://perma.cc/G84A-UWQE.

Page 293. After note 10, add:

11. Voluntary cessation to avoid a bad precedent. The Supreme Court had granted cert in New York State Rifle & Pistol Association v. City of New York, 140 S. Ct. 1525 (2020), to consider whether a provision of New York City gun laws violated gun owners' Second Amendment rights. After the cert grant, New York City amended its rules to allow the conduct at issue in the lawsuit, no doubt to avoid a likely adverse ruling at the Court. The Court held that the city's conduct mooted the case and remanded to the lower courts for further proceedings, including a possible damages claim. Justice Alito, joined by Justice Gorsuch and in part by Justice Thomas, dissented, accusing the majority of allowing its docket to be "manipulated." *Id*. at 1527 (Alito, J., dissenting). Alito claimed the decision was not moot for two reasons. "First, the changes in City and State law do not provide petitioners with all the injunctive relief they sought. Second, if we reversed on the merits, the District Court on remand could award damages to remedy the constitutional violation that petitioners suffered." *Id*. at 1528.

The case was a preview of things to come. The Court soon thereafter denied cert in 10 cases raising Second Amendment questions. Adam Winkler, *John Roberts May Not Be the Ally Gun-Rights Advocates Hoped For*, The Atlantic (June 16, 2020). Justice Thomas, joined in part by Justice Kavanaugh, dissented from the denial of cert in one of them. Rogers v. Grewal, 140 S. Ct. 1865 (2020).

After Justice Amy Coney Barrett replaced Justice Ruth Bader Ginsburg, the Court heard another Second Amendment case and invalidated a different restriction, this one from New York state, on licenses for those who wish to carry concealed weapons out of the home. New York State Rifle & Pistol Association v. Bruen, 2022 WL 2251305 (U.S. June 23, 2022).

12. Another Supreme Court example. The Court relied on the voluntary cessation doctrine to reach the merits in West Virginia v. Environmental Protection Agency, 2022 WL 2347278 (U.S. June 28, 2022). In the Obama years, the EPA issued a set of regulations it called its Clean Power

Plan. In the Trump years, the EPA issued its own less demanding regulations that repealed the Clean Power Plan. Multiple litigants sued, and the D.C. Circuit vacated the Trump regulations. American Lung Association v. Environmental Protection Agency, 985 F.3d 914 (D.C. Cir. 2021).

The EPA under the Biden Administration asked the D.C. Circuit to stay its mandate insofar as it reinstated the Clean Power Plan, and announced its intention to craft a new set of regulations. Meanwhile, West Virginia and others successfully petitioned for certiorari. The Court held that the case was not moot. The EPA had not promised that its new regulation would not include the substance of the provisions that West Virginia was challenging. The burden of proving mootness is on the party asserting mootness, and "That burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct.'" 2022 WL 2347278 at *11, quoting Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000).

2. Preventing Lawful Acts That Might Have Wrongful Consequences

Page 302. At the end of note 4, add:

4. The concept of prophylactic relief. . . .

President Trump pardoned Levandowski before leaving office, reportedly at the urging of Silicon Valley venture capitalist Peter Thiel. Theodore Schleifer, *Trump Issued a Pardon for the Man at the Center of an Epic Fight Between Google and Uber*, Recode (Jan. 20, 2021).

Page 305. At the end of note 9, add:

9. Meeting your friends? . . .

California is moving away from the use of gang injunctions in the face of falling crime rates and criticism of their overbreadth. James Queally, *California Moving Away from Gang Injunctions Amid Criticism, Falling Crime Rates*, L.A. Times (July 8, 2018).

4. Institutional Reform Litigation (Structural Injunctions)

Page 325. At the end of the runover paragraph at the top of the page, add:

INTRODUCTORY NOTE: THE SCHOOL DESEGREGATION CASES . . .

For a retrospective on the 50th anniversary of the *Swann* decision, see Ann Doss Helms, *50 Years After Swann Ruling, The Legacy of CMS Desegregation Shows Up in Changed Lives*, WFAE (Apr. 20, 2021) [https://perma.cc/WF93-Z48V].

CHAPTER FIVE

CHOOSING REMEDIES

A. Substitutionary or Specific Relief

1. Irreplaceable losses

a. Injunctions

Page 397. After note 1.f, add:

g. Death. Death of course is the ultimate irreparable injury, or so it would seem. A death row inmate in federal prison, Wesley Ira Purkey, filed a last-minute request for a preliminary injunction blocking his execution, arguing that the method of execution was unconstitutional. In arguing for the execution to go forward, the Department of Justice challenged Purkey's claim of irreparable injury: "While there is no question that Purkey will not be able to litigate the merits of his claims should his scheduled execution proceed, it is not clear that would constitute irreparable harm in the context of a challenge to the method of execution—rather than to the lawfulness of the execution itself." Defendants' Opposition to Plaintiff Wesley Ira Purkey's Motion for a Preliminary Injunction at 1, https://www.scribd.com/document/436130893/DOJ-opposition-to-stay-of-execution-Purkey, in Roane v. Barr (In the Matter of the Fed. Bureau of Prisons' Execution Protocol Cases), 2019 WL 6691814 (D.D.C Nov. 20, 2019). The DOJ also argued that even if there were irreparable injury, a preliminary injunction was inappropriate, because Purkey was not likely to succeed on the merits of his challenge to the execution protocol.

A federal district court blocked the execution of Purkey and four other inmates. Roane v. Barr (In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases), 2019 WL 6691814 (D.D.C. Nov. 20, 2019). The court rejected the government's argument on irreparable injury. "Here, absent a preliminary injunction, Plaintiffs would be unable to pursue their claims, including the claim that the 2019 Protocol lacks statutory authority, and would therefore be executed under a procedure that may well be unlawful. This harm is manifestly irreparable." *Id*. at *7. It also rejected the government's argument on likelihood of success on the merits. The government then sought a stay first from the D.C. Circuit then from the Supreme Court. Both denied relief, but the Supreme Court directed the D.C. Circuit to decide the government's appeal "with appropriate dispatch." Barr v. Roane, 140 S. Ct. 353, 353 (2019). On the merits, the D.C. Circuit on a 2-1 vote reversed the district court, issuing three different opinions. Roane v. Barr (In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases), 955 F.3d 106 (D.C. Cir. 2020). The appellate opinions did not address the issue of irreparable harm. The Supreme Court denied a stay and cert, paving the way for federal executions to restart. Justices Ginsburg and Sotomayor dissented on the stay and cert denial. Bourgeois v. Barr, 141 S. Ct. 180 (2020).

Purkey was executed in July 2020, among the 13 federal prisoners executed after this ruling and before the end of the Trump Administration. "The number of federal death sentences carried out under Trump since 2020 is more than in the previous 56 years combined, reducing the number of prisoners on federal death row by nearly a quarter. It's likely none of the around 50 remaining men will be executed anytime soon, if ever, with Biden signaling he'll end federal executions."

Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th And Final Execution*, Associated Press (Jan. 15, 2021).

b. Specific performance of contracts

Page 408. At the end of note 13, add:

13. Business preferences. . . .

A more recent study of over 1,000 merger and acquisition contracts found that more than 85 percent of them, in the years 2010-2019, included a clause requiring specific performance of contract. See Theresa Arnold et al., *"Lipstick on a Pig": Specific Performance Clauses in Action*, 2021 Wis. L. Rev. 359 (2021).

In 2022, Billionaire Elon Musk promised to buy Twitter for $44 billion, but then tried to back out, arguing that Twitter failed to reveal certain information about the number of computer "bots" on its platform and that this failure constituted a material breach of contract. Twitter has sued Musk for specific performance in the Delaware Court of Chancery, citing a specific performance clause in its contract.

14. A confession of error.

Dean Robert E. Scott, now Professor Emeritus at Columbia, was one of the founders of the law and economics movement. He was not the first to propose the idea of efficient breach, but he promoted the idea and he coined the phrase. In an admirable, even remarkable, example of academic integrity, he has confessed error. After briefly reviewing the early literature on efficient breach, and his article, co-authored with Charles Goetz, in which he first used the phrase, he said:

> It was a nice try but, in fact, the theory does not fit the data very well. There are very few examples in the case law of an efficient breach in which one party has chosen not to perform and instead offered to pay the expectation damages that are subsequently assessed by a court. What commercial parties do who wish to reserve an option on the contract performance is to stipulate in the contract an exercise price for the option to terminate and walk away from the contemplated exchange. The option may take the form of "break up" fees, a stipulated damages clause, or a term that permits one party to terminate, cancel, return, or redeem goods. What parties do not do, however, is to leave the exercise price to be determined at the discretion of a court following a declaration of contract breach. In that sense, *efficient breach is both a null set as well as an oxymoron*. So, while we meant well, Goetz and I are probably primarily responsible for leading a generation of scholars down the wrong garden path.

Robert E. Scott, *Contract Design and the Shading Problem*, 99 Marquette L. Rev. 1, 10-11 (2015) (emphasis added).

2. Burdens on Defendant or the Court

Page 429. At the end of note 5, add:

5. The legal remedy: a $31-million verdict. . . .

As of January 2022, the White Flint mall property remains undeveloped. Bryan P. Sears, *Erlich Wants to Replace Development Impact Fees with Targeted Tax Plan*, Maryland Daily Record (Jan.

31, 2022). Lord & Taylor closed its White Flint property in 2020, Dan Schere, *Lord & Taylor Closing in White Flint After Company Files for Bankruptcy*, Bethesda Mag. (Aug. 4, 2020), and the company closed all its stores in 2021, Nathan Bomey, *Lord & Taylor Going Out of Business: Store Closings, Liquidation Sales Begin*, USA Today (Aug. 27, 2020). So much for projecting the future of the mall and store out to 2042 or 2057. Even if the court had ordered specific performance of the contract, Lord & Taylor would have been able to reject the contract in its bankruptcy and release its rights under the specific performance decree.

3. Other Policy Reasons

Page 434. At the end of note 1, add:

1. Irreplaceable and hard to measure?. . . .

A divided Pennsylvania Supreme Court upheld an injunction that barred a mother from speaking publicly about her bitter custody dispute in any way that would allow anyone to learn the identity of the child. S.B. v. S.S., 243 A.3d 90 (Pa. 2020). The majority rejected the argument that the gag order violated the First Amendment. None of the opinions in the case cited *Willing*.

Willing was much discussed in Constantakis v. Bryan Advisory Services, LLC, 2022 WL 1417282 (Pa. Super. Ct. May 5, 2022), but for its prior restraint holding, not its irreparable injury holding. Plaintiffs and defendants were in business as investment advisers; plaintiffs were the principals of an affiliate of the corporate defendant. Plaintiffs sought to separate from defendants and become an independent company; defendants accused them of wrongdoing in regulatory filings with the Securities and Exchange Commission. These filings brought plaintiffs' business to an effective halt.

The Court of Common Pleas found, in a two-day preliminary injunction hearing, that there was no basis for the charges of misconduct. It ordered defendants to amend the regulatory filings to conform to the court's fact finding, and to refrain "from making false, unsubstantiated, and defamatory statements" about plaintiffs. Id. at *10. The Superior Court vacated the preliminary injunction against future false statements as a prior restraint, citing *Willing*. But it affirmed the order to correct the regulatory filings, holding that this was a subsequent remedy and not a prior restraint.

The Superior Court also affirmed a finding of irreparable injury, because the false statements were destroying plaintiffs' business; this part of the opinion had nothing of substance to say about *Willing*. And it held that the right to jury trial had not been violated, because the injunction was only preliminary, and there could still be a jury trial before a final judgment. The discussion of jury trial did not appear to distinguish between a claim for damages and a claim for a permanent injunction.

Page 436. At the end of note 3, add:

3. Prior restraints against unprotected speech. . . .

John Bolton, a former National Security Advisor for President Trump, wrote a critical book, *The Room Where It Happened*, about his experiences working for the Trump Administration. Bolton clashed with the government over a prepublication security review of the material in his book, with Bolton alleging that he had satisfied all the reviewer's objections and that the review was then held up for political reasons. After his publisher had announced that the book would soon be on sale, after the book had been shipped to bookstores around the world, and after advance

copies of the book had been shared widely with the media, the government sought an order against Bolton, seeking to have him direct his publisher to stop distribution and collect all copies of the book.

A federal district court denied a TRO against publication of the book, even though it found that the government was likely to succeed in showing that Bolton violated the law by publishing the book before prepublication review was completed. The court held that the government could not show that an injunction would prevent irreparable injury, because it was too late to retrieve the book. "Reviews of and excerpts from the book are widely available online. As noted at the hearing, a CBS News reporter clutched a copy of the book while questioning the White House press secretary. By the looks of it, the horse is not just out of the barn—it is out of the country." United States v. Bolton, 468 F. Supp. 3d 1, 6 (D.D.C. 2020).

Although the court framed its order in terms of lack of irreparable injury, it also could have written that the request was moot (see pages 290-293 in the main volume), or that it was barred by laches, a doctrine taken up in Chapter 11, which allows courts to deny requests for equitable relief that come too late. The court also alluded to the First Amendment implications of the government's requested order. "For reasons that hardly need to be stated, the Court will not order a nationwide seizure and destruction of a political memoir." *Id.* at 6. And it concluded that it should not issue a "toothless" injunction. *Id.* at 7.

The Biden Administration abandoned the case, and it was dismissed. Michael S. Schmidt & Katie Benner, *Justice Dept. Ends Criminal Inquiry and Lawsuit on John Bolton's Book*, N.Y. Times (June 16, 2021). Before dismissal, the government was seeking a constructive trust over all of Bolton's profits from the book, a remedy taken up in Chapter 8. In a famous earlier case involving breach of a prepublication review requirement for books by former CIA agents, the Supreme Court approved such a constructive trust remedy. Snepp v. United States, 444 U.S. 507 (1980).

Page 438. At the end of note 6, add:

6. Developments in the lower courts. . . .

Professor Volokh counts 31 states and five federal circuits that allow anti-libel injunctions in at least some circumstances. Eugene Volokh, *Anti-Libel Injunctions*, 168 U. Pa. L. Rev. 73, 137 app. A. (2019). As a matter of both First Amendment law and sound policy, Volokh recommends what he terms a "hybrid permanent injunction" against libelous speech. In the context of his example of Don having falsely accused Paula of cheating him, Volokh favors an injunction along the lines of "Don may not libelously accuse Paula of cheating him." He believes that such an injunction, by including the term "libelously," would have a "narrower chilling effect" and would not allow Don to be "punished for criminal contempt unless, at the contempt hearing, his speech is found to be libelous." He would not allow the findings in the proceeding that issued the injunction to be claim or issue preclusive in the contempt proceeding, and he would not allow the use of imprisonment in coercive civil contempt. He would require a jury trial for imprisonment in criminal contempt, and he would require a jury trial either at the injunction stage or the contempt stage before any fines in coercive civil contempt. These safeguards would graft significant free-speech exceptions on to the existing law of contempt, briefly summarized at pages 276-277 of the main volume and explored in depth in Chapter 9.

Page 438. At the end of note 7, add:

7. Are prior restraints special? . . .

In Sindi v. El-Moslimany, 896 F.3d 1 (1st Cir. 2018), the First Circuit unanimously upheld the trial court's remitted damage award of $720,000 for claims that included defamation and intentional infliction of emotional distress resulting from false statements about the credentials and work of a scientist. On a 2-1 vote, however, the court reversed a permanent injunction barring the defendants from uttering six false statements about the defendant, including the statement that plaintiff was fraudulently awarded her Ph.D. Judge David Barron, dissenting in part, believed that defendants had not adequately preserved on appeal their objection to the injunction. He saw no "reason for the majority to address these debatable and defaulted First Amendment arguments when the majority suggests that the much less consequential, albeit still defaulted, argument that the record did not show that an injunction was necessary to prevent irreparable harm could on its own suffice to justify the invalidation of the injunction." *Id*. at 49. Wouldn't continued repetition of false statements that had already damaged plaintiff's reputation and cost her a job and other opportunities count as irreparable harm?

In Shak v. Shak, 144 N.E.3d 274 (Mass. 2020), the highest court in Massachusetts reversed an order related to a nasty divorce proceeding barring the ex-couple from posting disparaging comments about each other on social media. The court accepted the argument that the state has a compelling interest in preventing children from being exposed to disparaging comments between their parents but found the order a First Amendment violation.

