

**Modern American Remedies:
Cases and Materials
Fifth Edition**

2021 Teachers' Update

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PREFACE

This Update includes decisions through the end of the Supreme Court's term on July 2, 2021. 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 2021.

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, and David Plick for excellent research assistance.

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CHAPTER TWO

PAYING FOR HARM: COMPENSATORY DAMAGES

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

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

2. The rightful position. . . .

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

E. Limits on Damages

1. The Parties’ Power to Specify the Remedy

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

5. Another confidentiality agreement. . . .

Daniels (legally known as Stephanie Clifford) sued in a California court for a declaration that the hush money agreement was not enforceable. After removing to federal court, the defendants, including President Trump, signed covenants not to sue under the agreement in an effort to moot the case. The effort succeeded, and the court never addressed the enforceability of the liquidated damages provision or any other part of the agreement. The court dismissed for lack of subject matter jurisdiction and remanded to state court defendants’ claim that they were entitled to recover the \$130,000 they had paid Daniels for her silence. *Clifford v. Trump*, 2019 WL 3249597 (C.D. Cal. Mar. 7, 2019). The state court also dismissed the action as moot. It denied costs but awarded Clifford \$44,100 in attorneys’ fees under a provision in the contract, as interpreted under a California statute. *Clifford v. Trump*, 2020 WL 4938460 (Cal. Super. Ct. Aug. 17, 2020).

2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources

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

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

5. The Requirement of Reasonable Certainty

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

7. Missing evidence. . . .

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

F. Taxes, Time, and the Value of Money

1. The Impact of Taxes

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

2. Payroll taxes. . . .

The Supreme Court appears to have resolved the dispute in *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019). Michael Loos, a BNSF employee, was injured on the job. He sued under the FELA, and a jury awarded him \$126,212.78, of which \$30,000 was attributable to wages lost during the time Loos was unable to work. The Court held that FELA damages awarded for lost wages are taxable as compensation under the Railroad Retirement Tax Act, 26 U.S.C. §3201 *et seq.* That Act, and its companion, the Railroad Retirement Act, 45 U.S.C. §231 *et seq.*, create a separate retirement system for railroad workers that substitutes for Social Security. BNSF was required to withhold \$3,765 in railroad retirement taxes from the judgment. And contrary to the assumption in note 2 in the main volume, the Court strongly implied that Social Security taxes would be treated the same way. Justices Gorsuch and Thomas dissented.

3. The Net Present Value of Future Damages

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

2. Lessons learned. . . .

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

G. Damages Where Value Cannot Be Measured in Dollars

2. The Controversy over Tort Law

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

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

3. Dignitary and Constitutional Harms

Page 216. After note 5, add:

6. Civil rights claims under Spending Clause statutes. The Supreme Court has agreed to review a decision holding that a plaintiff alleging disability discrimination by a medical provider and suing under the Rehabilitation Act and the Affordable Care Act cannot recover damages for emotional distress. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020), *cert. granted*, 2021 WL 2742781 (U.S. July 2, 2021). The relevant anti-discrimination provisions of these statutes apply only to defendants who accept federal funds. The Court has held that submitting to regulation in exchange for funding forms a sort of contract, so that the appropriate remedies for violation are contract remedies. *Barnes v. Gorman*, 536 U.S. 181 (2002), summarized at 572 of the main volume and holding that punitive damages are unavailable. The Fifth Circuit said that emotional distress damages are generally not available in contract, and that it did not have to follow the exception for contracts where breach is especially likely to cause emotional distress, because the contract analogy is only an analogy and not authoritative. It said that the question is whether the recipient of federal funds was on notice of the potential liability. The Supreme Court’s decision will likely apply to other Spending Clause statutes, including Title VI on racial discrimination and Title IX on sex discrimination in education.

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

2. Proving the damages. . . .

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

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

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

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

CHAPTER THREE
PUNITIVE REMEDIES

A. Punitive Damages

1. Common Law and Statutes

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

8. Other federal claims. . . .

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

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

2. The Constitution

Page 253. 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. 2021 WL 2194948 (U.S. Jun. 1, 2021).

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

a. The Florida tobacco litigation. . . .

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

B. Other Punitive Remedies

2. Civil Penalties Payable to the Government

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

4. The Excessive Fines Clause. . . .

d. Against the states. In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Supreme Court unanimously held that the Eighth Amendment's Excessive Fines Clause 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 (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*, 2021 WL 2373817 (Ind. June 10, 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 has agreed to decide whether 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 Superior Court held that this fee violated the Excessive Fines Clause; the Court of Appeals reversed. *City of Seattle v. Long*, 467 P.3d 979 (Wash. App. Div. 1 2020), *review granted*, 476 P.3d 562 (Wash. 2020). *Long* argues that *Timbs* requires the court to take account of his personal financial circumstances in considering whether the fine is excessive. *Timbs* quoted Blackstone to that effect but did not decide the question.

