# Modern American Remedies:
# Cases and Materials
# Concise Fifth Edition

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**2022 Teachers' Update**

**Douglas Laycock**
Robert E. Scott Distinguished Professor of Law
and Professor of Religious Studies
University of Virginia

Alice McKean Young Regents Chair in Law Emeritus
The University of Texas at Austin

**Richard L. Hasen**
Professor of Law
University of California, Los Angeles

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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.

Douglas Laycock
Austin

Richard L. Hasen
Los Angeles

## CHAPTER TWO

## PAYING FOR HARM: COMPENSATORY DAMAGES

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

**Page 13. 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 18. 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 78-81.

### D. Consequential Damages

**Page 45. 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.

## E. Limits on Damages

### 1. The Parties' Power to Specify the Remedy

**Page 67. At the end of note 5, add:**

**5. Donald Trump and Stormy Daniels. . . .**

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 80. At the end of note 5, add:**

**5. 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.

## F. Taxes, Time, and the Value of Money

### 1. The Impact of Taxes

**Page 114. 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.

## G. Damages Where Value Cannot Be Measured in Dollars

### 2. The Controversy over Tort Law

**Page 154. 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.

### 3. Dignitary and Constitutional Harms

**Page 176. 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 104-105.

## CHAPTER THREE

## PUNITIVE REMEDIES

### A. Punitive Damages

#### 1. Common Law and Statutes

**Page 191. 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 204. 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 204. At the end of note 6, add:**

**6. Class actions. . . .**

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 216. At the end of note 4, add:**

**4. The Excessive Fines Clause. . . .**

In Timbs v. Indiana, 139 S. Ct. 682 (2019), the Supreme Court unanimously held that the Eighth Amendment's Excessive Fines Clause was 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 228. After note 3, add:**

**4. 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). It will be interesting to watch whether the new Biden Administration, facing its own lawsuits seeking nationwide injunctions against its policies, takes a different approach.

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).

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.

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.

The Court granted cert on the universal injunction issue in *Little Sisters* but decided the case on other grounds. Justice Ginsburg, dissenting, would have upheld the universal injunction under the Administrative Procedure Act, see *supra*, and also because in her view, a nationwide injunction was necessary to provide complete relief to the named plaintiffs. Pennsylvania and New Jersey alleged that they would incur additional expense, because women would lose employer-provided contraception under the challenged regulations. But 800,000 women in those two states worked in other states, so an injunction limited to employers within the two states would not solve the problem. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (Ginsburg, J., dissenting). She did not endorse universal injunctions more broadly than these two rationales. But these rationales, and especially the first one, are quite broad.

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 232. After note 6, add:**

7**. 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).

**8. 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 241. 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 258. At the end of first full paragraph on 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

#### 2. Burdens on Defendant or the Court

**Page 342. At the end of note 4, 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 346. At the end of note 1, add:**

**3. 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 348. 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 very 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, 7 (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 230-232 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 349. At the end of note 6, add:**

**6. Developments in the lower courts. . . .**

In a recent article, Professor Volokh counts 31 states and five federal circuits that allow anti-libel injunctions in at least some circumstances. Eugene Volokh, *Anti-Libel Injunctions and the Criminal Libel Connection*, 168 U. Pa. L. Rev. 74, 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 220-221 of the main volume and explored in depth in Chapter 9.

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

**Page 355. After note 3, add:**

**3.1. 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 355. At the end of note 4, add:**

**4. 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 they 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 362. 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."

**2. The Procedure for Obtaining Preliminary Relief**

**Page 384. At the end of note 9, add:**

**9. 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 with the Court's growing conservative majority. 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.

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, 4 (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. It is unclear if this statement will get applied in other cases.

## C. Prospective or Retrospective Relief

### 1. Suits Against Officers in Their Official Capacities

**Page 390. 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. 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).

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

**Page 405. After note 6.a.iii., add:**

**a. Specificity. . . .**

**iv.** 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 405. At the end of note 6.b., add:**

**b. Obvious applications. . . .**

Despite repeatedly questioning the whole doctrine of qualified immunity (see note 11 in the main volume and this Update at 408), 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 406. At the end of note 6.e., add:**

**e. 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 443-444.

**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 408. At the end of note 11, add:**

**11. 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 409. At the end of note 12, add:**

**12. 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.

**Page 409. At the end of note 13, add:**

**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 collects 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 421. At the end of note 6, add:**

**6. 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 for all torts 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 7 in the main volume at 424), 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 (6th Cir. 2019).

**Page 422. 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).

**2. Suits Against Officers—Absolute Immunity**

**Page 431. 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 437. 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 442. 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 9 at page 407 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 444. At the end of note 7, add:**

**7. 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 page 406, 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*, wrote an article tracing 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 444. At the end of note 8, add:**

**8. 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 442), 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 446. At the end of note 4, add:**

**4. 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.

**4.1. *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 446. After note 5, add:**

**5.1. "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. Tanvir v. Tanzin, 141 S. Ct. 486 (2021). 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.

## CHAPTER SEVEN

## PREVENTING HARM WITHOUT COERCION: DECLARATORY REMEDIES

### A. Declaratory Judgments

#### 1. The General Case

**Page 471. 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 487. 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 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.

### D. Declaratory Relief at Law

**Page 503. 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). 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. 171 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. 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.

## 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 510. Replace note 9.a with the following:**

**9. Law and equity. . . .**

**a. Why no constructive trust?** 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 537. 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 542.

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 Federal Trade Commission v. AMG Capital Management, LLC, 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 543. At the end of note 4.a, add:**

**4. 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 613. After note 9, add:**

**10. 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 624. 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.

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

**a. Perpetual Coercion?**

**Page 635. At the end of note 6, add:**

**6. 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).

**B. Collecting Money Judgments**

**1. Execution, Garnishment, and the Like**

**Page 682. 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, Nos. 18-1368 & 18-1466 (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 684. 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 702. 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 ELEVEN

## REMEDIAL DEFENSES

### B. Unclean Hands and *In Pari Delicto*

**Page 766. 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 785. 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 772. 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., 2021 WL 2653265 (U.S. June 29, 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 777. 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 782. 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 783. At the end of note 6, add:**

**2. 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).

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## E. Statutes of Limitation

### 1. Continuing Violations

**Page 792. 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.

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 424-433.

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 800. At the end of note 9, add:**

**9. 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.

## CHAPTER TWELVE

## FLUID-CLASS AND CY PRES REMEDIES

**Page 819. 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 213). 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.