> Assuming for the sake of discussion that the Commonwealth's interest in protecting a child from such harm is sufficiently weighty to justify a prior restraint in some extreme circumstances, those circumstances do not exist here. No showing was made linking communications by either parent to any grave, imminent harm to the child. The mother presented no evidence that the child has been exposed to, or would even understand, the speech that gave rise to the underlying motion for contempt. As a toddler, the child is too young to be able either to read or to access social media. The concern about potential harm that could occur if the child were to discover the speech in the future is speculative and cannot justify a prior restraint.

Id. at 279-280.

4. eBay Inc. v. MercExchange LLC: A New Federal Standard for Permanent Injunctive Relief?

Page 446. After note 6, add:

6.1. Congress steps in to protect trademarks. The Trademark Modernization Act of 2020 added the following sentence to 15 U.S.C. §1116(a) of the Lanham Act in relation to the availability of injunctions in trademark cases: "A plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection in the case of a motion for a permanent injunction or upon a finding of likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order." Why did Congress protect only trademark holders and not patent or copyright holders?

Page 446. At the end of note 7, add:

7. A broader assessment. . . .

Elizabeth A. Rowe, eBay, *Permanent Injunctions, and Trade Secrets*, 77 Wash. & Lee L. Rev. 553 (2020), examined 150 federal trade secret cases between 2000 and 2014 with damages totaling $2 billion. "All were successful on their trade secret claims and received damages but most did not receive a permanent injunction." Many plaintiffs received no injunction because they didn't ask for one. Professor Rowe found that courts are not necessarily strictly applying the four factors from *eBay*, and that the injunctions issued and the opinions (if any) explaining the injunction decisions were generally perfunctory. In those cases where courts denied an injunction and gave a reason, the lack of irreparable harm seemed to have been the factor most often articulated as the reason for the denial. Damages for the past are not inconsistent with an injunction for the future, and damages for the past do not necessarily indicate that future damages can be reasonably proved and measured. But a large award of damages may suggest to some judges that they have granted an adequate remedy.

Colleen Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1, 9-10 (2012), found that the success rate for requests for injunctions in patent cases fell from 95 percent to 75 percent in the first six years after *eBay*.

A study by Matthew Sag & Pamela Samuelson found that injunctive relief in copyright cases is less common post-*eBay*. Matthew Sag & Pamela Samuelson, *Discovering eBay's Impact on Copyright Injunctions Through Empirical Evidence*, https://papers.ssrn.com/abstract_id=3898460 (draft dated Jan. 31, 2022). Samuelson's separate qualitative study of such cases concludes that "[i]n the past decade, courts have generally been dutifully analyzing each of the *eBay* factors and seem to be granting injunctions less frequently now than before *eBay*." Pamela Samuelson, *Withholding Injunctions in Copyright Cases: The Impact of eBay*, 63 Wm. & Mary L. Rev. 773, 779-780 (2022). Professor Samuelson's *William & Mary* article argues that *eBay* has been beneficial on the whole in copyright cases; she thinks that copyright injunctions had become too nearly automatic before *eBay*. Assuming that she is right about that bottom line, *eBay* may be a case of reaching sound results for unsound reasons.

B. Preliminary or Permanent Relief

1. The Substantive Standards for Preliminary Relief

Page 454. After the second paragraph of note 4, add:

4. A mess in the lower courts. . . .

The Eighth Circuit has adhered to its view that plaintiff need not prove "a greater than fifty percent likelihood" of success on the merits, but only "a fair chance of prevailing." Jet Midwest International Co. v. Jet Midwest Group, LLC, 953 F.3d 1041, 1044-1045 (8th Cir. 2020). It did not discuss *Winter*; it cited and quoted several of its own cases, all of which predate *Winter*.

Meanwhile the Seventh Circuit has finally taken note of *Winter*. Illinois Republican Party v. Pritzker, 973 F.3d 760, 762-763 (7th Cir. 2020). It noted that *Winter* had expressly disapproved of its "better than negligible" standard; it also said that *Winter* does not require proof of the merits by a preponderance of the evidence. But probability of success "normally includes a demonstration of how the applicant proposes to prove the key elements of its case."

Page 456. After note 7, add:

7.1. One more example. In Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020), the Court granted an injunction pending appeal that blocked an expiring New York order limiting capacity at religious services during the early months of the COVID-19 pandemic. The Court held the order was a likely free exercise violation under the First Amendment. The majority, citing *Winter*, saw the plaintiffs as easily meeting the standard for relief: "The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Id*. at 66. Chief Justice Roberts dissented. He agreed the worship limits were restrictive and potentially a violation of the First Amendment. But the restrictions had expired and might not be renewed. He added that "it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic. If the Governor does reinstate the numerical restrictions the applicants can return to this Court, and we could act quickly on their renewed applications. As things now stand, however, the applicants have not demonstrated their entitlement to 'the extraordinary remedy of injunction.' *Nken*." *Id*. at 75 (Roberts, C.J., dissenting).

Justice Breyer, dissenting for himself and Justices Sotomayor and Kagan, also cited this language from *Nken*, and added that such a remedy is especially inappropriate "where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts' determination." *Id*. at 77 (Breyer, J., dissenting). Stays and injunctions pending appeal are discussed in the main volume at 481 and more extensively in this Update to page 481.

Page 459. After note 14, add:

15. A mistaken concession? The federal Bureau of Alcohol, Tobacco, Firearms, and Explosives enacted a new rule outlawing "bump-stock-type devices," in which semi-automatic weapons function like fully automatic weapons by allowing continuous firing with a single pull of the trigger. 27 C.F.R. §§447.11, 478.11, 479.11. A group of gun owners sought a preliminary injunction against enforcement of that part of the new rule requiring current possessors of such devices to "'destroy the devices or abandon them at an ATF office prior to' the effective date of March 26, 2019." Gun Owners of America v. Barr, 2019 WL 1395502, at *1 (6th Cir. Mar. 25, 2019). (quoting Bump-Stock-Type Devices, 83 Fed. Reg. at 66514). The trial court denied a preliminary injunction, and the gun owners took their case to the Sixth Circuit. *Id.*

In opposing the grant of the preliminary injunction, the government "concede[d] that the plaintiffs will suffer irreparable harm if . . . the Final Rule is not enjoined." But the government argued that the public interest supported denying an injunction. The Sixth Circuit denied an injunction pending appeal, as did the Supreme Court without comment. 139 S. Ct. 1406 (2019). (Ruling two years later on the merits, the Sixth Circuit on a 2-1 vote held that ATF's interpretation of a criminal statute is not entitled to *Chevron* deference and that as a matter of statutory interpretation, a weapon with a bump stock could not be considered a machine gun under the statute. Gun Owners of America v. Garland, 992 F.3d 446, 475-476 (6th Cir. 2021). The Sixth Circuit took the case en banc and affirmed the district court by an equally divided court. 19 F.4th 890 (6th Cir. 2021) (en banc). A cert petition is pending. (No 21-1215.)

Putting aside the public interest, might the government's concession in the Sixth Circuit have been wrong at the preliminary injunction stage? Owners who complied with the new rule by turning in or destroying their bump stocks (how many would that be?) could replace their bump

stocks later if the rule were struck down. So the real harm is not permanent loss of bump stocks, but temporary loss plus the cost of replacement. But as the next section discusses, the government would certainly be immune from any suit for those damages. The harm pending trial on the merits could not be compensated or repaired, but neither was it very serious. And magnitude of harm matters at the preliminary injunction stage.

16. Preliminary damages? Caution in issuing preliminary injunctions is not resistance to equity; it is resistance to preliminary relief and its greater risk of error. Preliminary relief is often granted in equity; in sharp contrast, the rule against preliminary relief in damage cases is absolute or nearly so. A personal injury plaintiff without funds for medical care may suffer irreparable injury before trial, but she cannot get preliminary damage payments to avoid that injury. For a proposal to award preliminary damages on a showing of likely success and irreparable injury, see Gideon Parchomovsky & Alex Stein, *Preliminary Damages*, 75 Vand. L. Rev. 239 (2022). They argue that preliminary awards of damages would make the entire litigation system both more just and more efficient, not only addressing problems like inability to finance medical care, but also the great imbalance of litigation resources between affluent and non-affluent litigants.

2. The Procedure for Obtaining Preliminary Relief

Page 471. After note 5, add:

5.1. Inadvertently withholding notice? In one of the many foibles connected to post-election litigation brought by Trump supporter Sidney Powell, Powell filed a motion for a TRO in federal court in Wisconsin without verification and without any explanation as to whether she gave notice to defendants or why or why not. Powell then filed a "corrected" notice which included a statement that the complainant "will provide electronic notice" to defendant. The court refused to accept the "corrected" motion for its continued failure to comply with Rule 65. "Because the afternoon motion indicates that the plaintiffs 'will' provide electronic notice to the adverse parties, the court does not know whether the plaintiffs have yet provided notice to the adverse parties or when they will do so. Until the plaintiffs notify the court that they have provided notice to the adverse parties, the court will not take any action because the motion does not comply with the requirements of Rule 65(b)." The court also noted that the complaint did not ask for expedited review despite the supposed emergency nature of the motion. Without expedition, defendants would have 21 days to reply under the local rules. Order Regarding Amended Motion for Injunctive Relief, Feehan v. Wisconsin Elections Commission, No. 20-cv-1771-pp, Doc. 7 (E.D. Wis. Dec. 2, 2020).

Page 479. At the end of note 8, add:

8. What counts as an injunction? . . .

One section of the Immigration and Nationality Act, 8 U.S.C. §1252(f)(1), says, with some exceptions, that no court has jurisdiction "to enjoin or restrain the operation of" certain other provisions of the Act. The Court quoted three dictionaries, Justice Story's treatise, and Nken v. Holder, 556 U.S. 418 (2009), to conclude that to "enjoin or restrain" means to tell the defendant what to do or not to do. It said that to "enjoin" is to "issue an injunction," but it recognized multiple possible meanings for "restrain," and did not consider the possibility that in such close association with "enjoin," "restrain" merely meant to issue a temporary restraining order. Garland v. Gonzalez, 142 S. Ct. 2057 (2022).

Three dissenters did not disagree with the Court's interpretation of "enjoin or restrain." Rather, they said that an injunction ordering the government to comply with the statute did not enjoin "the operation of" the statute. On this view, constitutional challenges to the Act were confined to the exceptions, but statutory interpretation claims were not restricted.

Page 481. At the end of note 9.e., add:

9. Appealing TROs.

Professor Genetin finds "expansive" doctrine allowing appeals in three circuits, and scattered decisions allowing appeals elsewhere. Bernadette Bollas Genetin, *Appealable TROs*, https://papers.ssrn.com/abstract_id=4094365. She criticizes these decisions for violating the congressional policy against piecemeal appeals and for effectively allowing courts of appeals broad discretion to decide which cases they want to hear and intervene in early. She would narrow the exceptions, but she would not entirely eliminate all appeals of TROs.

Page 481. After note 10, add:

10. Stays and injunctions pending appeal. . . .

The Supreme Court has become much more willing to grant emergency relief, including emergency injunctions pending appeal, than it has been in the past. The Trump Administration went to the Court repeatedly for such relief, and was often successful. This emergency relief came in what is coming to be called the "shadow docket," in which the Court issues emergency orders without oral argument and often without an accompanying opinion.

In Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020), described in this Update to page 456, the Court granted an injunction pending certiorari that blocked an expiring New York order limiting capacity at religious services during the COVID-19 pandemic. The Court issued a similar order, with an opinion that appeared to casually resolve a deep disagreement over the meaning of the Court's free exercise precedents, in a shadow docket case involving California's COVID-related worship restrictions. Tandon v. Newsom, 141 S. Ct. 1294 (2021).

Professor Stephen Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. Times (Apr. 15, 2021), found the Court's new turn towards injunctions on the shadow docket especially worrisome:

> This trend of using the shadow docket for substantive jurisprudence first surfaced most visibly in cases involving the Trump administration—in which the Justice Department repeatedly asked the Supreme Court to pause an adverse lower-court ruling while the government challenged the decision on appeal. All told, the Trump administration sought emergency relief pending appeal 41 times in four years; in contrast, the Bush and Obama administrations together sought such relief eight times in 16 years. And the justices largely acquiesced to the Trump applications, granting 28 in full or in part.
>
> But whereas virtually all of the Trump cases involved "stays" pending appeal, where a lower court had already ruled against the government, the California ruling involved a far more aggressive form of emergency relief—where a party challenging a government policy that lost in the lower courts seeks to have the policy frozen pending appeal.
>
> For decades, the Supreme Court has insisted that these emergency injunctions should be far rarer than stays. Summarizing the precedents, Justice Antonin Scalia explained in 1986 that such relief should be granted "sparingly and only in the most critical and exigent

> circumstances, and only where the legal rights at issue are indisputably clear." It ought to follow that newly minted rights, such as the one the court articulated on Friday, are not "indisputably clear." [Professor Vladeck believed that the Court in *Tandon* did not just resolve an ambiguity, but changed free exercise law from one reasonably clear rule to a new and different rule. – EDS.]
>
> This is not just a technical point; it goes directly to the Supreme Court's constitutionally mandated (and self-described) role in our constitutional system. As Justice Scalia put it, unlike a stay, which is a short-term order delaying a proceeding, an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts."
>
> To provide relief in such a case where the right to relief is not clear is to effectively allow the Supreme Court to go first, ahead of the lower courts—never mind that, as the justices have repeatedly said in the past, "ours is a court of review, not first view," and that their "primary responsibility" is "as an appellate tribunal." Using emergency orders pending appeal to change substantive law turns those principles on their heads and arguably exceeds the justices' statutory authority to issue such relief.
>
> All of this would be problematic enough if the California decision was an outlier. But it wasn't. Rather, the ruling was the seventh time since October that the justices have issued an emergency injunction—all of which have blocked Covid restrictions in blue states on religious exercise grounds.

The Scalia opinion referenced by Professor Vladeck is Ohio Citizens for Responsible Energy v. Nuclear Regulatory Commission, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers); see also Respect Maine PAC v. McKee, 562 U.S. 996 (2010) (Court citing Justice Scalia's opinion with approval). As Professor Vladeck explained on a law professor listserv, "under the Court's long-settled precedents, it lacked the authority to do what it did [in *Tandon*]. Unlike a stay pending appeal (for which the Court's authority is expressly provided by statute, see 28 U.S.C. §2101(f)), a 'writ of injunction' is an exercise of common law authority under the All Writs Act." According to Vladeck, to the extent *Tandon* made new free exercise law, the decision to grant the injunction could not have been "indisputably clear," and therefore an injunction was inappropriate. For more data and analysis of emergency orders during the Trump Administration, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019).

Justice Sotomayor has been especially critical of this trend: "[I]t appears the Government has treated this exceptional mechanism as a new normal." Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting). In Wolf v. Cook County, 140 S. Ct. 681, 683-684 (2020), Justice Sotomayor expanded on her criticism in a case involving the Administration's changes to the "public charge" rule involving the deportation of undocumented immigrants—a rule intended to exclude immigrants who are likely to depend on government-provided welfare benefits:

> Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow. . . .

> [T]his Court is partly to blame for the breakdown in the appellate process. That is because the Court—in this case, the New York cases, and many others—has been all too quick to grant the Government's "reflexiv[e]" requests. But make no mistake: Such a shift in the Court's own behavior comes at a cost.
>
> Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay. . . . They demand extensive time and resources when the Court's intervention may well be unnecessary—particularly when, as here, a court of appeals is poised to decide the issue for itself.
>
> Perhaps most troublingly, the Court's recent behavior on stay applications has benefited one litigant over all others. This Court often permits executions—where the risk of irreparable harm is the loss of life—to proceed, justifying many of those decisions on purported failures "to raise any potentially meritorious claims in a timely manner." Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of a 20-year status quo in one State. I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.

More recently, the Supreme Court on a 5-4 vote but without an opinion granted a stay requested by some states of a lower court's decision issued five months earlier to vacate a rule of the Environmental Protection Agency. Louisiana v. American Rivers, 142 S. Ct. 1347 (2022). Justice Kagan dissented, writing for herself and the Chief Justice, Justice Breyer, and Justice Sotomayor. She argued that the states showed no irreparable harm and otherwise could not meet the *Nken* factors for a stay. The states also delayed by months in seeking emergency relief in the Supreme Court: "By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all." *Id*. at 1349 (Kagan, J., dissenting).