CHAPTER FOUR

PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF

A. The Scope of Injunctions

1. Preventing Wrongful Acts

Page 288. After note 4, add:

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

Scholarly debate continues as well. See, for example, Howard Wasserman, *Congress and Universal Injunctions*, https://papers.ssrn.com/abstract_id=3779479 (Feb. 5, 2021); John C. Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bulletin 37 (2020); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 Harv. L. Rev. 920 (2020); Samuel Bray, *A Response to the Lost History of the “Universal” Injunction*, Yale J. Reg.: Notice & Comment (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/>; Mila Sohoni, *A Reply to Bray’s Response to The Lost History of the “Universal” Injunction*, Yale J. Reg.: Notice & Comment (October 10, 2019), <https://www.yalejreg.com/nc/a-reply-to-brays-response-to-the-lost-history-of-the-universal-injunction-by-mila-sohoni/>; Michael T. Morley, *Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni*, 72 Ala. L. Rev. 239 (2020); Howard Wasserman, *“Nationwide” Injunctions are Really “Universal” Injunctions and They are Never Appropriate*, 22 Lewis & Clark L. Rev. 335 (2018). The Colorado Law Review has published a symposium with six articles on nationwide injunctions, beginning at 91 U. Colo. L. Rev. 779 (2020).

Writing for a majority in *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020, as amended), Judge Rovner weighed into the Sohoni-Bray dispute over historical equity practice related to universal injunctions. The context was a lawsuit over a Trump Administration decision to withhold certain funding for local law enforcement efforts from “sanctuary cities,” including Chicago, that did not cooperate with federal authorities on certain immigration matters. A district court had issued a nationwide injunction against the federal government withholding the funds.

In a lengthy opinion, the appeals court explained why relief in this case should be limited to Chicago. But along the way in dicta it offered a strong defense of universal injunctions. Relying on Professor Sohoni’s analysis as well as an amicus brief submitted by leading historians, the court concluded that universal injunctions have a long history in American law. “Those historians examined the relief provided in equity from the 18th century onward, such as bills of peace as well as ordinary bills for injunctions including injunctions to abate nuisances, and concluded that

‘equity courts had the equitable powers to issue nationwide injunctions in the early republic,’ and ‘have long issued injunctions that protect the interests of non-parties.’ In fact, the historians noted periods of time in which the equitable remedies were much more drastic, extending as far as enjoining non-parties (which it noted would not be accepted today) and including a period of time in which injunctions were so broad they were called ‘omnibus injunctions’ and ‘Gatling-gun injunctions.’” *Id.* at 914. (quoting Brief of Amici Curiae Legal Historians In Support of Plaintiff and Appellee the City of Chicago (No. 18-2885), 2018 WL 6173238).

Despite recognizing that universal “injunctions present real dangers, and will be appropriate only in rare circumstances,” the court described the importance of preserving a court’s ability to issue injunctions protecting nonparties:

Absent the ability to grant injunctive relief that extends beyond the particular party, courts will have little ability to check the abuse of power that presents the most serious threat to the rule of law — such as that which is swift in implementation, widespread in impact, and targeted toward those with the least ability to seek redress. Although circumspection is appropriate in ascertaining whether such relief is appropriate, an outright ban of such injunctions is neither required by history nor desirable in light of the range of situations — some as unpredictable and impactful as the sudden travel ban — that courts may confront.

Id. at 916, 918. Judge Manion concurred in the judgment.

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 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 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.

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

9. Nominal damages. . . .

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

On an 8-1 vote, the Court held that the claim for nominal damages was not moot, and that seeking nominal damages satisfies the redressability requirement of Article III standing. Citing this casebook for the proposition that nominal damages were an early way of obtaining a form of

declaratory judgment, Justice Thomas for the Court noted that there was no dispute that nominal damages could provide a predicate for seeking prospective relief. “For example, a trespass to land or water rights might raise a prospective threat to a property right by creating the foundation for a future claim of adverse possession or prescriptive easement.” *Id.* at 798. But there is a greater dispute in the historical record on whether nominal damages may be used for purely retrospective relief, such as damages. The Court held that the better reading of the history was to allow retrospective claims.

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

Id. at 800.

Chief Justice Roberts dissented, and Justice Kavanaugh in a concurring opinion suggested that a defendant could moot a claim for nominal damages by offering plaintiff a dollar. Would such a gambit work? “Time will tell.” Douglas Laycock, [Supreme Court Says a Claim for Nominal Damages Avoids Mootness—But When Does That Matter?](https://perma.cc/P5G5-PTH6), ALI Adviser (Mar. 22, 2021) [https://perma.cc/P5G5-PTH6].

Page 293. After note 10, add:

11. Voluntary cessation to avoid a bad precedent. The Supreme Court 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](https://www.theatlantic.com), *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 the addition of conservative Justice Amy Coney Barrett after the death of liberal Justice Ruth Bader Ginsburg, the Court agreed to hear in the October 2021 Term a Second Amendment case challenging New York’s rules for issuing licenses for those who wish to carry concealed

weapons out of the home. *New York State Rifle & Pistol Association v. Corlett*, 818 F. App'x 99 (2d Cir. 2020), *cert. granted*, 2021 WL 1602643 (Apr. 26, 2021).

2. Preventing Lawful Acts That Might Have Wrongful Consequences

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

4. The concept of prophylactic relief. . . .

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

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

9. Meeting your friends? . . .

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

4. Institutional Reform Litigation (Structural Injunctions)

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

INTRODUCTORY NOTE: THE SCHOOL DESEGREGATION CASES . . .