And in a case staying an order from the federal Occupational Safety and Health Administration imposing a COVID-19 vaccination requirement on many employees, on the ground that the order was beyond the authority that Congress had delegated to the agency, the Court suggested that at least in that context, it was not its job to balance the equities:

> The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations.
>
> It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84

million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

National Federation of Independent Business v. Department of Labor, 142 S. Ct. 661, 666 (2022).

Justice Breyer, dissenting for himself and Justices Kagan and Sotomayor, did not think the equity question was a close call. "This Court should decline to exercise its equitable discretion in a way that will—as this stay will—imperil the lives of thousands of American workers and the health of many more." Id. at 676 (Breyer, J., dissenting). The majority's statement apparently abdicating equity left some commentators puzzled. Richard Re, *Did the Supreme Court Overrule Equity?*, Re's Judicata (Jan. 14, 2022); Will Baude, *Balancing the Equities in the Vaccine Mandate Case*, Volokh Conspiracy (Jan. 14, 2022). It is unclear if this statement will get applied in other cases.

Professor Samuel Bray, in testimony prepared for the Presidential Commission on the Supreme Court of the United States, argues that the dramatic increase in stays and injunctions pending a cert petition is not so much a result of the nation's polarization or of the Trump Administration's challenges to legal norms, but rather a response to the rise of the nationwide injunction in the lower courts. An injunction that shuts down an entire federal program nationwide presents a much more plausible claim of emergency than an injunction confined to named plaintiffs, to one judicial district, or even to one judicial circuit. On the nationwide injunction, see the main volume and this Update to pages 285-288.

Page 482. At the end of note 11, add:

11. The *Purcell* Principle: A special rule in emergency election cases? . . .

The conservative and liberal Justices continued to battle over the *Purcell* principle during the contentious 2020 election season, which took place amid a pandemic that upended normal voting practices. In Democratic National Committee v. Wisconsin State Legislature, 141 S. Ct. 28 (2020), the Court agreed with the Seventh Circuit to stay a district court order that would have extended the deadline for the receipt of mail-in ballots in Wisconsin by six days following Election Day.

There was no majority opinion. The main concurrence came from Justice Kavanaugh who advanced a very strong notion of the *Purcell* principle (and offered two separate additional reasons for supporting the affirmance of the stay). He cited seven other Supreme Court orders issued during the 2020 election season that he said reflected application of the principle: "This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle."

> The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.

> Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.
>
> That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.

Id. at 31 (Kavanaugh, J., concurring).

Justice Kagan wrote the sole dissent, focusing, like Hasen in the main volume, on the incongruity between the principle and the way courts ordinarily approach requests for emergency relief:.

> At its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity. See, e.g., *Winter* ("In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief"). And that means courts must consider all relevant factors, not just the calendar. Yes, there is a danger that an autumn injunction may confuse voters and suppress voting. But no, there is not a moratorium on the Constitution as the cold weather approaches. Remediable incursions on the right to vote can occur in September or October as well as in April or May.

Id. at 42 (Kagan, J. dissenting).

In 2022, Justice Kavanaugh sought to defend application of the *Purcell* principle in a case halting a lower court order requiring the redrawing of congressional districts where the primary was four months away and the general election nine months away. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring). After first remarking that the "traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election," *id.* at 880, he explained:

> Some of this Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may never enjoin a State's election laws in the period close to an election. As I see it, however, the *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context—a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. Although the Court has not yet had occasion to fully spell out all of its contours, I would think that the *Purcell* principle thus might be overcome even with respect to

> an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

Id. at 881.

Justice Kagan dissented, pointing out that the Court in the past had rejected *Purcell* arguments in cases on a similar months-long timeframe and that these plaintiffs had been diligent in suing within hours or days of the enactment of the redistricting plan. "Alabama is not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year." *Id*. at 888-889 (Kagan, J., dissenting). Justices Breyer and Sotomayor joined in this dissent. The majority's expansive reading of the *Purcell* principle could give jurisdictions one full election cycle with illegal maps or rules in place before a court could step in to clock them.

In Moore v. Harper, 142 S. Ct. 1089 (2022), the Supreme Court refused to stay a North Carolina Supreme Court order requiring new congressional districts against a claim that the state court exceeded its powers under the Constitution. Justice Kavanaugh, citing *Merrill* and its similar time frame, concurred on *Purcell* grounds even as he expressed sympathy with the petitioners' claim on the merits. *Id.* (Kavanaugh, J., concurring). Justice Alito dissented for himself and Justices Thomas and Gorsuch, without mentioning *Purcell*. *Id.* at 1089-1090 (Alito, J., dissenting). The Court later granted certiorari to review the claim on the merits. Moore v. Harper, 2022 WL 2347621 (June 30, 2022).

One difference between *Merrill* and *Moore*: In *Merrill*, applying *Purcell* benefitted Republicans and in *Moore* it benefited Democrats.

C. Prospective or Retrospective Relief

1. Suits Against Officers in Their Official Capacities

Page 489. After note 1, add:

1.1 Evading the core compromise. Texas enacted a sophisticated attempt to wholly prevent any judicial review of a statute that was, at the time of its enactment, flagrantly unconstitutional. The scheme and the response to it are somewhat complicated to explain, and the repudiation of any constitutional right to abortion in Dobbs v. Jackson Women's Health Organization, 2022 WL 2276808 (U.S. June 24, 2022), has mostly mooted the dispute for now. But it is worth taking time to understand, because it reveals a serious gap in the Court's structure for reconciling constitutional rights with sovereign immunity.

Texas prohibited all abortions after a fetal heartbeat can be detected. The law has been widely referred to as SB8; it is codified in Tex. Health & Safety Code §§171.201 et seq. For our purposes, the key provisions are §§171.207 and 171.208.

Section 171.207 provides that no effort to enforce the law "may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208." And §171.208 provides that "[a]ny person, other than an officer or employee of a state

or local government entity in this state," may sue for any actual or intended violation of the statute for an injunction to prevent the violation, for statutory damages of not less than $10,000, and for costs and attorneys' fees. The amount of statutory damages is not capped, but there can be no more than one judgment against the same defendant for the same abortion. Reliance on a decision valid at the time of the abortion, but later overruled (e.g., Roe v. Wade), is not a defense.

The genius of §171.207 is that no state official can be named as a defendant in an Ex parte Young action, because no state official has enforcement authority. There are nearly 8 billion potential individual plaintiffs, plus countless potential corporate plaintiffs, under §171.208, no one of whom is at all likely to file a lawsuit, and any one of whom could deny any such intention if an abortion clinic sued to enjoin enforcement of the law. Showing a ripe claim for an injunction against any particular private defendant would be difficult or impossible. And even if a plaintiff surmounted that hurdle and then won on the merits, and got an injunction against enforcement on the ground that the law is unconstitutional, that judgment would not be claim- or issue-preclusive in a suit by any of the other billions of potential plaintiffs. §171.208(e)(5). Such a decision would provide a measure of protection only if it were affirmed on appeal and became a binding precedent.

In theory, a clinic could obtain judicial review by continuing to perform abortions in due course and waiting to be sued. But if it took that course and then lost on the constitutional issue, it would be liable for an unlimited amount of statutory damages per abortion, for every abortion performed since the law was enacted. Especially with the widespread expectation that Roe v. Wade would soon be overruled, only one clinic is known to have been willing to take that risk. Because there was no apparent way to get judicial review, and the law effectively ended nearly all abortions to which it applied, despite its plain unconstitutionality prior to *Dobbs*. Texas women continued to obtain abortions by having the procedure very early in a pregnancy, by traveling out of state, or by ordering abortifacient medications online.

A group of abortion clinics sued the state's attorney general, a state judge, a court clerk, the executive directors of the state's medical licensing boards, and a private citizen, for an injunction against enforcing the law. Whole Women's Health v. Jackson, 142 S. Ct. 522 (2021). Plaintiffs indicated their intention to eventually seek an injunction against a defendant class of all state judges and all court clerks, ordering them not to decide or accept for filing any lawsuits under §171.208. The Court dismissed the claim against the attorney general, because he had no enforcement authority, and the claim against the private party, because he denied any intention to enforce the law. It dismissed the claim against the judge and the clerk because they do not enforce laws; they neutrally adjudicate disputes between litigants or facilitate the filing and adjudication of such disputes.

But the Court held that the claims against the directors of the medical boards could go forward. A savings clause in §171.207(b)(3) said that it did not "limit the enforceability of any other laws that regulate or prohibit abortion." Under some of those other laws, the boards could revoke the license of any medical provider who performed an illegal abortion, so despite the language elsewhere in §171.207, these boards still had enforcement authority. "[T]his is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed." 142 S. Ct. at 537. Justice Thomas would have dismissed all the claims; Chief Justice Roberts, joined by Justices Breyer, Sotomayor, and Kagan, concurred as to the directors of the medical boards and would also have let the case proceed against the court clerks.

On remand, Texas denied that the medical boards could enforce the law, and the Fifth Circuit certified that question to the state supreme court. 23 F.4th 380 (5th Cir. 2022). A dissenter accused the majority of defying the Supreme Court, and the plaintiffs sought a writ of mandamus against the Fifth Circuit in the Supreme Court. For mandamus, see notes 2 and 3 at pages 307-308 of the main volume. The Court denied the writ without comment. In re Whole Women's Health, 142 S. Ct. 701 (2022). Justices Breyer, Sotomayor, and Kagan dissented; they too more or less accused the Fifth Circuit of defying the Supreme Court.

The Texas court unanimously held that the medical boards had no authority to enforce the statute. Whole Women's Health v. Jackson, 642 S.W.3d 569 (Tex. 2022). The Fifth Circuit then remanded to the federal district court with instructions to dismiss the complaint. 31 F.4th 1004 (5th Cir. 2022).

No federal court stayed enforcement of the law at any point in this saga; Texas was allowed to run out the clock in anticipation of *Roe*'s overruling. The Supreme Court has repeatedly said that lower courts should not anticipate overrulings of Supreme Court cases, and must wait until the Court itself says that one of its decisions has been overruled. The Texas law was unconstitutional until *Dobbs* was decided, but it remained in effect the entire time.

Meanwhile, a state trial judge declared the private enforcement provisions of §171.208 unconstitutional on state law grounds. Van Stean v. Texas Right to Life, https://reason.com/wp-content/uploads/2021/12/Van-Stean-v-Texas-Right-to-Life-order-12-9-21.pdf (Travis Cnty. Dist. Ct. Dec. 9, 2021). The court held that authorizing damages to persons who had not been harmed violated the state's Open Court Clause, that the statutory damages awarded to persons who had not been harmed were punishment without due process, and that the delegation of state enforcement authority to private citizens who had not been harmed violated the separation of powers. Defendants took an immediate interlocutory appeal. That case, Texas Right to Life v. Van Stean, is still pending as No. 03-21-00650-CV in the state's Third Court of Appeals.

What is to stop any legislature from using the Texas technique to eliminate judicial enforcement of any constitutional right it dislikes? Chief Justice Roberts, concurring in part and dissenting in part in the Supreme Court's case, said that the "clear purpose and actual effect of SB8 has been to nullify this Court's rulings. . . . The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake." 142 S. Ct. at 545. Justices Breyer, Sotomayor, and Kagan joined this opinion.

Justice Sotomayor, in a separate opinion for herself and Justices Breyer and Kagan, described the Texas law as "a brazen challenge to our federal structure." Id. at 550. She compared it to John Calhoun's antebellum claims that states could "nullify" federal law, and she argued that Ex parte Young must be expanded as necessary to address such schemes. If the whole purpose of the *Young* fiction is to make judicial review possible, doesn't it have to expand to fit that purpose?

Pro-life groups are now drafting model legislation to prohibit women from leaving their home state to get an abortion, to be enforced only on the model of the Texas law to evade judicial review. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, Wash. Post (June 30, 2022).

Page 489. After note 3, add:

3.1. Declaratory judgments. In a dispute over a temporary and private display at the state capitol, the district court entered a declaratory judgment as follows: "IT IS FURTHER DECLARED that defendants violated [plaintiff's] First Amendment rights and engaged in

viewpoint discrimination as a matter of law when the [plaintiff's] exhibit was removed from the Texas Capitol building under the circumstances of this case." Freedom from Religion Foundation v. Abbott, 955 F.3d 417, 423 (5th Cir. 2020). The Fifth Circuit held that this "backwards-looking, past-tense declaratory judgment" is retrospective relief barred by sovereign immunity and by *Edelman*, even though there was a continuing controversy about future displays. *Id.* at 425.

Page 491. After note 6, add:

6.1. An eminent domain exception to sovereign immunity. It is long settled that the federal government has power to take property for public use. The Constitution does not expressly grant that power, but the Takings Clause of the Fifth Amendment assumes its existence and requires just compensation to the owner. It is equally settled that Congress can delegate this power to private actors such as railroads, and that the federal government can take property owned by states. So, can Congress delegate to private actors the power to take property owned by a state? And would such a delegation enable the private actor to sue the state in federal court to take its property?

Yes to both questions, the Court said in PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021). The case fractured the Court's usual ideological lines. Chief Justice Roberts wrote the opinion, joined by Justices Breyer and Sotomayor, Justice Kavanaugh, and perhaps most surprisingly, Justice Alito. Justice Barrett wrote the principal dissent, joined by Justices Thomas, Gorsuch, and Kagan. Neither Alito nor Kagan wrote separately to explain their votes. But it is probably a good thing when the Justices surmount ideology and vote independently.

The Court held that New Jersey waived its immunity in the plan of the Convention, because eminent domain was a known power; it was known to be delegable, and federal authority was explicitly supreme. The opinion is surprisingly practical; if the pipeline could not sue New Jersey, either there would never be any more pipelines, or the pipeline would have to physically occupy the land without consent and wait to be sued by New Jersey, or the United States would have to take the land itself, in a lawsuit in which the pipeline would be pulling the strings, and then the government could convey the land to the pipeline. Those kinds of practicalities have rarely mattered in sovereign immunity decisions.

Justice Barrett said that those practicalities did not matter; the United States could sue New Jersey, but the pipeline could not. Period. There is no explicit federal eminent domain power, and the Takings Clause is a limit on that power, not a grant of it. Eminent domain must be a necessary and proper means of exercising some other power, and here, that power was the Commerce Clause. So this was just a case of Congress overriding state sovereign immunity pursuant to the Commerce Clause, a power the Court has said that Congress does not have. See note 9 at 496 of the main volume.

As in the bankruptcy cases, the majority said that no express congressional override of immunity was required. New Jersey had waived immunity in this context at the Convention, and no immunity remained to be waived or overridden. And unlike the bankruptcy cases, Congress here had not expressly authorized the pipeline to sue a state. It had authorized the pipeline to exercise eminent domain power as necessary to build a pipeline, and that necessarily included the power to sue a state.

6.2. A military exception to sovereign immunity. The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 et seq., gives military veterans a right to return to their old job in the civilian economy, or to a job with comparable pay if they are unable to perform their old job due to a service-connected injury. The Act authorizes veterans to sue for reinstatement

or damages, in state or federal court, and it explicitly authorizes suits against states. The Court held that states waived their immunity to these suits in the plan of the Convention. Torres v. Texas Department of Public Safety, 2022 WL 2334306 (U.S. June 29, 2022).

The centerpiece of the opinion is a phrase used twice in *PennEast*: the power at issue is "complete in itself." In *PennEast*, the Court used the phrase to say that because the power of eminent domain is complete in itself, it includes the power to bring suits to take property, so that the power to bring such lawsuits need not be separately mentioned either in the Constitution or in congressional delegation of eminent domain power to private parties.

In *Torres*, the Court said that the power to raise armies and make war is complete in itself in the sense that it is totally delegated to the federal government and excluded from the states. When a power is complete in itself, states cannot obstruct the exercise of that power, by asserting sovereign immunity or otherwise, and in the plan of the Convention, states implicitly waived immunity to suits that Congress authorizes pursuant to that power. *Torres* says that *PennEast* made this the test for whether a waiver of immunity is inherent in the structure of the Constitution. The opinion puts a similar spin on *Katz*, the bankruptcy case in note 6. The Court also notes that the complete congressional power to raise armies would be undermined if it could not protect the rights of state employees who volunteer for military service. Justice Breyer wrote the opinion, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh.

Justice Thomas's dissent for the other four Justices is nearly twice as long as the majority opinion. He traced the phrase "complete in itself" back to Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), which said that the commerce power "like all others vested in Congress, *is complete in itself*, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196. If every federal power is complete in itself, and if a power complete in itself overrides state sovereign immunity, then all federal powers override state sovereign immunity. The Court denied that it meant any such thing. It said that the power to regulate commerce is shared with the states, and therefore is not complete in itself. Whether any other federal powers are complete in themselves in the *Torres* sense remains to be seen.

The dissent also argued that it is especially offensive, and unprecedented, to make states submit to suit in their own courts. But it is long settled that Congress can require state courts to entertain suits arising under federal law, and the Court saw *Torres* as no different from those earlier cases.

Page 496. After note 10, add:

10.1. The Copyright Act. In the Copyright Remedy Clarification Act of 1990, 17 U.S.C. §511, Congress authorized suits against states for copyright infringement, explicitly overriding any claim of sovereign immunity. In Allen v. Cooper, 140 S. Ct. 994 (2020), the Supreme Court held that neither the Copyright Clause nor the Fourteenth Amendment authorized Congress to override state sovereign immunity. The Court held that its decision in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), involving a similar law authorizing suits for patent infringement, and struck down by the Court on the same grounds, "compel[led]" the same result in the copyright context.

Page 497. At the end of note 13, add:

13. Sister states. . . .

The parties in *Hyatt* made a third trip to the Supreme Court, which finally overruled *Hall* in Franchise Tax Board v. Hyatt, 139 S. Ct. 1485 (2019). On a 5-4 vote, the Court held that a state

may not be sued by a private party in the courts of a different state without its consent. The majority declared that *Hall*'s holding was "contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent." *Id.* at 1492. The Court split along its now common conservative-liberal line. Justice Breyer, for the four dissenters, concluded his discussion of the value of *stare decisis* with the following: "Today's decision can only cause one to wonder which cases the Court will overrule next." *Id.* at 1506.

Page 498. At the end of note 16, add:

16. Municipalities. . . .

The Supreme Court denied Maricopa County's cert petition without comment. Maricopa County v. United States, 139 S. Ct. 1373 (2019). The correct citation to the Ninth Circuit opinion is 889 F.3d 648 (9th Cir. 2018).

Gage County, Nebraska, population 21,000, is on the losing end of a $28-million judgment, plus attorneys' fees, for using manufactured evidence and manipulated false confessions to wrongfully convict six people of a murder they had nothing to do with. They collectively served 77 years in prison before they were exonerated by DNA evidence and pardoned; a state investigation identified the real killer. The sheriff at the heart of the scheme was held to be a policy maker. The final judgment was affirmed in Dean v. Searcey, 893 F.3d 504 (8th Cir. 2018). The county has increased property taxes and sales taxes in its effort to raise the money to pay, but those taxes will raise only $4 to $5 million a year. It has unsuccessfully sought a bailout from the state, and considered whether to file for bankruptcy. Its struggles are reviewed in Jack Healy, *A Rural County Owes $28 Million for Wrongful Convictions. It Doesn't Want to Pay*, N.Y. Times (Apr. 1, 2019).

One victim says it isn't fair that the citizens have to pay, "but it wasn't fair what they did to us, either." One resentful taxpayer says, "I wasn't even born" when it all happened. And despite all the evidence, many local citizens still insist that the victims were guilty.

The county's insurer refused to provide a defense and refused to pay. The state supreme court resolved a key coverage issue in favor of the county, but other issues remain. Gage County v. Employers Mutual Casualty Co., 937 N.W.2d 863 (Neb. 2020). The coverage limit of an umbrella policy is not stated in the opinion, but it probably isn't anywhere near $28 million. A county board member running for reelection says he expects the judgment to be paid off in another year and a half. Scott Koperski, *County Board Member Seeking Reelection*, Beatrice Daily Sun, 2022 WLNR 1845968 (Jan. 18, 2022).

Page 498. After note 17, add:

17.1. Immunity that can't be waived? The Court has often said that the Eleventh Amendment is merely an example of the broad sovereign immunity implicit in the structure of the Constitution. Justice Gorsuch, joined by Justice Thomas, took this idea a bold step further in PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021), described in this Update to page 491. His dissenting opinion says that there are really two distinct immunities. The structural immunity implicit in the Constitution is a privilege of each state, and it is waivable. But the Eleventh Amendment immunity is jurisdictional: "The judicial power of the United States shall not be construed to extend" to diversity suits against a state. That deprives the federal courts of subject matter jurisdiction, and subject matter jurisdiction cannot be created by consent, so no state can waive the Eleventh

Amendment. The plaintiff, PennEast, was incorporated in Delaware, so it could not sue New Jersey in federal court even if New Jersey had consented. This theory would probably affect few cases if adopted by the Court, but conceptually, it would be a substantial extension of state sovereign immunity.

2. Suits Against Officers in Their Personal Capacity (and the Doctrine of Qualified Immunity)

Page 509. After note 6.a.iv., add:

a. Specificity. . . .

v. The Court continues to apply qualified immunity aggressively. In City of Escondido v. Emmons, 139 S. Ct. 500 (2019), the Court unanimously granted a cert petition and summarily reversed in part and vacated and remanded in part a Ninth Circuit decision holding that two police officers, who had been sued for use of excessive force, were not entitled to qualified immunity. As to one of the officers, the Ninth Circuit had offered no reasoning for its holding. *Id.* at 502. As to the other officer, the Ninth Circuit had applied the clearly established law test at too high a level of generality in deciding whether the officer used excessive force in taking down a suspect during a call for a domestic disturbance:

> The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established.

Id. at 503.

In October 2021, the Supreme Court issued unanimous per curiam opinions summarily reversing two more cases in which appeals courts had rejected qualified immunity for police officers. Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021); City of Tahlequah v. Bond, 142 S. Ct. 9 (2021).

Page 509. At the end of note 6.b., add:

b. Obvious applications. . . .

Despite repeatedly questioning the whole doctrine of qualified immunity (see note 12 in the main volume and this Update at 513), Justice Thomas was the sole dissenter (without explanation) in a rare Supreme Court case holding that a lower court erred in granting qualified immunity to a government official. In Taylor v. Riojas, 141 S. Ct. 52 (2020), the Court held that the Fifth Circuit erred in accepting a claim of qualified immunity in a case with egregious facts. A Texas prison inmate alleged that "for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in 'massive amounts of feces': all over the floor, the ceiling, the window, the walls, and even 'packed inside the water faucet.' Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and

because Taylor was confined without clothing, he was left to sleep naked in sewage." *Id.* at 53 (quoting Taylor v. Stevens, 946 F.3d 211 (5th Cir. 2019)).

The Fifth Circuit agreed that this was cruel and unusual punishment in violation of the Eighth Amendment, but it held that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." The Supreme Court thought otherwise: "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Justice Alito concurred, but wrote that the Court should not have taken the case for simple error correction purposes. One might respond to Justice Alito that *Taylor* shows that there is a bar (however low) below which government officials may not go, and that this is a lesson that the Fifth Circuit and other courts need to learn. The Court cited *Lanier*; some idea of applications too obvious to have been previously litigated appears to survive.

Page 511. At the end of note 6.g, add:

g. Places outside the law? . . .

The Supreme Court took up the case again in Hernández v. Mesa, 140 S. Ct. 735 (2020), rejecting a *Bivens* claim in the context of a cross-border shooting. See this Update to Page 561.

6.1. It's not just police officers and prison officials. The great bulk of these cases involve law-enforcement officers, but the qualified-immunity rules apply to all government officials except those few with absolute immunity. Recall that defendants in the leading case before *Harlow* were members of a school board. The Eighth Circuit recently held that officials at the University of Iowa do *not* have qualified immunity for a free-speech violation. Business Leaders in Christ v. University of Iowa, 991 F.3d 969 (8th Cir 2021).

The University requires all student organizations to commit to nondiscrimination on the basis of a long list of protected categories, including race, sex, sexual orientation, and gender identity. Business Leaders in Christ (BLinC), an organization of conservative Christian business students, provides that LGBTQ students can be members of the organization but cannot hold leadership positions. A gay student who aspired to a leadership position complained to the University, which revoked BLinC's status as a registered student organization.

When BLinC pointed out that other student groups had been approved with constitutions requiring members or officers to be of a particular race, ethnicity, sex, or sexual orientation, the University undertook a review of all student organizations. All or most were required to sign a nondiscrimination statement, but secular organizations with such requirements in their constitutions were approved without change. BLinC and some other religious organizations were disapproved. The court held that this was viewpoint discrimination in violation of clearly established law, resting on Supreme Court cases, Eighth Circuit cases, and persuasive authority from other circuits, and that the relevant university officials could be liable in damages. BLinC also brought a free-exercise challenge, but the court held that that law was not clearly established.

Page 513. At the end of note 12, add:

12. The new attacks on qualified immunity: originalism. . . .

Justice Thomas again attacked the qualified immunity doctrine in a dissent from a denial of cert in Baxter v. Bracey, 140 S. Ct. 1862 (2020). The undisputed facts proved that police unleashed a dog that bit the plaintiff who had already surrendered after being caught in the act of burglary.

The plaintiff brought a §1983 claim for excessive force in violation of the Fourth Amendment. The Sixth Circuit held the claim barred by qualified immunity, and the Supreme Court refused to hear the case. Justice Thomas in dissent argued that the qualified immunity doctrine lacked support in the text of §1983. He also asserted that "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. . . . [W]e at least ought to return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law." *Id.* at 1864.

He has also questioned why qualified immunity is a "one-size-fits-all doctrine." "[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J., on denial of certiorari).

And in footnote 2 of *Baxter*, he indicated an openness to reconsidering a line of cases beginning with Monroe v. Pape, 365 U.S. 167 (1961), holding that §1983 applies even when state officials engage in action not authorized by state law. Reversing *Monroe* would mean an end to most §1983 claims, because state laws say, or could be rewritten to say, that unauthorized use of force and other unconstitutional conduct are contrary to state law.

Page 514. At the end of note 13, add:

13. The new attacks on qualified immunity: empirical evaluation. . . .

Consistent with Professor Schwartz's research, a *Washington Post* investigation found that the 25 largest police departments paid $3.2 billion over ten years to settle 40,000 claims of police misconduct. And that was with qualified immunity in place. Much of this money (a majority in Chicago), was paid on account of a small number of officers who were the subject of repeat claims. There are five officers with more than 100 settled claims each. Keith L. Alexander, Steven Rich, & Hannah Thacker, *The Hidden Billion-Dollar Cost of Repeated Police Misconduct*, Wash. Post (Mar. 9, 2022).

Professors Nielson and Walker offer a defense of qualified immunity on federalism grounds, pointing to what they consider to be extensive reliance by state and local governments on the doctrine. They also believe that eliminating the doctrine would curtail experiments within states in crafting alternative remedies for deprivation of civil rights. Aaron Nielson & Christopher Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229 (2020). They contend that eliminating qualified immunity would greatly harm the finances of state and local governments.

Professor Schwartz responds in Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 Geo. L.J. 305 (2020). She disagrees that eliminating qualified immunity would have ruinous financial consequences for state and local governments and contests the reliance points. She further argues that governments can use indemnification to avoid adverse consequences and that eliminating qualified immunity would greatly improve civil rights litigation.

In the wake of the George Floyd protests in the spring and summer of 2020, national attention focused strongly on the role of qualified immunity in leaving victims of police misconduct uncompensated. An extensive report from Reuters detailed how Supreme Court qualified immunity doctrine has shielded police officers in egregious cases of police brutality. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta, & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, Reuters (May 8, 2020). Multiple bills were introduced in both

houses of Congress to abolish or reform qualified immunity, but they reportedly faced stout Republican opposition in the Senate. Luke Broadwater & Catie Edmondson, *Police Groups Wield Strong Influence in Congress, Resisting the Strictest Reforms*, N.Y. Times (June 25, 2020). None of the bills were enacted.

In Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605 (2021), Professor Schwartz examined police training materials and found that police officers are not trained about the specific holdings of Supreme Court cases, so they never learn what constitutes "clearly established law" and cannot rely on it.

Professors Nielson and Walker's latest contribution to the debate is *Qualified Immunity's 51 Imperfect Solutions*, 17 Duke J. Const. Law & Pub. Pol'y 321 (2022) (arguing for state level experimentation on qualified immunity). The article is part of a symposium on the topic, as the literature and public interest on this topic explodes.

Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337 (2021), argues that nineteenth century law offered some forms of immunity for public officials, but the approach looked quite different from current law on qualified immunity.

Alex Reinert, Qualified Immunity on Appeal: An Empirical Assessment, https://papers.ssrn.com/abstract_id=3798024 (Mar. 16, 2021), found that appeals courts were more likely to reverse trial court decisions denying qualified immunity than decisions granting qualified immunity, and the results unsurprisingly differed by circuit and the ideology of the judges. See also F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 Wake Forest L. Rev. 501 (2021), arguing that the Court has increasingly protected elected officials against victims of constitutional violations rather than protecting those victims from government action.

13.1. Judicial attacks. For a passionate attack on qualified immunity, see Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020), involving a prolonged pretextual search of an African-American man whose offense appears to have been that he drove a nice car. Despite his dislike for the doctrine, the judge felt obliged to grant the officer's motion for qualified immunity. The judge collected many examples of "terrible cases" granting immunity, and in note 165, six other federal judges and a state supreme-court justice attacking the doctrine, including judges appointed by Lyndon Johnson, George W. Bush, Barack Obama, and Donald Trump.

CHAPTER SIX

REMEDIES AND SEPARATION OF POWERS

A. More on Governmental Immunities

1. Consented Suits Against the Government

Page 533. At the end of note 10, add:

10. What is *not* a discretionary function these days? . . .

The Supreme Court granted cert in *Thacker* but only on the question of the scope of TVA's sovereign immunity. It reversed the lower court's determination that "TVA remains immune from all tort suits arising from its performance of so-called discretionary functions," because the legislation creating the TVA says that it can sue and be sued. This is a far more general waiver of sovereign immunity than the Tort Claims Act (see note 8 in the main volume at 538), and the exceptions in the Tort Claims Act are not exceptions to a sue-and-be-sued clause. Instead, "the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity." Thacker v. Tennessee Valley Authority, 139 S. Ct. 1435, 1438-1439 (2019).

But even with a sue-and-be-sued clause, "the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties." The Court emphasized that this judicially implied exception is narrow, available only when allowing the suit to proceed would cause "grave interference" with a governmental function. It remanded the case for further consideration, but it is hard to see how fishing an electric line out of the water could be anything different from what would have to be done by "a private corporation supplying electricity." On remand, the Sixth Circuit briefly summarized the Court's new exception to sue-and-be-sued clauses and remanded the case to the district court. 773 F. App'x 598 (11th Cir. 2019).

Page 534. At the end of the second paragraph of note 2, add:

2. The Federal Tort Claims Act. . . .

In Daniel v. United States, 139 S. Ct. 1713 (2019), the Supreme Court denied cert in a case asking the Court to overrule *Feres*. Justices Ginsburg and Thomas dissented. Justice Thomas, writing only for himself, quoted an earlier statement of Justice Scalia that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Id.* at 1713. The decedent in the case was a Navy Lieutenant who died from complications of childbirth in a naval hospital.

Justice Thomas again dissented in a case applying *Feres* to bar a former West Point cadet from suing for an alleged sexual assault by a fellow cadet. "Perhaps the Court is hesitant to take up this issue at all because it would require fiddling with a 70-year-old precedent that is demonstrably wrong. But if the *Feres* doctrine is so wrong that we cannot figure out how to rein it in, then the better answer is to bid it farewell. There is precedent for that approach." Doe v. United States, 141 S. Ct. 1498, 1499 (2021) (Thomas J., dissenting).