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

CHAPTER FIVE

CHOOSING REMEDIES

A. Substitutionary or Specific Relief

1. Irreplaceable losses

a. Injunctions

Page 397. After note 1.f, add:

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

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

Purkey was executed in July 2020, among the 13 federal prisoners executed after this ruling and before the end of the Trump Administration. “The number of federal death sentences carried out under Trump since 2020 is more than in the previous 56 years combined, reducing the number of prisoners on federal death row by nearly a quarter. It’s likely none of the around 50 remaining men will be executed anytime soon, if ever, with Biden signaling he’ll end federal executions.” Michael Tarm & Michael Kunzelman, [*Trump Administration Carries Out 13th And Final Execution*](#), Associated Press (Jan. 15, 2021).

2. Burdens on Defendant or the Court

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

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

As of March 2021, the White Flint mall property remains undeveloped. Dan Schere, [Erlich Seeks Developer to Build White Flint Life Sciences, Tech Campus](#), Bethesda Mag. (Mar. 12, 2021). 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, Liquidations Begin](#), USA Today (Aug. 27, 2020). So much for projecting the future of the mall and store out to 2042 or 2057. Even if the court had ordered specific performance of the contract, Lord & Taylor would have been able to reject the contract in its bankruptcy and release its rights under the specific performance decree.

3. Other Policy Reasons

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

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 (2020). The majority rejected the argument that the gag order violated the First Amendment. None of the opinions in the case cited *Willing*.

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

3. Prior restraints against unprotected speech. . . .

John Bolton, a former National Security Advisor for President Trump, wrote a 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 290-293 in the main volume), or that it was barred by laches, a doctrine taken up in Chapter 11, which allows courts to deny requests for equitable relief that come too late. The court also alluded to the First Amendment implications of the government's

requested order. “For reasons that hardly need to be stated, the Court will not order a nationwide seizure and destruction of a political memoir.” *Id.* at 6. And it concluded that it should not issue a “toothless” injunction. *Id.* at 7.

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

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

6. Developments in the lower courts. . . .

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 276-277 of the main volume and explored in depth in Chapter 9.

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

7. Are prior restraints special? . . .

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

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

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

Id. at 279-280.

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

Page 446. After note 6, add:

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

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

7. A broader assessment. . . .

Elizabeth A. Rowe, *eBay, Permanent Injunctions, and Trade Secrets*, 77 Wash. & Lee L. Rev. 553 (2020), examined 150 federal trade secret cases between 2000 and 2014 with damages totaling \$2 billion. "All were successful on their trade secret claims and received damages but most did not receive a permanent injunction." Many plaintiffs received no injunction because they didn't ask for one. Professor Rowe found that courts are not necessarily strictly applying the four factors from *eBay*, and that the injunctions issued and the opinions (if any) explaining the injunction decisions were generally perfunctory. In those cases where courts denied an injunction and gave a reason, the lack of irreparable harm seemed to have been the factor most often articulated as the reason for the denial. Damages for the past are not inconsistent with an injunction for the future, and 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 so-far unpublished study by Matthew Sag & Pamela Samuelson, cited in note 1 of Pamela Samuelson, *Withholding Injunctions in Copyright Cases: The Impact of eBay*, Wm. & Mary L. Rev. (forthcoming 2021), https://papers.ssrn.com/abstract_id=3801254, found that injunctive relief in copyright cases is less common post-*eBay*. 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*.” Professor Samuelson’s William & Mary article argues that *eBay* has been beneficial on the whole in copyright cases; she thinks that copyright injunctions had become too nearly automatic before *eBay*. Assuming that she is right about that bottom line, *eBay* may be a case of reaching sound results for unsound reasons.

B. Preliminary or Permanent Relief

1. The Substantive Standards for Preliminary Relief

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

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

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

Page 456. After note 7, add:

7.1. One more example.

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

Justice Breyer, dissenting for himself and Justices Kagan and Sotomayor, also cited this language from *Nken*, and added that such a remedy is especially inappropriate “where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts’

determination.” *Id.* at 77 (Breyer, J., dissenting). Stays and injunctions pending appeal are discussed in the main volume at 481 and more extensively in this Update to page 481.

Page 459. After note 14, add:

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

In opposing the grant of the preliminary injunction, the government “concede[d] that the plaintiffs will suffer irreparable harm if . . . the Final Rule is not enjoined.” But the government argued that the public interest supported denying an injunction. The Sixth Circuit denied an injunction pending appeal, as did the Supreme Court without comment. 139 S. Ct. 1406 (2019). (Ruling two years later on the merits, the Sixth Circuit on a 2-1 vote held that ATF’s interpretation of a criminal statute is not entitled to *Chevron* deference and that as a matter of statutory interpretation, a weapon with a bump stock could not be considered a machine gun under the statute. *Gun Owners of America v. Garland*, 992 F.3d 446, 475-476 (6th Cir. 2021). The Sixth Circuit accordingly held that the gun owners were likely to prevail on the merits. The Sixth Circuit has [now agreed](#) to hear the case en banc.)