Page 535. After note 3, add:

3.1. Big claims with no immunity? Devin Kelley was an Air Force veteran with a dishonorable discharge who had shown repeated evidence of mental illness and criminality while in the service. In 2018, he murdered 26 people and wounded 20 others at the Sutherland Springs First Baptist Church in Texas. The Air Force was required to report his history to the National Instant Criminal Background Check System; it had failed to do so. Its failures were systematic; it had failed to report in some 60 percent of all cases. Kelly bought his guns from a dealer who ran the required background check; if the Air Force had reported as required, he would not have been able to buy those guns. Survivors and families of those murdered sued the Air Force for various forms of negligence.

The government did not claim that failing to report was a discretionary function; reporting appears to have been a ministerial duty. Rather, the government claimed that the suit was essentially one for misrepresentation, because its negligence had led the Background Check System to misrepresent Kelley's status. Misrepresentation claims are one of the exceptions in the block quote at the top of 535, and while the other exceptions listed there are intentional torts, the cases hold that either intentional or negligent misrepresentation is within the exception.

A federal district court rejected the government's argument. Holcombe v. United States, 388 F. Supp. 3d 777 (W.D. Tex. 2019). The plaintiffs' claims did not sound in misrepresentation, but in operational negligence. No plaintiff claimed to have relied, even indirectly, on any government representation.

The government also argued that it should be immune under the Brady Act, which created the Background Check System. That Act provides that neither a local government nor any government employee required to report can be liable for failing to prevent the illegal purchase of a weapon. 18 U.S.C. §922(t)(6). The statutory text conspicuously does not immunize the United States, but the government argued that sovereign immunity is the default, and has to be clearly waived, and it is not waived in the Brady Act. Plaintiffs and the district court responded that immunity was waived in the Federal Tort Claims Act (FTCA).

The Fourth Circuit rejected immunity claims under the FTCA and Brady Act on somewhat similar facts in Sanders v. United States, 937 F.3d 316 (4th Cir. 2019). This case arose out of Dylann Roof's murder of nine people at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. There, the Background Check System found a somewhat cryptic and not entirely accurate record of Roof's arrest for a drug offense, which should have disqualified him from buying a gun. The System failed to adequately follow up, and erroneously told the gun dealer that Roof was eligible to buy guns.

On remand, the trial court denied another motion to dismiss. The government argued that its duties under the Background Check System were uniquely governmental, with no private analogs. But the court found sufficient analogies in state-law reporting duties of exterminators, pathology labs, and drug-testing labs, and in the general rule that one who voluntarily intervenes to assist must exercise due care not to make the situation worse. Sanders v. United States, 493 F. Supp. 3d 470 (D.S.C. 2020). The court cited a similar holding in In re Marjory Stoneman Douglas High School Shooting FTCA Litigation, 482 F. Supp. 3d 1273 (S.D. Fla. 2020), yet another case of a failure to flag an ineligible gun buyer who murdered 17 students and teachers and injured 17 more. The district court in the Texas case has rejected similar government arguments about the lack of any analogous state-law duty. Holcombe v. United States, 2021 WL 67217 (W.D. Tex. Jan. 6, 2021).

The Texas case has now gone to trial, and the court entered a judgment against the United States totaling some $450 million, itemized by plaintiff and category of damage. Holcombe v. United States, 2022 WL 354974 (W.D. Tex. Feb. 7, 2022). The court has been disposing of post-trial motions, and the government can at last, or at least soon, appeal to the Fifth Circuit.

2. Suits Against Officers—Absolute Immunity

Page 545. At the end of note 2, add:

2. Investigative activities. . . .

The Fifth Circuit held that a prosecutor had acted in an investigative capacity, and thus had only qualified immunity, when, allegedly, he repeatedly met with a detective and a witness to coerce that witness into testifying to a fictional story invented by the prosecutor and the detective. Wearry v. Foster, 33 F.4th 260 (5th Cir. 2022). The plaintiff's conviction for capital murder had earlier been vacated, for failure to turn over exculpatory evidence, in Wearry v. Cain, 577 U.S. 385 (2016).

Page 554. At the end of note 4, add:

4. Presidential immunity. . . .

Waiting until after Trump left office, the Supreme Court granted cert and then remanded the case to the Second Circuit to dismiss it as moot. Biden v. Knight First Amendment Institute, 141 S. Ct. 1220 (2021). The suit was against Trump in his official capacity, so Biden was substituted. But Biden was not going to continue the challenged practice, which was really personal to Trump. The case nicely illustrates how changes in administration can render an official-capacity case moot. Justice Thomas issued a separate concurring opinion, discussing the tangential question whether social media platforms such as Twitter may be required to carry content from users consistent with the First Amendment.

In Saget v. Trump, 375 F. Supp. 3d 280 (E.D.N.Y. 2019), a federal district court, distinguishing *Knight* and other cases, issued a universal preliminary injunction against government defendants, including the President in his official capacity, barring them from terminating a designation of "Temporary Protected Status" granted to Haitian nationals in the wake of a 2010 earthquake. The designation allows the Haitians to stay in the United States until the government properly revokes this status. The court held that defendants likely had not followed proper procedures in revoking the status and may have been motivated by animus against non-white immigrants. "Here, injunctive relief against the President does not invade the province of executive discretion . . .; rather, enjoining the President and other executive officials from violating the TPS statute is akin to performing a ministerial duty and ensuring executive officials follow the laws enacted by the Congress." *Id.* at 335.

In Trump v. Vance, 140 S. Ct. 2412 (2020), the Court held that the President has no categorical or absolute immunity that entitles him to block a subpoena from a *state* prosecutor, directed to his accountants and demanding his financial records. But he might have as-applied defenses if particular demands interfered with performance of his presidential duties; any issues of that sort were left open on remand. On remand, the lower courts rejected all such arguments. Trump v. Vance, 977 F.3d 198 (2d Cir. 2020). Trump promptly filed a motion in the Supreme Court for an emergency stay, but the Court did not treat the motion as an emergency. It held the motion for more than four months before denying it without opinion. Trump v. Vance, 141 S. Ct. 1364 (2021).

In the companion case, Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020), the Court held that lower courts had given insufficient attention to separation of powers concerns arising from a House of Representative's subpoena for the President's financial records. The House did not say that it needed the records to consider impeachment; it said it needed them to consider legislation. The Court rejected the President's argument that the subpoena should be subject to the same standards of necessity as the subpoena for records of the President's conversations with close aides in United States v. Nixon, and it rejected the House's argument that it had essentially unlimited power to gather information. It said the House could not subpoena records for law enforcement purposes, or simply to expose private wrongdoing, because that is not a legislative function. The lower courts should "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers," *id.* at 2035, and three more specific factors that appeared to help implement this overarching factor.

On remand, the chair of the House committee filed a detailed memorandum explaining possible legislation and the relevance of the President's financial records. The district court rejected the subpoena for some papers, and ordered it enforced for others, based on varied judgments about the relevance of the papers sought to various legislative purposes. Trump v. Mazars USA LLP , 560 F. Supp. 3d 47 (D.D.C. 2021).

The D.C. Circuit affirmed in part and reversed in part. Trump v. Mazars LLP, 2022 WL 2586480 (D.C. Cir. July 8, 2022). It required the disclosure of all documents from 2014-2018 indicating "any undisclosed, false, or otherwise inaccurate information" or concerns about information that might be "incomplete, inaccurate, or otherwise unsatisfactory," all documents from November 2016 to 2018 relating to the Trump's lease of the Old Post Office in Washington for conversion into a luxury hotel or to the Trump entity that held that lease, and all documents from 2017 to 2018 relating to any "financial relationships, transactions, or ties" between any Trump entity and any foreign government, or any federal or state government, or any government official.

This litigation on remand has so far taken two full years. If Trump files a petition for rehearing en banc, and then a petition for certiorari, the case will presumably drag on into the next Congress. If the Republicans regain control of the House, as many political observers predict, they will presumably withdraw the subpoena and abandon the litigation. Unless all requests for stays are denied and the documents are actually produced before January 3, 2023, the documents may never be produced, no matter what the resolution of the legal issues.

B. Creating Causes of Action

Page 559. At the end of note 1.b, add:

1. The scope of *Bivens.*

b. *Bivens* as a claim-by-claim possibility. . . .

Wilkie arose on an interlocutory appeal under the collateral order doctrine (see note 10 at page 512 of the main volume), effectively making any recognition of a *Bivens* claim immediately appealable. Bryan Lammon writes that in light of *Wilkie* and other developments described below, "nearly every civil-rights suit against a federal official will require addressing the *Bivens* question both in the district court and, if the district court holds that a *Bivens* remedy exists, in an interlocutory qualified-immunity appeal." Bryan Lammon, *Making* Wilkie *Worse: Qualified-*

Immunity Appeals and the Bivens *Question after* Ziglar *and* Hernandez, U. Chi. L. Rev. Online (July 24, 2020).

Page 561. At the end of note 8, add:

8. Is *Bivens* worth the trouble? . . .

Professors Pfander, Reinert, and Schwartz used Freedom of Information Act requests to identify successful *Bivens* actions over a 10-year period. They found that in over 95 percent of the cases, "individual defendants contributed no personal resources to the resolution of the claims. Nor did the responsible federal agency pay the claims through indemnification." James E. Pfander, Alexander A. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561, 561 (2020). Instead, judgments were paid from the Judgment Fund, money that Congress appropriates each year to pay judgments against the United States. These findings mean that the risk of liability creates no significant deterrence either against individual employees or against the agency that employs them.

In Hernández v. Mesa, 140 S. Ct. 735 (2020), described further in the main volume at pages 510-511, the Supreme Court refused to extend *Bivens* in the context of a cross-border shooting—one with the shooter in the United States and victim in Mexico. The Court cited separation of powers concerns. "Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Because of the distinctive characteristics of cross-border shooting claims, we refuse to extend *Bivens* into this new field." *Id.* at 739.

Professor Stephen Vladeck, who was counsel of record in *Hernandez*, traced the pre-*Bivens* history of federal officials being held liable for damages in state courts under state tort law. Stephen I. Vladeck, *Constitutional Remedies in Federalism's Forgotten Shadow*, 107 Calif. L. Rev. 1043 (2019). A symposium on *Bivens* appears in Volume 96, No. 5 of the Notre Dame Law Review (May 2021).

Page 562. At the end of note 9, add:

9. Creeping ever closer to repudiation?. . . .

In Egbert v. Boule, 142 S. Ct. 1793 (2022), the Court refused to recognize a *Bivens* claim for alleged excessive force in violation of the Fourth Amendment, where the defendant was a Border Patrol agent. The Border Patrol was a new context.

Special factors counseling hesitation became any factor "indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* at 1803, quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017). "If there is even a single 'reason to pause before applying *Bivens* in a new context,' a court may not recognize a *Bivens* remedy." *Id.*, quoting Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020). Each partial quote was substantially beefed up with new language: "at least arguably," and "even a single." And it is not enough that a claim closely parallels the claim in *Bivens* itself, or in *Passman* or *Carlson* (see note 1.a at 558-559), unless the claim "also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law." *Id.* at 1809.

Justice Gorsuch, concurring in the judgment, thought that there are always reasons to think that Congress is a better judge than the Court, and that the Court should say so.

Justice Sotomayor dissented for herself and Justices Breyer and Kagan. But these three Justices concurred on narrower grounds in dismissing a claim that the agent had retaliated against plaintiff for his speech. They said that such claims might be raised against nearly any federal official in a wide range of contexts, and Congress was in better position to judge the impact of such claims on the federal service.

Page 562. After note 10, add:

11. *Bivens* and the Tort Claims Act. The Tort Claims Act provides that a judgment in favor of the United States is a bar to any suit against a federal employee based on the same facts. The language is broad enough to include *Bivens* suits. The Supreme Court unanimously held that this bar applies when the Tort Claims suit is dismissed for lack of jurisdiction. Brownback v. King, 141 S. Ct. 740 (2021). Because the Tort Claims Act includes both a waiver of sovereign immunity and a grant of jurisdiction, issues that would normally go to the merits are sometimes treated as jurisdictional. "[W]here, as here, pleading a claim and pleading jurisdiction entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar." *Id*. at 749.

Page 565. At the end of note 5, add:

5. The reach of *Gonzaga*. . . .

The Court has agreed to decide whether plaintiffs can sue under §1983 for violations of the Federal Nursing Home Reform Act, 42 U.S.C. §1396r, which provides minimum standards and a set of patient rights for nursing homes that receive federal money under Medicaid, a program that provides medical care for the poor. Talevski v. Health & Hospital Corp., 6 F.4th 713 (7th Cir. 2021), *cert. granted*, 2022 WL 1295706 (May 2, 2022). Defendant argues that the Act does not create enforceable individual rights for patients, and that such claims should not be allowed to bypass state legislative limits on claims for medical malpractice.

But far more than that: defendant argues that §1983 should never be available to enforce any statute that imposes conditions on recipients of federal funds. It says that such claims are inconsistent with the original understanding, because funding conditions are effectively a contract between the subsidized entity and the United States, and no third-party beneficiary of a contract could sue to enforce the contract in 1871, when §1983 was enacted. And therefore, defendant says, Supreme Court cases from 1980, 1987, and 1990, all using §1983 to enforce Spending Clause statutes, should be overruled. The principal provisions of the Nursing Home Act were enacted in 1987, squarely in the time frame of the cases that defendant wants overruled.

5.1. *Miranda.* In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that criminal suspects in custody must be advised of their rights before they are questioned. The case has been made famous by countless television shows. It was reaffirmed in Dickerson v. United States, 530 U.S. 428 (2000), but it has been riddled with exceptions and limited remedies.

Now the Court has held that *Miranda* cannot be enforced with a suit for damages under §1983. Vega v. Tekoh, 2022 WL 2251304 (U.S. June 23, 2022). In the process, the Court appears to have created a narrow new category of §1983 exceptions. The Court said, not for the first time, that *Miranda* is a prophylactic rule rooted in the Constitution, and thus binding on the states, but that a *Miranda* violation is not itself a constitutional violation. Therefore, there is no §1983 claim for violating the Constitution. *Miranda* may or may not be a federal "law," but there is no §1983 claim

for violating the laws unless the Court decides that the advantages of a damage remedy outweigh the costs. And for *Miranda*, they do not. Justice Kagan dissented, joined by Breyer and Sotomayor.

The structure of the opinion implies, but never quite says, that *Gonzaga* does not apply to constitutional claims. That is, it appears that §1983 still provides a remedy for all constitutional violations, and that *Gonzaga*'s statement equating §1983 claims with implied rights of action applies only to statutory violations.

Page 565. After note 6, add:

6.1. "Appropriate relief." The Religious Freedom Restoration Act provides that a victim of a violation of the act "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. §2000bb-1(c). "Government" is defined to include federal officials and any person acting under color of federal law. The Court unanimously held that the statute authorizes damages against federal employees. Tanzin v. Tanvir, 141 S. Ct. 486 (2020). Muhammad Tanvir and other plaintiffs alleged they were put on the federal "No Fly" list for their refusal to serve as informants against their religious communities, and that doing so violated RFRA. The Court agreed that the case could go forward. "In the context of suits against Government officials, damages have long been awarded as appropriate relief. . . . A damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction." *Id*. at 491-92.

C. The Right to Jury Trial

Page 587. After note 5, add:

6. A simplified approach? Professor Bray argues for a simplified approach to the right to a jury trial:

> There are certain categories of suits that were equitable in 1791 and are still identifiable today. These were not, and are not, "Suits at common law," and so in these categories there should be no federal constitutional right to a jury trial. Three such categories are described here: (1) plaintiff's suit is in equity's exclusive jurisdiction, (2) plaintiff seeks an equitable remedy; and (3) plaintiff employs an equitable device for aggregating cases, such as interpleader or class action. Apart from these categories, there should be a presumption of a right to a jury trial. That presumption would be rebuttable, though in practice it would be rebutted only rarely.

Samuel L. Bray, *Equity, Law, and the Seventh Amendment,* 100 Tex. L. Rev 467, 471-472 (2022). His first category might require some tweaking of Supreme Court precedent in the ERISA cases and perhaps elsewhere; his third category would require the wholesale overruling of the cases requiring a jury trial in class actions for damages.