Putting aside the public interest, might the government’s concession in the Sixth Circuit have been wrong at the preliminary injunction stage? Owners who complied with the new rule by turning in or destroying their bump stocks (how many will that be?) could replace their bump stocks later if the rule were struck down. So the real harm is not permanent loss of bump stocks, but temporary loss plus the cost of replacement. But as the next section discusses, the government would certainly be immune from any suit for those damages. The harm pending trial on the merits could not be compensated or repaired, but neither was it very serious. And magnitude of harm matters at the preliminary injunction stage.

2. The Procedures for Obtaining Preliminary Relief

Page 471. After note 5, add:

5.1. Inadvertently withholding notice? In one of the many foibles connected to post-election litigation brought by Trump supporter Sidney Powell, Powell filed a motion for a TRO in federal court in Wisconsin without verification and without any explanation as to whether she gave notice to defendants or why or why not. Powell then filed a “corrected” notice which included a statement that the complainant “will provide electronic notice” to defendant. The court refused to accept the “corrected” motion for its continued failure to comply with Rule 65. “Because the afternoon motion indicates that the plaintiffs ‘will’ provide electronic notice to the adverse parties, the court does not know whether the plaintiffs have yet provided notice to the adverse parties or when they will do so. Until the plaintiffs notify the court that they have provided notice to the adverse parties, the court will not take any action because the motion does not comply with the requirements of Rule 65(b).” The court also noted that the complaint did not ask for expedited review despite the

supposed emergency nature of the motion. Without expedition, defendants would have 21 days to reply under the local rules. [Order Regarding Amended Motion for Injunctive Relief](#), *Feehan v. Wisconsin Elections Commission*, No. 20-cv-1771-pp, Doc. 7 (E.D. Wis. Dec. 2, 2020).

Page 481. After note 10, add:

10. Stays and injunctions pending appeal. . . .

The Supreme Court has become much more willing to grant emergency relief, including emergency injunctions pending appeal, than it has been in the past. The Trump Administration went to the Court repeatedly for such relief, and was often successful 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.

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

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

This trend of using the shadow docket for substantive jurisprudence first surfaced most visibly in cases involving the Trump administration — in which the Justice Department repeatedly asked the Supreme Court to pause an adverse lower-court ruling while the government challenged the decision on appeal. All told, the Trump administration sought emergency relief pending appeal 41 times in four years; in contrast, the Bush and Obama administrations together sought such relief eight times in 16 years. And the justices largely acquiesced to the Trump applications, granting 28 in full or in part.

But whereas virtually all of the Trump cases involved “stays” pending appeal, where a lower court had already ruled against the government, the California ruling involved a far more aggressive form of emergency relief — where a party challenging a government policy that lost in the lower courts seeks to have the policy frozen pending appeal.

For decades, the Supreme Court has insisted that these emergency injunctions should be far rarer than stays. Summarizing the precedents, Justice Antonin Scalia explained in 1986 that such relief should be granted “sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear.” It ought to follow that newly minted rights, such as the one the court articulated on Friday, are not “indisputably clear.” [Professor Vladeck believed that the Court in *Tandon* did not just resolve an ambiguity, but changed free exercise law from one reasonably clear rule to a new and different rule. – EDS.]

This is not just a technical point; it goes directly to the Supreme Court’s constitutionally mandated (and self-described) role in our constitutional system. As Justice Scalia put it, unlike a stay, which is a short-term order delaying a proceeding, an injunction “does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.”

To provide relief in such a case where the right to relief is not clear is to effectively allow the Supreme Court to go first, ahead of the lower courts — never mind that, as the justices have repeatedly said in the past, “ours is a court of review, not first view,” and that their “primary responsibility” is “as an appellate tribunal.” Using emergency orders pending appeal to change substantive law turns those principles on their heads and arguably exceeds the justices’ statutory authority to issue such relief.

All of this would be problematic enough if the California decision was an outlier. But it wasn’t. Rather, the ruling was the seventh time since October that the justices have issued an emergency injunction — all of which have blocked Covid restrictions in blue states on religious exercise grounds.

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

Justice Sotomayor has been especially critical of this trend: “[I]t appears the Government has treated this exceptional mechanism as a new normal.” *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3, 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.

Professor Samuel Bray, in testimony prepared for the Presidential Commission on the Supreme Court of the United States, argues that the dramatic increase in stays and injunctions pending a cert petition is not so much a result of the nation’s polarization or of the Trump Administration’s challenges to legal norms, but rather a response to the rise of the nationwide injunction in the lower courts. An injunction that shuts down an entire federal program nationwide presents a much more plausible claim of emergency than an injunction confined to named plaintiffs, to one judicial district, or even to one judicial circuit. On the nationwide injunction, see the main volume and this supplement at pages 285-288. Bray’s testimony is posted at: <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf>.

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

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

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

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

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

Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court’s injunction, then devise plans to implement that late-breaking injunction, and then

determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.

That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion — and thereby protects the State’s interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.