CHAPTER SEVEN

PREVENTING HARM WITHOUT COERCION: DECLARATORY REMEDIES

A. Declaratory Judgments

1. The General Case

Page 595. At the end of note 4, add:

4. When is a declaratory judgment "appropriate"? . . .

In California v. Texas, 141 S. Ct. 2104, 2116 (2021), the Supreme Court suggested that a plaintiff has no standing for Article III purposes to seek a declaratory judgment if plaintiff would not be entitled to other relief (whether or not such relief is actually sought). That determination seems to refute the idea that declaratory judgments have a lower standard of constitutional ripeness than claims for injunctions.

2. The Special Case of Interfering with State Enforcement Proceedings

Page 614. At the end of the first paragraph of note 2, add:

2. The myth of mildness. . . .

In Ohio litigation during the 2020 election season, a trial court issued a declaratory judgment stating that the Ohio Secretary of State's interpretation of Ohio law to limit the use of drop boxes to deposit mail-in ballots was contrary to Ohio law. The Ohio Secretary of State refused to abide by the declaratory judgment, and the court promptly followed it up with an injunction. "[T]he court purposely did not include an injunction because the court understood the Secretary favored allowing additional ballot drop boxes and would follow a legal ruling recognizing them as lawful. . . . However, public statements of a 'spokesperson' for the Secretary after the Opinion issued as reported by news media (and now in the record) that the Secretary would not comply with the declaratory judgment without also being under an injunction required the court to reevaluate the matter. On the morning of September 16, the court ordered the Secretary to explain his position. In response, the court has been advised the Secretary will not abide by the declaratory judgment alone. The Secretary urges the court to grant an injunction so that he may appeal." Ohio Democratic Party v. LaRose, 2020 WL 5580378, at *1 (Ohio Ct. Com. Pl. Sept. 16, 2020). The court did so, the Secretary appealed, and under Ohio law the appeal automatically stayed an injunction against a state official. The appeals court later reversed the trial court on the merits. 159 N.E.3d 1241 (Ohio Ct. App. 2020).

It is not clear why the court issued only a preliminary injunction after an apparently final declaratory judgment, or why the declaratory judgment was not appealable. Perhaps the court considered the declaratory judgment to also be preliminary; there are references to such a thing in Ohio cases. Whatever the answer to these puzzles, the case highlights that litigants who are not at all scofflaws may flout a declaratory judgment if they gain some procedural or substantive advantage from being enjoined.

Page 617. After note 6, add:

6.1. Self-inflicted injuries? The Court decided two standing issues in Federal Election Commission v. Cruz for Senate, 142 S. Ct. 1638 (2022). The case involved a challenge to federal law rather than state law, and an injunction against enforcement rather than a declaratory judgment, but neither distinction affected the issues presented.

Political candidates often lend their own money to their campaign. Federal law provides that no more than $250,000 of such loans can be repaid with contributions received after the election. In order to challenge this law, Senator Ted Cruz loaned his campaign $260,000. The campaign repaid $250,000 shortly after the election. Cruz then sued to challenge the prohibition on its repaying the remaining $10,000.

The Court held it irrelevant that Cruz had structured the whole transaction in order to create standing to challenge the law. Putting oneself in danger of enforcement actions is a common feature of suits to challenge the validity of laws, and Cruz would also have had standing if he had made no loan at all, but simply alleged that he would have loaned his campaign more than $250,000 if federal law did not make it so difficult to obtain repayment of the loan.

The government also argued that the statute at issue did not actually prohibit repayment of the last $10,000; that prohibition came only from the FEC's implementing regulation. This argument turned on details of tracing funds that the Court described as "Alice in Wonderland" and "a rabbit hole." Without resolving the factual argument, the Court held that Cruz had standing to challenge the statute because, if the statute fell, the regulation would necessarily fall with it.

On the merits, the Court invalidated the statute. Justice Kagan dissented on the merits, joined by Justices Breyer and Sotomayor. The dissenters did not discuss the standing issues.

Page 620. At the end note 3, add:

3. The limits of preliminary relief. . . .

Michael Morley, *Erroneous Injunctions*, 71 Emory L.J. 1137 (2022), weighs in on the debate in Edgar v. MITE Corp., arguing that federal courts have the power to prevent the federal government and states from taking punitive measures against people for actions performed under the protection of a federal injunction.

D. Declaratory Relief at Law

Page 637. At the end of note 1, add:

1. Nominal damages as a way to reach the merits. . . .

The Supreme Court resolved this dispute against mootness in Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021). See this Update to page 293.

CHAPTER EIGHT

BENEFIT TO DEFENDANT AS THE MEASURE OF RELIEF: RESTITUTION

A. Restitution from Innocent Defendants—and Some Who Are Treated as Innocent

1. Introducing Restitution—Mistake

Page 646. Replace note 9.a with the following:

9. Law and equity. . . .

a. Why no constructive trust? The main volume says that plaintiff did not seek a constructive trust, but that is not quite right. It asked for one, but made no effort to prove the essential facts that might entitle it to one.

There are important restitutionary remedies that originated in equity, including constructive trust. Plaintiff needs a constructive trust when she seeks to recover a specific asset from a specific fund. Blue Cross sought a constructive trust, but the court denied that relief, because Blue Cross didn't allege the existence of specific property from a specific fund upon which to impose a trust. Blue Cross instead got a simple money judgment in restitution to be collected from defendants' general assets in the same legal way as a damage judgment would be collected. On these facts, Blue Cross got a legal remedy that could simply be described as a judgment in restitution or a judgment in unjust enrichment.

B. Recovering More Than Plaintiff Lost

1. Disgorging the Profits of Conscious Wrongdoers

Page 679. After note 9.c, add:

9.1. Reforming the SEC's version of disgorgement. In Liu v. Securities & Exchange Commission, 140 S. Ct. 1936 (2020), the Court took up the issue it had reserved in *Kokesh*. The statute authorizes the SEC to seek and obtain "equitable relief," which the statute does not define or specify. 15 U.S.C. §78u(d)(5). The defendant fraudsters argued that *Kokesh* had held disgorgement to be a penalty, that equity does not enforce penalties, and that therefore, disgorgement is not equitable relief and is unavailable to the SEC. The SEC argued that equitable relief is vaguely defined and capable of expansion, and that it could include joint and several liability for the gross receipts of all conspirators, with no credit for expenses.

The Court held, in an opinion by Justice Sotomayor, that disgorgement is basically a new name for the equitable remedy traditionally known as accounting for profits. And that remedy, with modest exceptions, is limited to the net profits, not gross receipts. And again with modest exceptions, each wrongdoer is liable only for his own net profits, not the profits received by others. And the SEC cannot just keep the profits for itself; it must make reasonable efforts to distribute any money recovered to the defrauded investors. So interpreted and so limited, disgorgement is equitable relief authorized by the statute. It may still be a penalty for statute of limitations purposes; the Court did not address that question.

Justice Thomas dissented. He seemed to think that disgorgement is not just a new name, but a new remedy, not historically available and therefore not included within the phrase "equitable

relief." He also thought that it is poorly defined and broader than the historic scope of accounting for profits. In places, he seemed to think that accounting for profits is more limited than it has been in most of the cases. Accounting for profits is taken up in the next principal case and in the main volume at 686.

The SEC responded by persuading Congress to amend §78u. It now expressly authorizes disgorgement, but it does not define disgorgement. The SEC may argue for the pre-*Liu* definition in the lower courts, but that seems quite implausible in the wake of *Liu*. Section 78t, which was not amended, says that persons who control violators (most commonly, the officers and directors of a corporation) are jointly and severally liable with the controlled violator under §78u. There's a good chance that no one in Congress focused on this, but that means joint and several liability in disgorgement for some defendants. The amendments to §78u also addressed *Kokesh*, providing a ten-year statute of limitations for violations involving scienter, a securities law term for knowing violations.

9.2. Injunctions to pay restitution? The Court addressed a similar but distinct issue in AMG Capital Management, LLC. v. Federal Trade Commission, 141 S. Ct. 1341 (2021). Section 13(b) of the FTC Act, 15 U.S.C. §53(b), authorizes the Commission to obtain a temporary restraining order, preliminary injunction, or permanent injunction, whenever it has reason to believe that any person "is violating, or is about to violate" any law that the FTC enforces. These injunctions have long ordered violators to refund money wrongfully taken from consumers.

But of course, "injunction" is a narrower term than "equitable relief," and the Court held that the statute does not authorize restitution of ill-gotten gains. It noted that injunctive relief is forward looking, to prevent future harms, and restitution is backward looking, to redress past harms. More important, other sections of the FTC Act do expressly authorize monetary redress to consumers. Those sections include more safeguards for defendants and require the FTC to go through its administrative process first; under §13(b), it can avoid those safeguards and go directly to court.

Pre-merger equity courts long granted restitution as incidental relief accompanying an injunction. The Court did not acknowledge that long tradition, but it did acknowledge two mid-twentieth century cases applying it. It said that those cases did not announce a universal rule for every statute, and that here, the statutory structure clearly implied that "injunction" meant only that, and did not carry incidental monetary relief with it. Justice Breyer wrote the opinion for a unanimous Court.

Page 683. After note 6, add:

7. Adequate remedy at law irrelevant (if there is any other basis for equitable jurisdiction). The Delaware Court of Chancery, which necessarily still views claims for an equitable remedy in jurisdictional terms, has issued a substantial opinion on the adequate remedy issue. Garfield on behalf of ODP Corp. v. Allen, 2022 WL 1641802 (Del. Ch. May 24, 2022).

The corporation adopted an equity compensation plan for its executives, and then issued shares of stock to defendant Allen in apparent excess of the limits in that plan. Plaintiff, a shareholder in the corporation, filed suit on his own behalf and derivatively on behalf of the corporation. He alleged claims in breach of contract, breach of fiduciary duty, and unjust enrichment. Defendants argued that lack of an adequate remedy at law is an essential element of any claim for unjust enrichment. Because plaintiff believed that his contract and fiduciary duty claims were valid, he was necessarily arguing that those claims would provide an adequate remedy, and so his unjust enrichment claim must be dismissed.

The court squarely rejected this argument, quoting comments to the Restatement §4 and also quoting Palmer's treatise. Because the law of unjust enrichment arose at law as well as in equity, lack of an adequate remedy at law is no element of a substantive claim for unjust enrichment. And it is not essential to jurisdiction in the Delaware Chancery Court if there is any other basis for equitable jurisdiction; the fiduciary duty claim was plainly a basis for equitable jurisdiction here. In states that have fully merged law and equity, the jurisdictional issue would not arise, and the key holding would be that lack of an adequate remedy at law is not an element of the substantive claim. The court expressly disapproved earlier Delaware cases that had suggested otherwise. *Id*. at *40-*45.

The court also reaffirmed that plaintiff could recover in unjust enrichment without proving any damages to himself. *Id.* at *37-*40. Cases that required both an enrichment and a corresponding "impoverishment" are properly understood as requiring only that the enrichment be acquired "in violation of the other's legally protected rights," citing §§1 and 3 of the Restatement and earlier Delaware cases.

Page 688. At the end of note 5.a, add:

5. Remedies for infringement of intellectual property. . . .

a. Trademark. . . .

The Supreme Court resolved a six-six circuit split over whether the current version of Section 35 of the Lanham Act, 15 U.S.C. §1117(a), allows for the recovery of a defendant's profits when there has been no showing of willful trademark infringement. Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020). The statutory language reads:

> When . . . a violation under section 1125(a) or (d) of this title [covering trademark infringement and cyberpiracy of trademarks respectively], or a willful violation under section 1125(c) of this title [covering trademark dilution], shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled . . . subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

The Court refused to read a willfulness requirement into the statute, but suggested willfulness may still be relevant to the award of profits. Justice Gorsuch, offering a textualist interpretation for the majority, emphasized that the relevant part of the Lanham Act contains no express willfulness requirement, while other parts of the Lanham Act do have such a requirement or other rules about mental states. 140 S. Ct. at 1495. The Court also rejected Fossil's argument that the provision in Section 1125 that courts should decide such cases consistent with "principles of equity" required a willfulness requirement: "[I]t seems a little unlikely Congress meant 'principles of equity' to direct us to a narrow rule about a profits remedy within trademark law." *Id.* at 1496. As stated, that seems right. But "principles of equity" should have directed the Court to the much broader principle that restitution of profits is generally available only against conscious wrongdoers and defaulting fiduciaries.

Surveying the complex history of courts' awarding of profits in pre-Lanham Act cases, the Court concluded that a defendant's mental state "is relevant to assigning an appropriate remedy." *Id.* at 1497. Justice Alito, joined by Justices Breyer and Kagan, concurred, calling willfulness "a highly important consideration in awarding profits under §1117(a), but not an absolute

precondition." *Id.* Justice Sotomayor, concurring in the judgment, went further, arguing that "a district court's award of profits for innocent or good-faith trademark infringement would not be consonant with the 'principles of equity' referenced in §1117(a) and reflected in the cases the majority cites." *Id.* at 1498.

C. Restitutionary Rights in Specific Property

3. Equitable Liens and Subrogation

Page 769. At the end of note 5, add:

5. A novel context. . . .

Congress responded to *Paroline* by passing the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, codified at 18 U.S.C. §2259. There is rhetoric in the findings about aggregate causation, but in substance Congress set a $3,000 floor as the minimum criminal restitution award in each case, repeatable until plaintiff is fully compensated. Subject to the minimum, the court should award "an amount that reflects the defendant's relative role in the causal process," which seems to codify *Paroline*. Congress also created a fund from which a victim can recover $35,000. Electing the government money does not preclude plaintiff from seeking restitution from other defendants in other cases.

D. Defenses and the Rights of Third Parties

2. Payment for Value

Page 783. After note 10, add:

11. A billion-dollar example. Revlon, a manufacturer of cosmetics, borrowed nearly $1 billion from a group of banks and hedge funds, each of which held a fractional share of the total loan. Such an arrangement is usually called a syndicated loan. Citibank was the Administrative Agent for this loan, meaning that it received payments from Revlon and distributed the cash to the various creditors.

On August 11, 2020, Citi attempted to pay $7.8 million in interest on the loan. Instead, it paid the entire interest and principal. It paid the interest with $7.8 million from Revlon, and it paid nearly $900 million in principal with its own money. Citi discovered the error the next day and requested refunds from all the creditors, some of whom voluntarily returned the extra money. Other creditors refused, and Citi sued them. The loan agreement provided that New York law applied, and the federal district court held that the creditors could keep the money under *Banque Worms*. In re Citibank August 11, 2020 Wire Transfers, 520 F. Supp. 3d 390 (S.D.N.Y. 2021).

Some issues were clear. Citi could ordinarily recover money paid by mistake, but not if the payment went to a creditor who was actually owed the money and took it without notice. Citi argued that it was enough that the creditors had notice before they credited the payment to Revlon's account and discharged the debt, citing cases from Illinois, Kentucky, and the District of Columbia. But under New York law, the creditors were protected unless they had notice before they received the money. Citi had caught its mistake one day later, but in *Banque Worms*, the paying bank had asked for the money back only two hours after sending it, and before the close of business, so likely before the receiving bank had settled its accounts for the day. *Banque Worms* was

controlling, and in any event, the court thought that it would be unworkable to litigate in every case just when the creditor receiving a mistaken payment had applied it to the debtor's account.

The court said that notice must come *before* the payment, but its subsequent analysis seemed to assume that notice *simultaneously* with the payment would suffice. The court agreed with Citi, and with the Restatement (Third), that constructive notice is enough. But witnesses from all the creditors testified that they had assumed that Revlon had decided to prepay its loan. They swore that it never occurred to them that a sophisticated institution like Citibank had made a blunder of such magnitude. The court found this testimony credible and persuasive.

Citi is now subrogated to the creditors' claims against Revlon, entitled to be repaid pursuant to the original terms and schedule of the loan agreement. But Revlon appears to have been in financial trouble. The creditors plainly doubted their ability to collect and had prepared a lawsuit against Revlon. This explains why they refused to return the mistaken prepayment even though they had once viewed this loan as a good investment. The credit risk is now transferred to Citi. Nearly two years after the mistaken payment, Revlon filed for bankruptcy. Lauren Hirsch & Julie Creswell, *Revlon, a Makeup Staple for Generations, Files for Bankruptcy*, N.Y. Times (June 16, 2022).

Citi has appealed. The district court denied a stay pending appeal. 2021 WL 1905002 (S.D.N.Y., May 12, 2021). Numerous amici have filed briefs addressing various issues of law and policy. But whatever the better rule would be, the case is controlled by New York law, *Banque Worms* states New York law, and the critical finding—that none of the creditors suspected a mistake—appears to be a finding of fact, reversible only if clearly erroneous.

The financial press reports that the industry is shocked by the district court's judgment and has drafted language to contract around it. See, e.g., Amanda Montano, *What Happens if You Make a Payment in Error? The LMA Responds to the Revlon Loan Dispute*, JD Supra (Blog), 2021 WLNR 21891398 (July 6, 2021). The LMA is the Loan Market Association, which describes itself as "the authoritative voice of the syndicated loan market" in Europe, Africa, and the Middle East. This development raises questions about whether the industry really needs or supports the *Banque Worms* rule, and perhaps, whether and how mistaken payments on a syndicated loan are different from mistaken wire transfers for other purposes.

Meanwhile, a British branch of Banco Santander, an international bank based in Spain, paid out $175 million in duplicate payments to 75,000 recipients on December 25, 2021. Merry Christmas everybody! Amanda Holpuch, *British Bank Makes $175 Million in Mistaken Payments*, N.Y. Times (Jan. 1, 2022). Whatever the relevant law in the United Kingdom, recovering 75,000 payments averaging a little more than $2,000 each may be completely unworkable. Santander was trying to recover through the various banks holding the accounts in which the mistaken payments were deposited.

CHAPTER NINE

ANCILLARY REMEDIES: ENFORCING THE JUDGMENT

A. Enforcing Coercive Orders: The Contempt Power

1. The Three Kinds of Contempt

Page 794. At the end of note 1, add:

1. The basic distinctions. . . .

The Supreme Court clarified the required state of mind for civil compensatory contempt, at least in the bankruptcy context and apparently more generally, in Taggart v. Lorenzen, 139 S. Ct. 1795 (2019). At the end of a bankruptcy proceeding, a bankruptcy court typically enters a "discharge order" releasing the debtor from liability for most prebankruptcy debts. The order prevents creditors from attempting to collect any debt covered by the order. In *Taggart*, a creditor attempted to collect from a debtor after a discharge order, and the bankruptcy court held the creditor in civil compensatory contempt under a strict liability standard. The Ninth Circuit, reversing, said that the appropriate standard for judging the creditor's state of mind was subjective good faith.

The Supreme Court, unanimously reversing the Ninth Circuit, rejected both standards and applied a standard of objective reasonableness:

> [A] court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

Id. at 1799.

"This standard reflects the fact that civil contempt is a 'severe remedy,' and that principles of 'basic fairness requir[e] that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt." *Id*. at 1802.

The Court rejected the Ninth Circuit's subjective good faith standard as:

> inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Id. at 1802-1803. The Court added that subjective bad faith also could be grounds for civil contempt.

The Court's reliance on "traditional civil contempt principles," and not on anything specific to the Bankruptcy Code, suggests that the statements from lower courts in the second paragraph of

note 1 in the main volume are no longer operative. But plausible claims of objective doubt as to what the injunction prohibits may arise far more frequently with respect to discharge orders than with respect to other injunctions. Injunctions are supposed to individuate the law's command, specifying what defendant is required to do or refrain from doing in the circumstances of the particular case. But "discharge orders are written in general terms and operate against a complex statutory backdrop . . ." *Id.* at 1803. The order typically says only that the bankrupt debtor is discharged, *id.* at 1799; the statute says that this operates as an injunction against further collection efforts, 11 U.S.C. §524(a)(2); and the statute also lists 19 categories of debts that are excepted from the discharge, 11 U.S.C. §523. The scope of these exceptions is the subject of vast amounts of litigation, and the law leaves that litigation to later collection efforts; the discharge order does nothing to further specify the scope of the discharge. So *Taggart* applies traditional principles of civil contempt to a very untraditional injunction.

Page 797. At the end of note 7, add:

7. A high-profile example with twists: Sheriff Joe Arpaio. . . .

The Supreme Court denied without comment a writ of mandamus seeking to block the appointment of a special prosecutor. In re Arpaio, 139 S. Ct. 1620 (2019). The Ninth Circuit denied rehearing en banc on the appointment of the special prosecutor, with substantial concurring and dissenting opinions. United States v. Arpaio, 906 F.3d 800 (9th Cir. 2018). The majority emphasized the court's inherent power to protect its authority by appointing a special prosecutor, noting that that authority is codified in Federal Rule of Criminal Procedure 42. The dissenters argued that it was sufficient to appoint an amicus to defend the judgment below, and that the court's authority to appoint a special prosecutor is exhausted once the government initiates a contempt prosecution—even if it later or immediately drops that prosecution. The majority thought it clear that the court had the authority to see that the prosecution actually be prosecuted.

On the merits, the Ninth Circuit affirmed the district court's judgment dismissing Arpaio's criminal proceeding with prejudice, and denying vacatur of the district court's order finding Arpaio guilty of criminal contempt. United States v. Arpaio, 951 F.3d 1001 (9th Cir. 2020).

The Second Circuit has rejected the arguments that court-appointed special prosecutors in contempt cases violate the Appointments Clause and that a criminal prosecution initiated by a judge violates the separation of powers. United States v. Donziger, 2022 WL 2232222 (2d Cir. June 22, 2022). But it reached these conclusions only by holding that the Attorney General can at any time remove such a special prosecutor. A dissenter argued that the *Young* case, in note 6 in the main volume, is inconsistent with later separation of powers decisions and is no longer good law. Donziger has been a persistent litigator, and a cert petition seems inevitable. For more on the spectacular fraud for which he has been held liable, see the main volume and this Update to page 954.

2. How Much Risk of Abuse to Overcome How Much Defiance?

a. Perpetual Coercion?

Page 810. At the end of note 6, add:

6. Too stubborn to be coerced. . . .

Thompson, the treasure hunter, remains in jail as of May 2022, though his artifacts recently went on tour. David Millward, *Treasure Hunter's Bounty Goes on Tour . . . While He Stays in Jail for Not Giving Up His Gold*, The Telegraph (May 8, 2022). He told a court in November 2018 that "I'm supposed to have the keys to my freedom by telling where the coins are, but I don't know where the coins are . . . . I put them in an off-shore trust. The trustee can put them anywhere he wants." Federal district judge Algenon L. Marbley did not buy it. "As long as you are content to be a master of misdirection and deceit to the court, I am content to let you sit." The judge is also fining Thompson $1,000 for each day he sits in jail on top of a $250,000 punishment for failing to reveal the location of the coins. Eric Barton, *Treasure Hunter Tommy Thompson Sold $50 Million Worth of Gold—and He's in Jail Until He Admits Where It Is*, Fort Lauderdale Illustrated (Feb. 18, 2019). The trustee story here is obviously different from the memory-failure story in the main volume, but maybe he recovered enough to remember the off-shore trust. If the trustee story were true, we assume that Thompson could ask the trustee where the coins are.

Thompson unsuccessfully argued to the Sixth Circuit that he could not be held for more than 18 months under 28 U.S.C. §1826, the recalcitrant-witness statute described in note 8 of the main volume. United States v. Thompson, 925 F.3d 292 (6th. Cir. 2019). The Sixth Circuit appeared to agree that if the district court were keeping Thompson in jail solely because he refused to testify as to the location of the coins, the district court might have been subject to §1826's 18-month limit on jailing a witness for refusing to testify or provide information. *Id.* at 298. But Thompson in his plea agreement also agreed to what the Sixth Circuit termed "non-testimonial" conduct in "assisting" civil plaintiffs in "identifying and recovering assets," and the district court had ordered Thompson to comply with this plea agreement. *Id.* at 301-02. Such conduct included executing "a limited power of attorney to permit the parties to 'probe' the contents of a Belizean trust." *Id.* at 303. The Sixth Circuit held that §1826's 18-month limit did not apply to his refusal to perform these non-testimonial obligations. *Id* at 303. The court's reasoning would presumably also apply to an explicit order to turn over the coins.

In December 2020, a court refused to release Thompson from custody based on his claim that he was at risk of contracting COVID-19. Associated Press, *Treasure Hunter Stuck in Jail for 5 Years Because He Still Won't Disclose Whereabouts of 500 Gold Coins*, CBS News (Dec. 17, 2020).

Page 810. At the end of note 8, add:

8. Recalcitrant witnesses. . . .

Former U.S. Army intelligence analyst Chelsea Manning was sentenced to 35 years in prison in 2013 for disclosing classified materials to WikiLeaks without authorization. President Obama commuted her sentence in 2017. The release did not end her legal troubles. Manning was jailed in coercive civil contempt for 62 days in 2019 for failing to disclose information about WikiLeaks to a federal grand jury. Authorities released her after the grand jury's term expired, but just days later she headed back to jail after she refused to speak with another grand jury. Jacey Fortin, *Chelsea Manning Ordered Back to Jail for Refusal to Testify in WikiLeaks Inquiry*, N.Y. Times (May 16, 2019). Manning was released in March 2020 but is still being required to pay $256,000 in fines because of her refusal to speak to the second grand jury. Charlie Savage, *Chelsea Manning Is Ordered Released From Jail*, N.Y. Times (Mar. 12, 2020).

6. Drafting Decrees

Page 860. At the end of note 1, add:

1. Rule 65(d)(1) again. . . .

A 2-1 Seventh Circuit panel held that an opinion and order granting a preliminary injunction was defective under Federal Rule of Civil Procedure 65(d)(1), because the order itself was not contained in a separate document. MillerCoors LLC v. Anheuser-Busch Companies LLC, 940 F.3d 922 (7th Cir. 2019). The court ordered a limited remand for the purpose of having the district court enter the order on a separate piece of paper. The dissenting judge wrote that nothing in the rule required that an order be on a separate document from the opinion explaining the basis for the order and that remand for this purpose made no pragmatic sense. "We need not remand for formalistic compliance with an imagined and non-jurisdictional rule that no party has raised." *Id*. at 924 (Hamilton, J., dissenting).

The Seventh Circuit has applied the same rule to declaratory judgments, this time invoking Rule 58. INTL FCStone Financial Inc. v. Jacobson, 950 F.3d 491 (7th Cir. 2020). Rule 58 expressly requires that "[e]very judgment and amended judgment must be set out in a separate document." And Rule 54(a) defines "judgment" to include "any order from which an appeal lies," which of course includes preliminary injunctions. But the court in *MillerCoors* had not relied on Rule 58, and Judge Hamilton's dissent thought it would be completely unworkable to apply Rule 58 to every appealable order—for example, an order denying a motion to modify a preliminary injunction.

The kernel of actual policy underlying these formalities is that when trial judges are sloppy about the orders they issue, the parties can be confused about what they are required to do or when the time for appeal runs, and appellate judges have to waste time sorting out the resulting disputes. Judge Hamilton did not dispute that, but he thought a good thing can be carried too far. The lesson for lawyers is to carefully attend to the details. You don't want to be the one who provokes a punctilious response from an irritated judge.

B. Collecting Money Judgments

1. Execution, Garnishment, and the Like

Page 866. At the end of note 1, add:

1. The mechanics of execution. . . .

For more on collecting money judgments, see Jason J. Kilborn, *Eyes on the Prize: Procedures and Strategies for Collecting Money Judgments and Shielding Assets* (Carolina Academic Press 2019).

Page 877. At the end of note 1, add:

1. What if a solvent defendant won't pay? . . .

The dispute between AGI and BI ended with a global settlement of all claims. Biolitec voluntarily dismissed its sixth appeal. AngioDynamics, Inc. v. Biolitec AG, 2019 WL 10734652 (1st Cir. Mar. 25, 2019). The trial court vacated the various contempt orders and the arrest warrant against the CEO, with AGI's consent. Agreed Motion to Vacate Civil Contempt Orders and Arrest Warrant at 1, AngioDynamics, Inc. v. Biolitec AG, No. 3:09-cv-30181 Doc. 674 (D. Mass. Apr.

24, 2019) (with handwritten notation of order). The orders do not reveal what AGI received in exchange for all this, but presumably it was a substantial partial payment.

Page 880. At the end of the first paragraph of note 9, add:

9. Harassment. . . .

But a law firm whose only role is to foreclose a mortgage in a nonjudicial foreclosure proceeding (which is permitted in about half the states) is not subject to most of the Act. Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029 (2019). This unanimous opinion was principally based on the negative implications of a sentence providing that such a firm is a debt collector for purposes of a single subsection. *Id.* at 1036-1037.

3. Preserving Assets Before Judgment

Page 906. At the end of note 1, add:

1. Freidman's other problems. . . .

It turns out that the collapse of taxi medallion prices was driven not just by Uber and Lyft, but also by a bubble driven by price manipulators and predatory lenders in the years before Uber and Lyft. And one of the major manipulators was apparently Evgeny Freidman. He bought medallions at inflated prices in the belief that such purchases would drive up the market price and increase the value of the other medallions that he already owned. Brian M. Rosenthal, *'They Were Conned': How Reckless Loans Devastated a Generation of Taxi Drivers*, N.Y. Times (May 19, 2019). The scheme is further detailed in Brian M. Rosenthal, *The Epic Rise and Hard Fall of New York's Taxi King*, N.Y. Times (Dec. 5, 2019). Freidman was sentenced to five years' probation on the tax-fraud charges in exchange for his cooperation in the government's prosecution of Michael Cohen. He died from a heart attack in 2021. Sam Roberts, *Gene Freidman, 'Taxi King' Who Upended His Industry, Dies at 50*, N.Y. Times (Oct. 25, 2021).

CHAPTER TEN

MORE ANCILLARY REMEDIES: ATTORNEYS' FEES AND THE COSTS OF LITIGATION

B. Attorneys' Fees from a Common Fund

Page 948. After note 1, add:

1.1. Clarification and oddities in Texas. The Texas court committed to the lodestar in all fee-shifting cases, both statutory and contractual, unless the statute or contract requires some other method. Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469 (Tex. 2019). The decision followed a long evolution from a vague list of factors; the seeming coexistence of the factors and the lodestar in Supreme Court opinions had generated confusion in the lower courts.

The list of factors had survived in part because fee awards in Texas are treated as part of the merits and submitted to the fact finder, including the jury in jury trials. See the main volume at 928. Vagueness in the rule enabled the attorney or her expert witness to testify in conclusory terms about the reasonableness of the fees. Such testimony will no longer suffice; the witness must testify to the tasks performed and when, and how much time was spent on each task. Billing records are not formally required, but as the court acknowledged, they will be necessary in all but the simplest cases. And because Texas has two-way fee-shifting in contract cases, both sides must often prove up their fees; presumably, the jury will now get two sets of billing records, authenticated by live testimony.

Fees for post-trial motions and appeals are awarded conditionally, and the time required can only be estimated. The jury in *Rohrmoos* awarded $800,000 for work in the trial court, an additional $150,000 if there were an appeal to the court of appeals, and an additional $75,000 if there were a further appeal to the state supreme court. The court vacated this award because the testimony in support of it did not have nearly enough detail to comply with the newly clarified rule.

Page 952. At the end of note 13, add:

13. Social Security cases. . . .

On the merits, the Supreme Court unanimously held that the 25 percent cap applies only to court representation, and not to total representation, of Social Security claimants. Culbertson v. Berryhill, 139 S. Ct. 517 (2019). This will cost Social Security claimants more, but it will also enable them to attract more and better counsel.

Page 954. At the end of note 2, add:

2. Disparities in wealth. . . .

Donziger was later found guilty of criminal contempt for repeatedly and willfully flouting earlier court orders in the civil case and sentenced to six months in jail. United States v. Donziger, 2022 WL 2232222 (2d Cir. June 22, 2022).

Page 954. At the end of note 3, add:

3. Except where a statute otherwise provides. . . .

The Copyright Act gives district courts discretion to award "full costs" for violations. 17 U.S.C. §505. The Ninth Circuit had read the word "full" in the statute to allow a district court to award expenses beyond the six categories of costs allowed in the general federal costs statutes, 28 U.S.C. §§1821 & 1920. The Supreme Court unanimously reversed, holding that costs under the Copyright Act are limited to the six categories of costs listed in Title 28. Rimini Street, Inc. v. Oracle USA, Inc., 139 S. Ct. 873 (2019).