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

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

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

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

C. Prospective or Retrospective Relief

1. Suits Against Officers in Their Official Capacities

Page 489. After note 3, add:

3.1. Declaratory judgments. In a dispute over a temporary and private display at the state capitol, the district court entered a declaratory judgment as follows: “IT IS FURTHER DECLARED that defendants violated [plaintiff’s] First Amendment rights and engaged in viewpoint discrimination as a matter of law when the [plaintiff’s] exhibit was removed from the Texas Capitol building under the circumstances of this case.” *Freedom from Religion Foundation v. Abbott*, 955 F.3d 417, 423 (5th Cir. 2020). The Fifth Circuit held that this “backwards-looking, past-tense declaratory judgment” is retrospective relief barred by sovereign immunity and *Edelman*, even though there was a continuing controversy about future displays. *Id.* at 425.

Page 491. After note 6, add:

6.1. An eminent domain exception to sovereign immunity. It is long settled that the federal government has power to take property for public use. The Constitution does not expressly grant that power, but the Takings Clause of the Fifth Amendment assumes its existence and requires just compensation to the owner. It is equally settled that Congress can delegate this power to private

actors such as railroads, and that the federal government can take property owned by states. So, can Congress delegate to private actors the power to take property owned by a state? And would such a delegation enable the private actor to sue the state in federal court to take its property?

Yes to both questions, the Court said in *Penneast Pipeline Co. v. New Jersey*, 2021 WL 26523262 (June 29, 2021). The case fractured the Court's usual ideological lines. Chief Justice Roberts wrote the opinion, joined by Justices Breyer and Sotomayor, Justice Kavanaugh, and perhaps most surprisingly, Justice Alito. Justice Barrett wrote the principal dissent, joined by Justices Thomas, Gorsuch, and Kagan. Neither Alito nor Kagan wrote separately to explain their votes. But it is probably a good thing when the Justices surmount ideology and vote independently.

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

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

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

Page 496. After note 10, add:

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

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

13. Sister states. . . .

The parties in *Hyatt* made a third trip to the Supreme Court, which finally overruled *Hall* in *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019). On a 5-4 vote, the Court held that a state may not be sued by a private party in the courts of a different state without its consent. The majority

declared that *Hall*'s holding was "contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent." *Id.* at 1492. The Court split along its now common conservative-liberal line. Justice Breyer, for the four dissenters, concluded his discussion of the value of *stare decisis* with the following: "Today's decision can only cause one to wonder which cases the Court will overrule next." *Id.* at 1506.

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

16. Municipalities. . . .

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

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

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

The county's insurer refused to provide a defense and refused to pay. The state supreme court resolved a key coverage issue in favor of the county, but other issues remain. *Gage County v. Employers Mutual Casualty Co.*, 937 N.W.2d 863 (Neb. 2020). The coverage limit of an umbrella policy is not stated in the opinion, but it probably isn't anywhere near \$28 million.

Page 498. After note 17, add:

17.1. Immunity that can't be waived? The Court has often said that the Eleventh Amendment is merely an example of the broad sovereign immunity implicit in the structure of the Constitution. Justice Gorsuch, joined by Justice Thomas, took this idea a bold step further in *Penneast Pipeline Co. v. New Jersey*, 2021 WL 2653262 (June 29, 2021), described in this supplement to page 491. His concurring opinion says that there are really two distinct immunities. The structural immunity implicit in the Constitution is a privilege of each state, and it is waivable. But the Eleventh Amendment immunity is jurisdictional: "The judicial power of the United States shall not be construed to extend" to diversity suits against a state. That deprives the federal courts of subject matter jurisdiction, and subject matter jurisdiction cannot be created by consent, so no state can waive the Eleventh Amendment. The plaintiff, Pipeline, was incorporated in Delaware, so it could not sue New Jersey in federal court even if New Jersey had consented. This theory would probably affect few cases if adopted by the Court, but conceptually, it is a substantial extension of state sovereign immunity.

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

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

a. Specificity. . . .

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

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

Id. at 503.

Justice Thomas 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 is likely 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*, 2021 WL 2742809 (U.S. July 2, 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 510. At the end of note 6.b., add:

b. Obvious applications. . . .

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

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

g. Places outside the law? . . .

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

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

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

When BLinC pointed out that other student groups had been approved with constitutions requiring members or officers to be of a particular race, ethnicity, sex, or sexual orientation, the University undertook a review of all student organizations. All or most were required to sign a nondiscrimination statement, but secular organizations with such requirements in their constitutions were approved without change. BLinC and some other religious organizations were disapproved. The court held that this was viewpoint discrimination in violation of clearly established law, resting on Supreme Court cases, Eighth Circuit cases, and persuasive authority

from other circuits, and that the relevant university officials could be liable in damages. BLinC also brought a free-exercise challenge, but the court held that that law was not clearly established.

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

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

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*, 108 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 have been introduced in both houses of Congress to abolish or reform qualified immunity, but they reportedly face stout Republican opposition in the Senate. Luke Broadwater and Catie Edmondson, [Police Groups Wield Strong Influence in Congress, Resisting the Strictest Reform](#), N.Y. Times (June 25, 2020).

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.

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](#), Wake Forest L. Rev. (forthcoming), https://papers.ssrn.com/abstract_id=3808164, arguing that the Court has increasingly protected elected officials against victims of constitutional violations rather than protecting those victims from government action.