Page 954. At the end of note 4, add:

4. What is included? . . .

The Supreme Court held that when a federal appellate court awards costs on appeal pursuant to Federal Rule of Appellate Procedure 39, a federal district court on remand does not have authority to deny or reduce such costs. City of San Antonio v. Hotels.com, 141 S. Ct. 1628 (2021). A class of 175 Texas municipalities had sued online travel companies, arguing that they were not collecting enough in hotel occupancy taxes. The municipalities initially won in federal district court, and the companies had to post a supersedeas bond eventually totaling $84 million so that the municipalities could not collect the judgment while the appeal was pending. The premium on the bonds was about $2.2 million. The companies eventually won on appeal on the merits and the Fifth Circuit awarded costs to the companies. Under Rule 39(e), supersedeas bond premiums are included as costs on appeal, and the district court on remand awarded the full amount of the bond premiums over the City of San Antonio's objection, holding that it had no discretion to do otherwise. The Supreme Court agreed, holding that such discretion rests only with the appeals court under Rule 39 as to costs on appeal.

Rule 39 provides that costs on appeal include the costs of preparing and transmitting the record and the reporter's transcript, the cost of bonds to delay collection of the judgment, and the fee for filing the notice of appeal. This rule supplements the statutory lists, explains Exxon's request for the cost of its supersedeas bond, and resolves the mystery noted in the second paragraph of note 4 in the main volume. Your senior editor, who wrote that paragraph, had just missed Appellate Rule 39.

CHAPTER ELEVEN

REMEDIAL DEFENSES

A. Unconscionability and the Equitable Contract Defenses

Page 986. At the end of note 4, add:

4. What's left? . . .

If one objecting customer can mess up arbitration for Fitbit, what could 75,000 customers organized to arbitrate do to Amazon? It potentially can induce a company to abandon arbitration and return disputes to the courts. See Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, Wall St. J. (June 1, 2021). Amazon's terms of service required that customers complaining about its products file a claim in arbitration, and Amazon agreed to pay the filing fee. Typical filing fees are between $100 and $2,000. Plaintiffs' lawyers flooded Amazon with 75,000 individual arbitration claims alleging that the company's Alexa-powered Echo devices recorded people without their permission. "That move triggered a bill for tens of millions of dollars in filing fees, according to lawyers involved, payable by Amazon under its own policies. . . . In recent years, a few well-resourced law firms have used online marketing and other tools to sign up consumers and employees en masse to file arbitration claims, alleging everything from unfair pay to fraudulent business practices. The filings can overwhelm arbitration providers and the targeted companies, which are accustomed to paying the fees for small numbers of claims but not tens of thousands all at once." Faced with these costs, Amazon changed its terms of service to require disputes to be filed in court.

The DoorDash food delivery company faced a similar problem when 5,000 of its drivers filed individually for arbitration over whether they should be treated as independent contractors. DoorDash unsuccessfully tried to block the arbitrations in federal court. "No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed." Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020).

The move by plaintiffs' lawyers to use individual arbitration took considerable effort. "Filing arbitration claims en masse takes considerable upfront resources and technology because plaintiffs' lawyers need to have a relationship with every single client. In class-action lawsuits, most plaintiffs have no involvement until receiving an email or postcard saying they are eligible for a payment." Randazzo, *supra*. The reason so many companies required arbitration and class-action waivers was to ensure that individual arbitration would become unworkable, so that claims would effectively be barred. The plaintiffs' bar called their bluff; it turns out that individual arbitration is unworkable for defendants too.

B. Unclean Hands and *In Pari Delicto*

Page 989. At the end of note 1, add:

1. Two defenses. . . .

Gilead and Merck competed in selling drugs to treat Hepatitis C. Gilead sued for a declaration that Merck's treatment patents were invalid and that Gilead was not infringing Merck's patent.

Merck counterclaimed for infringement. Gilead Sciences, Inc. v. Merck & Co., Inc., 888 F.3d 1231, 1233 (Fed. Cir. 2018). After preliminary rulings that favored Merck, Gilead eventually stipulated that it had infringed, and the jury awarded $200 million in damages. The district court then held a bench trial on Gilead's "equitable defenses," including unclean hands, and ruled that Merck could not collect its damages because of both its pre-litigation business conduct and its litigation tactics. The Federal Circuit affirmed, without discussing whether unclean hands could be used to defeat a legal remedy such as damages, and without acknowledging that it had recently been reversed on the related question of whether another equitable defense, laches, could be applied to claims for damages from patent infringement. See the main volume at 1014. The Supreme Court denied cert, despite an amicus brief by Professor Samuel Bray arguing that if the Federal Circuit decision were allowed to stand, the "right to trial by jury in patent cases will be severely undermined by the reconsideration of damage awards via equitable defenses," and that the decision would "cause confusion throughout the lower courts about whether equitable defenses apply to claims for legal remedies." Brief for Samuel L. Bray As Amicus Curiae Supporting Petitioners at 4-5, Merck & Co., Inc. v. Gilead Sciences, Inc., 139 S. Ct. 797 (2019) (No. 18-378).

C. Estoppel and Waiver

1. Equitable Estoppel

Page 997. After note 5, add:

5.1. More on estoppel and federal claims. The Supreme Court has reaffirmed the rule that an owner of a patent who assigns (sells) the patent to another, and explicitly or implicitly represents that the patent is valid, is estopped from later asserting in litigation against the assignee (buyer) that the patent is invalid. Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298 (2021). The issue typically arises when the original inventor who assigned the patent later invents something new and related that competes with the original version.

The rule is called "assignor estoppel" in patent law, and it appears to be a straightforward application of general estoppel principles. But Justices Alito and Barrett filed dissents, and Thomas and Gorsuch joined the Barrett dissent. There was some disagreement about precedent, but the principal ground of the dissents appears to be that estoppel cannot be applied in patent cases because it is not codified in the Patent Act. This approach to statutory interpretation would wipe out all kinds of long-established background principles of law, including the remedial defenses, unless Congress thinks to write them into every statute creating a federal cause of action. Or perhaps Congress could enact a universally applicable estoppel statute. There probably isn't much political incentive to do that.

2. Waiver

Page 1004. At the end of note 2, add:

2. Is reliance required? . . .

The Supreme Court has reaffirmed, without discussion, that reliance is not required for waiver under federal law. Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022). The issue was whether there should be an exception to this rule for waiver of a right to arbitration instead of litigation. Plaintiff

sued her employer in a class action alleging systematic violations of the Fair Labor Standards Act. The employer litigated for eight months before first alleging that plaintiff's employment contract contained an arbitration clause. The Eighth Circuit, following most others, held that because of the federal policy favoring arbitration, defendant could not waive its right to arbitration unless plaintiff was prejudiced. The majority found no prejudice in eight months of wasted litigation; the district judge, and the dissenter, found prejudice.

The Supreme Court reversed, holding that there is no arbitration exception to the general federal rule that waiver is an intentional relinquishment of a known right and that prejudice is not required. And it said that the federal policy favoring arbitration is only a rule that courts should not discriminate against arbitration, not that they should create special rules favoring it.

D. Laches

Page 1010. At the end of note 2, add:

2. Prejudice and preventive injunctions. . . .

The Arizona Libertarians did not give up their legal fight after the district court denied a preliminary injunction. Eventually the district court granted summary judgment for the state on the merits and the Ninth Circuit affirmed that the law did not violate the party's constitutional rights. But it took another three years to get that final resolution. Arizona Libertarian Party v. Hobbs, 925 F.3d 1085 (9th Cir. 2019).

Page 1012. At the end of note 6, add:

6. Speculating at defendant's expense. . . .

Laches also figured heavily in 2020 post-election litigation. President Trump refused to concede his race to Joe Biden, claiming without evidence that election irregularities led to Biden's victory. Trump and his allies brought over 60 lawsuits, losing all but a few inconsequential ones. A number of courts rejected Trump post-election claims as barred by laches, because they raised issues about election rules that could have been raised well before the election. E.g., Kelly v. Commonwealth, 240 A.3d 1255 (Pa. 2020); Trump v. Biden, 951 N.W.2d 568 (Wis. 2020).

E. Statutes of Limitation

1. Continuing Violations

Page 1023. At the end of note 5, add:

5. Tolling rules. . . .

In McDonough v. Smith, 139 S. Ct. 2149 (2019), the Court held that when a §1983 claim accrues, and therefore when the statute of limitations begins to run, is a question of federal law, even though the number of years is borrowed from a state statute. McDonough, a former election official, was prosecuted for ballot tampering. The first trial ended in a mistrial and the second in an acquittal. McDonough alleged that the prosecution was based on fabricated evidence, and he brought a §1983 suit against the special prosecutor. The Court held that the §1983 action against the special prosecutor accrued upon McDonough's acquittal at the second trial, and not at the earlier times when the fabricated evidence was first used against him or when he first learned that the evidence was fabricated. The Court analogized the claim to accrual rules applicable to common

law tort actions for malicious prosecution, and it distinguished the very harsh results in similar false imprisonment claims, summarized at page 1040 of the main volume.

Justice Thomas, joined by Gorsuch and Kagan, dissented, arguing that McDonough did not clearly articulate the constitutional basis for his fabricated evidence claim, and that until he did so, it was impossible to evaluate either his analogy to malicious prosecution or his argument that the prosecutor engaged in a continuing violation. (The majority did not reach the continuing violation argument.) The dissenters also noted that McDonough brought a separate state-law malicious prosecution claim, which the trial court dismissed on grounds of absolute immunity, and it was unclear how the §1983 fabricated evidence claim was different. They would have dismissed the writ as improvidently granted. On absolute prosecutorial immunity, see the main volume at 538-548.

The Court has agreed to decide when the statute of limitations begins to run on a §1983 claim to DNA testing needed to challenge a criminal conviction. Reed v. Goertz, 995 F.3d 425 (5th Cir. 2021), *cert. granted*, 2022 WL 1205834 (Apr. 25, 2022). Does the statute run from the date the state trial court refused to order testing? Or from the date that decision became final after the exhaustion of appeals?

2. The Discovery Rule

Page 1032. At the end of note 10, add:

10. Codification. . . .

The Court in Rotkiske v. Klemm, 140 S. Ct. 355 (2019), appeared to further close the door on reading discovery rules into federal statutes that do not expressly state the discovery rule. At issue was a limitation clause in the Fair Debt Collection Practices Act (FDCPA) authorizing private civil actions against debt collectors who engage in certain prohibited practices. An action under the FDCPA may be brought "within one year from the date on which the violation occurs." 15 U.S.C. §1692k(d). The Court wrote that "atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision," citing other statutes that explicitly included the discovery rule. 140 S. Ct. at 361. The Court distinguished the general discovery rule, which it entirely and unanimously rejected, from what it called the "equitable, fraud-specific discovery rule." *Id*. at 357. But it held that plaintiff had not preserved the equitable issue for appeal.

Justice Ginsburg, dissenting, thought the equitable rule had been preserved and that it applied where the underlying claim was for fraud and also where defendant fraudulently concealed the claim. The defendant in the FDCPA case had sued plaintiff on a debt allegedly barred by the statute of limitations. She would not have treated that as a fraud. Defendant had served the debt-collection complaint on a person found at an old address where plaintiff no longer lived, filed a false affidavit of service, and had allegedly done so knowingly. Then it got a default judgment on the time-barred debt when plaintiff, who knew nothing of the case, failed to appear. She would have treated the deliberate failure to serve process and the false affidavit as frauds that supported application of the equitable doctrine.

The Employee Retirement Income Security Act of 1974 (ERISA) requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of gaining that knowledge rather than within the 6-year period that would otherwise apply. 29 U.S.C. §1113. The Court held that a plaintiff does not necessarily have "actual knowledge" of the information

contained in disclosures that he receives but does not read or cannot recall reading. Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020).

In *Sulyma*, the plaintiff alleged that Intel invested his retirement funds in unduly risky investments with excessive fees. Intel says that it disclosed all these investments in various plan documents that were sent to all employees, including fact sheets on individual investments. But plaintiff says he never read those disclosures or at least has no memory of ever seeing them. The Court rejected Intel's argument that it need not prove a plaintiff's "actual knowledge," and remanded for resolution of the factual dispute over plaintiff's knowledge.

Page 1033. At the end of note 14, add:

14. "Jurisdictional" time limits. . . .

The Supreme Court unanimously held that the 14-day deadline for seeking immediate appeal from an order granting or denying class certification is not subject to equitable tolling. Nutraceutical Corp. v. Lambert, 139 S. Ct. 710 (2019). Justice Sotomayor's opinion confirmed that Rule 23(f) is a claims processing rule rather than a jurisdictional rule. And because the rule is not jurisdictional, failure to comply could be waived or forfeited by the opposing party. But the Court held that even a claim processing rule can be "mandatory" and not subject to tolling. "Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility." *Id*. at 714. The Court found that Rule 23(f) afforded no such flexibility, based in part on an analysis of several related procedural rules.

The Court did clarify that the 14-day period for filing an appeal would run anew after the denial of a timely filed petition for reconsideration in the district court. The problem for the plaintiff here was that his motion for reconsideration had not been filed within the time allowed by the rules, but only within the more generous deadline set by the trial judge at a status conference.

And in Fort Bend County v. Davis, 139 S. Ct. 1843 (2019), the Supreme Court unanimously held that an employer could waive an employee's failure to allege a ground of discrimination in her charge before the Equal Employment Opportunity Commission, a normal prerequisite for suing the employer on that ground under Title VII, the principal federal employment-discrimination statute. The Court held that the charge-filing requirement is a mandatory, non-jurisdictional claim-processing rule that a party can waive. The case did not involve any of the statute's time limits and whether they could be tolled or extended, but rather the omission of a legal theory from the charge filed with the EEOC.

Military veterans who claim a service-related disability can get disability benefits from the date of their discharge from service if they apply within one year; if they apply later, they can get benefits only from the date of their application. 38 U.S.C. §5110. The Court has agreed to decide whether this deadline is subject to equitable tolling. Arellano v. McDonough, 1 F.4th 1059 (Fed. Cir. 2021), *cert. granted*, 142 S. Ct. 1106 (2022). Arellano was discharged in 1981 and applied for benefits in 2011. He was found to be 100 percent disabled by mental illness resulting from trauma while in the service. His brother is now managing the litigation for him and argues that his mental illness is the reason he did not apply sooner.

And in one more in this seemingly endless series of cases, the Court has agreed to decide whether the statute of limitations in the Quiet Title Act, 28 U.S.C. §2409a(g), is jurisdictional. Wilkins v. United States, 13 F.4th 791 (9th Cir. 2021), *cert. granted*, 2022 WL 1914111 (June 6, 2022). The statute governs claims to property in which the United States claims an interest; the time limit is twelve years from the date the plaintiff or her predecessor in interest "knew or should

have known of the claim of the United States." This codification of the discovery rule will make it difficult to argue for any other exception.

But the plaintiffs' factual claim is strong. The United States has a recorded easement, granted in 1962, for a 60-foot-wide road across their property. The burden of that easement was minimal until 2006, when the United States posted a sign indicating that the road was public. That brought much greater traffic volumes, and the plaintiffs allege, trespassers, thieves, hunters, speeders, and a person who shot at a house. The claim from 2006 seems very different than the claim from 1962.

The Court's efforts to solve the problem of allegedly jurisdictional time limits is reviewed in detail, from 2004 forward, in Ziv Schwartz, *Fixing a Failed Jurisdictional Revolution*, 90 Miss. L.J. 729 (2021). Schwartz says that the jurisdictional label is largely gone, but that many of the harsh consequences remain. He blames the Court's inconsistency and lack of clarity, and to some extent its failure to distinguish timing rules from other prerequisites to litigation.

CHAPTER TWELVE

FLUID-CLASS AND CY PRES REMEDIES

Page 1054. At the end of note 6, add:

6. The Supreme Court steps in, in a case where plaintiffs recovered nothing. . . .

The Supreme Court declined to reach the merits, remanding the case to consider potential standing problems under Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (a case described further in the main volume at page 266). Frank v. Gaos, 139 S. Ct. 1041 (2019). The Court then tightened the *Spokeo* standing rules even further in TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021). The Court has not yet taken a case to revisit the cy pres issue, but a recent cert. petition supported by 20 state attorneys general in Lowery v. Joffe (No. 21-1535) tees up the issue once again.