13.1. Judicial attacks. For a passionate attack on qualified immunity, see *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020), involving a prolonged pretextual search of an African-American man whose offense appears to have been that he drove a nice car. Despite his dislike for the doctrine, the judge felt obliged to grant the officer’s motion for qualified immunity. The judge 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 533. At the end of note 10, add:

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

The Supreme Court granted cert in *Thacker* but only on the question of the scope of TVA's sovereign immunity. It reversed the lower court's determination that "TVA remains immune 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 8 in the main volume at 538), and the exceptions in the Tort Claims Act are not exceptions to a sue-and-be-sued clause. Instead, "the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity." *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435, 1438-1439 (2019). But even with a sue-and-be-sued clause, "the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties." The Court emphasized that this judicially implied exception is narrow, available only when allowing the suit to proceed would cause "grave interference" with a governmental function. It remanded the case for further consideration, but it is hard to see how fishing an electric line out of the water could be anything different from what would have to be done by "a private corporation supplying electricity." On remand, the Sixth Circuit briefly summarized the Court's new exception to sue-and-be-sued clauses and remanded the case to the district court. 773 F. App'x 598 (6th Cir. 2019).

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

2. The Federal Tort Claims Act. . . .

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

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

Page 535. After note 3, add:

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

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

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

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

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

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

2. Suits Against Officers—Absolute Immunity

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

4. Presidential immunity. . . .

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

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

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

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

to Toss out Subpoena, Offered to Give House Democrats a Peek at Financial Statements, Wash. Post (July 1, 2021).

B. Creating Causes of Action

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

1. The scope of *Bivens*.

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

Wilkie arose on an interlocutory appeal under the collateral order doctrine (see note 10 at page 512 of the main volume), effectively making any recognition of a *Bivens* claim immediately appealable. Bryan Lammon, [Making Wilkie Worse: Qualified-Immunity Appeals and the Bivens Question after Ziglar and Hernandez](#), U. Chicago L. Rev. Blog (July 24, 2020), 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.”

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

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

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

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

Professor Stephen Vladeck, who was counsel of record in *Hernandez*, 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).

Page 562. After note 10, add:

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

ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar.” *Id.* at 749.

Page 565. After note 6, add:

6.1. “Appropriate relief.” The Religious Freedom Restoration Act provides that a victim of a violation of the act “may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” 42 U.S.C. §2000bb-1(c). “Government” is defined to include federal officials and any person acting under color of federal law. The Court unanimously held that the statute authorizes damages against federal employees. *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.

C. The Right to Jury Trial

Page 587. After note 5, add:

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

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

Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, Texas L. Rev (forthcoming 2021), at 5, <https://ssrn.com/abstract=3237907>. His first category might require some tweaking of Supreme Court precedent in the ERISA cases and perhaps elsewhere; his third category would require the wholesale overruling of the cases requiring a jury trial in class actions for damages.

CHAPTER SEVEN

PREVENTING HARM WITHOUT COERCION: DECLARATORY RELIEF

A. Declaratory Judgments

2. The Special Case of Interfering with State Enforcement Proceedings

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

2. The myth of mildness. . . .

In Ohio litigation during the 2020 election season, a trial court issued a declaratory judgment stating that the Ohio Secretary of State’s interpretation of Ohio law to limit the use of drop boxes to deposit mail-in ballots was contrary to Ohio law. The Ohio Secretary of State refused to abide by the declaratory judgment, and the court promptly followed it up with an injunction. “[T]he court purposely did not include an injunction because the court understood the Secretary favored allowing additional ballot drop boxes and would follow a legal ruling recognizing them as lawful. . . . However, public statements of a ‘spokesperson’ for the Secretary after the Opinion issued as reported by news media (and now in the record) that the Secretary would not comply with the declaratory judgment without also being under an injunction required the court to reevaluate the matter. On the morning of September 16, the court ordered the Secretary to explain his position. In response, the court has been advised the Secretary will not abide by the declaratory judgment alone. The Secretary urges the court to grant an injunction so that he may appeal.” *Ohio Democratic Party v. LaRose*, 2020 WL 5580378, at *1 (Ohio 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 637. At the end of note 1, add:

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

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

CHAPTER EIGHT

BENEFIT TO DEFENDANT AS THE MEASURE OF RELIEF: RESTITUTION

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

1. Introducing Restitution—Mistake

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

9. Law and equity. . . .

a. **Why no constructive trust?** There are important restitutionary remedies that originated in equity, including constructive trust. Plaintiff needs a constructive trust when she seeks to recover a specific asset from a specific fund. Blue Cross sought a constructive trust, but the court denied that relief, because Blue Cross didn't allege the existence of specific property from a specific fund upon which to impose a trust. Blue Cross instead got a simple money judgment in restitution to be collected from defendants' general assets in the same legal way as a damage judgment would be collected. On these facts, Blue Cross got a legal remedy that could simply be described as a judgment in restitution or a judgment in unjust enrichment.

B. Recovering More Than Plaintiff Lost

1. Disgorging the Profits of Conscious Wrongdoers

Page 679. After note 9.c, add:

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

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

Justice Thomas dissented. He seemed to think that disgorgement is not just a new name, but a new remedy, not historically available and therefore not included within the phrase "equitable relief." He also thought that it is poorly defined and broader than the historic scope of accounting for profits. In places, he seemed to think that accounting for profits is more limited than it has been in most of the cases. Accounting for profits is taken up in the next principal case and in the main volume at 686.

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

9.2. Injunctions to pay restitution? The Court addressed a similar but distinct issue in *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 688. At the end of note 5.a, add:

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

a. Trademark. . . .

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

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

The Court refused to read a willfulness requirement into the statute, but suggested willfulness may still be relevant to the award of profits. Justice Gorsuch, offering a textualist interpretation for the majority, emphasized that the relevant part of the Lanham Act contains no express

willfulness requirement, while other parts of the Lanham Act do have such a requirement or other rules about mental states. 140 S. Ct. at 1495. The Court also rejected Fossil’s argument that the provision in Section 1125 that courts should decide such cases consistent with “principles of equity” required a willfulness requirement: “[I]t seems a little unlikely Congress meant ‘principles of equity’ to direct us to a narrow rule about a profits remedy within trademark law.” *Id.* at 1496. As stated, that seems right. But “principles of equity” should have directed the Court to the much broader principle that restitution of profits is generally available only against conscious wrongdoers and defaulting fiduciaries.

Surveying the complex history of courts’ awarding of profits in pre-Lanham Act cases, the Court concluded that a defendant’s mental state “is relevant to assigning an appropriate remedy.” *Id.* at 1497. Justice Alito, joined by Justices Breyer and Kagan, concurred, calling willfulness “a highly important consideration in awarding profits under §1117(a), but not an absolute precondition.” *Id.* Justice Sotomayor, concurring in the judgment, went further, arguing that “a district court’s award of profits for innocent or good-faith trademark infringement would not be consonant with the ‘principles of equity’ referenced in §1117(a) and reflected in the cases the majority cites.” *Id.* at 1498.

C. Restitutionary Rights in Specific Property

3. Equitable Liens and Subrogation

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

5. A novel context. . . .

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

Page 783. After note 10, add:

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

On August 11, 2020, Citi attempted to pay \$7.8 million in interest on the loan. Instead, it paid the entire interest and principal. It paid the interest with \$7.8 million from Revlon, and it paid nearly \$900 million in principal with its own money. Citi discovered the error the next day and requested refunds from all the creditors, some of whom voluntarily returned the extra money. Other creditors refused, and Citi sued them. The loan agreement provided that New York law applied, and the federal district court held that the creditors could keep the money under *Banque Worms*. *In re Citibank August 11, 2020 Wire Transfers*, 2021 WL 606167 (Feb. 16, 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, and Citi is appealing. But the critical finding—that none of the creditors suspected a mistake—appears to be a finding of fact, reversible only if clearly erroneous.

CHAPTER NINE

ANCILLARY REMEDIES: ENFORCING THE JUDGMENT

A. Enforcing Coercive Orders: The Contempt Power

1. The Three Kinds of Contempt

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

1. The basic distinctions. . . .

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

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

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

Id. at 1799.

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

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

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

Id. at 1802-03. The Court added that subjective bad faith also could be grounds for civil contempt.

The Court’s reliance on “traditional civil contempt principles,” and not on anything specific to the Bankruptcy Code, suggests that the statements from lower courts in the second paragraph of note 1 in the main volume are no longer operative. But plausible claims of objective doubt as to what the injunction prohibits may arise far more frequently with respect to discharge orders than

with respect to other injunctions. Injunctions are supposed to individuate the law’s command, specifying what defendant is required to do or refrain from doing in the circumstances of the particular case. But “discharge orders are written in general terms and operate against a complex statutory backdrop . . .” *Id.* at 1803. The order typically says only that the bankrupt debtor is discharged, *id.* at 1799; the statute says that this operates as an injunction against further collection efforts, 11 U.S.C. §524(a)(2); and, the statute also lists 19 categories of debts that are excepted from the discharge, 11 U.S.C. §523. The scope of these exceptions is the subject of vast amounts of litigation, and the law leaves that litigation to later collection efforts; the discharge order does nothing to further specify the scope of the discharge. So *Taggart* applies traditional principles of civil contempt to a very untraditional injunction.

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

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

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

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

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

a. Perpetual Coercion?

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

6. Too stubborn to be coerced. . . .

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

Thompson unsuccessfully argued to the Sixth Circuit that he could not be held for more than 18 months under 28 U.S.C. §1826, the recalcitrant-witness statute described in note 8 of the main

volume. *United States v. Thompson*, 925 F.3d 292 (6th. Cir. 2019). The Sixth Circuit appeared to agree that if the district court were keeping Thompson in jail solely because he refused to testify as to the location of the coins, the district court might have been subject to §1826’s 18-month limit on jailing a witness for refusing to testify or provide information. *Id.* at 298. But Thompson in his plea agreement also agreed to what the Sixth Circuit termed “non-testimonial” conduct in “assisting” civil plaintiffs in “identifying and recovering assets,” and the district court had ordered Thompson to comply with this plea agreement. *Id.* at 301-02. Such conduct included executing “a limited power of attorney to permit the parties to ‘probe’ the contents of a Belizean trust.” *Id.* at 302. The Sixth Circuit held that §1826’s 18-month limit did not apply to his refusal to perform these non-testimonial obligations. *Id.* at 303. The court’s reasoning would presumably also apply to an explicit order to turn over the coins.

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

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

8. Recalcitrant witnesses. . . .

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

6. Drafting Decrees

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

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

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

The Seventh Circuit has applied the same rule to declaratory judgments, this time invoking Rule 58. *Intl FCStone Financial Inc. v. Jacobson*, 950 F.3d 491 (7th Cir. 2020). Rule 58 expressly requires that “[e]very judgment and amended judgment must be set out in a separate document.” And Rule 54(a) defines “judgment” to include “any order from which an appeal lies,” which of

course includes preliminary injunctions. But the court in *MillerCoors* had not relied on Rule 58, and Judge Hamilton’s dissent thought it would be completely unworkable to apply Rule 58 to every appealable order — for example, an order denying a motion to modify a preliminary injunction.

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

B. Collecting Money Judgments

1. Execution, Garnishment, and the Like

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

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

The dispute between AGI and BI ended with a global settlement of all claims. Biolitec voluntarily dismissed its sixth appeal. *AngioDynamics, Inc. v. Biolitec AG*, 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 880. At the end of the first paragraph of note 9, add:

9. Harassment. . . .

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

3. Preserving Assets Before Judgment

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

1. Freidman’s other problems. . . .

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

CHAPTER TEN

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

B. Attorneys' Fees from a Common Fund

Page 948. After note 1, add:

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

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

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

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

13. Social Security cases. . . .

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

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

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

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

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

3. What is included? . . .

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

CHAPTER ELEVEN

REMEDIAL DEFENSES

A. Unconscionability and the Equitable Contract Defenses

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

4. What’s left? . . .

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

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

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

B. Unclean Hands and *In Pari Delicto*

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

1. Two defenses. . . .

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

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

C. Estoppel and Waiver

1. Equitable Estoppel

Page 997. After note 5, add:

5.1. More on estoppel and federal claims. The Supreme Court has reaffirmed the rule that an owner of a patent who assigns (sells) the patent to another, and explicitly or implicitly represents that the patent is valid, is estopped from later asserting in litigation against the assignee (buyer) that the patent is invalid. *Minerva Surgical, Inc. v. Hologic, Inc.*, 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.

D. Laches

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

2. Prejudice and preventive injunctions. . . .

The Arizona Libertarians did not give up their legal fight after the district court denied a preliminary injunction. Eventually the district court granted summary judgment for the state on the merits and the Ninth Circuit affirmed that the law did not violate the party’s constitutional

rights. But it took another three years to get that final resolution. *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 111 (2020).

Page 1012. 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).

E. Statutes of Limitation

1. Continuing Violations

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

5. Tolling rules. . . .

In *McDonough v. Smith*, 139 S. Ct. 2149 (2019), the Court held that when a §1983 claim accrues, and therefore when the statute of limitations begins to run, is a question of federal law, even though the number of years is borrowed from a state statute. *McDonough*, a former election official, was prosecuted for ballot tampering. The first trial ended in a mistrial and the second in an acquittal. *McDonough* alleged that the prosecution was based on fabricated evidence, and he brought a §1983 suit against the special prosecutor. The Court held that the 1983 action against the special prosecutor accrued upon *McDonough*’s acquittal at the second trial, and not at the earlier times when the fabricated evidence was first used against him or when he first learned that the evidence was fabricated. The Court analogized the claim to accrual rules applicable to common law tort actions for malicious prosecution, and it distinguished the very harsh results in similar false imprisonment claims, summarized at page 1040 of the main volume.

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

2. The Discovery Rule

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

10. Codification. . . .

The Court in *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019), appeared to further close the door on reading discovery rules into federal statutes that do not expressly state the discovery rule. At issue was a limitation 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. §113. In *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020), 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.

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

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

14. “Jurisdictional” time limits. . . .

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

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

And in *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), the Supreme Court unanimously held that an employer could waive an employee’s failure to allege a ground of discrimination in

her charge before the Equal Employment Opportunity Commission, a normal prerequisite for suing the employer on that ground under Title VII, the principal federal employment-discrimination statute. The Court held that the charge-filing requirement is a mandatory, non-jurisdictional claim-processing rule that a party can waive. The case did not involve any of the statute's time limits and whether they could be tolled or extended, but rather the omission of a legal theory from the charge filed with the EEOC.

The Court's efforts to solve the problem of allegedly jurisdictional time limits is reviewed in detail, from 2004 forward, in Ziv Schwartz, *Fixing a Failed Jurisdictional Revolution*, 90 Miss. L.J. (forthcoming 2021), https://papers.ssrn.com/abstract_id=3593523. Schwartz says that the jurisdictional label is largely gone, but that many of the harsh consequences remain. He blames the Court's inconsistency and lack of clarity, and to some extent its failure to distinguish timing rules from other prerequisites to litigation.

CHAPTER TWELVE

FLUID-CLASS AND CY PRES REMEDIES

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

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

The Supreme Court declined to reach the merits, remanding the case to consider potential standing problems under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (a case described further in the main volume at page 266). *Frank v. Gaos*, 139 S. Ct. 1041 (2019). The Court then tightened the *Spokeo* standing rules even further in *Transunion LLC v. Ramirez*, 2021 WL 2599472 (U.S. June 25, 2021). The Court has not yet taken a case to revisit the cy pres issue.