Modern American Remedies: Cases and Materials Fifth Edition

2024 Teachers' Update

Douglas Laycock
Robert E. Scott Distinguished Professor of Law Emeritus
University of Virginia

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

Richard L. Hasen
Gary T. Schwartz Endowed Chair in Law
Professor of Political Science
University of California, Los Angeles

ASPEN
PUBLISHING

PREFACE

This Update includes decisions through the end of the Supreme Court's term on July 2, 2024. 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 2024.

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 Gennifer Birkenfeld-Malpass, Richard Camarena III, Timothy Duong, Patrick Randall, David Plick, and Sammy Zeino for excellent research assistance.

Douglas Laycock
Austin

Richard L. Hasen
Los Angeles

CHAPTER ONE

INTRODUCTION

THE ROLE OF REMEDIES

Page 1. After the first paragraph, add:

The Supreme Court recently commented that "[a] 'remedy' denotes 'the means of enforcing a right,' and may come in the form of, say, money damages, an injunction, or a declaratory judgment. Black's Law Dictionary 1320 (8th ed. 2004); see also 13 Oxford English Dictionary 584-585 (2d ed. 1991) (defining 'remedy' as '[l]egal redress')." Luna Perez v. Sturgis Public Schools, 598 U.S. 142, 147 (2023). The Court also said that "remedies" is generally, and in the case before it, synonymous with "relief." The issue in the case was whether a statutory exhaustion requirement applied to a lawsuit seeking a remedy — compensatory damages — that was not available under the statute that required exhaustion. The Court said no, based in part on the text of the statute at issue.

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, 589 U.S. 399, 413-414 (2020): "'Remedies generally seek to place the victim of a legal wrong . . . in the position that person would have occupied if the wrong had not occurred.' R. Weaver, E. Shoben, & M. Kelly, Principles of Remedies Law 5 (3d ed. 2017)." The context was a holding that a discrimination plaintiff could not get reinstatement or damages for loss of employment unless the discrimination was the but-for cause of plaintiff losing the job.

The Restatement Third, Torts: Remedies §2 (Am. L. Inst. Tentative Draft No. 1, 2022), sets forth the rightful position standard in the context of tort claims: "A plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy or remedies that will place that plaintiff, as nearly as possible, in the position the plaintiff would have occupied if the tort had not been committed. This basic principle is implemented by more specific rules, some of which limit or extend its reach." The casebook editors are the Reporters for this new Restatement. The Tentative Drafts are available on Westlaw.

B. Value as the Measure of the Rightful Position

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

1. The appeal. . . .

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

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

4. Pets. . . .

The Washington pets case was dismissed and apparently settled. Thomas v. Cannon, 2018 WL 7107615 (9th Cir. Nov. 1, 2018). More recently, an intermediate Washington state appellate court held that emotional distress damages could be recovered in a conversion case based upon the defendant's alleged euthanizing of plaintiffs' horse, "Brad Pitt." The circumstances of the animal's death were disputed. Thorley v. Nowlin, 542 P.3d 137, 151 (Wash. Ct. App. 2024). The court held that Washington law allowed emotional distress damages for conversion, without noting any special rules for conversion claims involving animals or pets. In contrast, the court held that an animal owner could not recover emotional distress damages for a breach of contract claim related to injury to or death of an animal. *Id*.

D. Consequential Damages

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

5. More analytic definitions. . . .

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

> (a) Distinctions between immediate and consequential damages, between direct and consequential damages, and between general and special damages are ill-defined and do not affect the availability or measurement of damages in tort.
>
> (b) Subject to the rules of [the rest of this Restatement], a plaintiff who establishes a defendant's liability in tort is entitled to compensation both for any harm suffered from the immediate effects of the tortious conduct and for any harm suffered later as a further consequence of that conduct or its immediate effects.

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

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

6. Lost profits. . . .

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

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

E. Limits on Damages

1. The Parties' Power to Specify the Remedy

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

5. Another confidentiality agreement. . . .

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

2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources

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

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

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

5. The Requirement of Reasonable Certainty

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

7. Missing evidence. . . .

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

F. Taxes, Time, and the Value of Money

1. The Impact of Taxes

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

2. Payroll taxes. . . .

The Supreme Court appears to have resolved the dispute in BNSF Railway Co. v. Loos, 586 U.S. 310 (2019). Michael Loos, a BNSF employee, was injured on the job. He sued under the FELA, and a jury awarded him $126,212.78, of which $30,000 was attributable to wages lost

during the time Loos was unable to work. The Court held that FELA damages awarded for lost wages are taxable as compensation under the Railroad Retirement Tax Act, 26 U.S.C. §3201 *et seq*. That Act, and its companion, the Railroad Retirement Act, 45 U.S.C. §231 *et seq.*, create a separate retirement system for railroad workers that substitutes for Social Security. BNSF was required to withhold $3,765 in railroad retirement taxes from the judgment. And contrary to the assumption in note 2 in the main volume, the Court strongly implied that Social Security taxes would be treated the same way. Justices Gorsuch and Thomas dissented.

3. The Net Present Value of Future Damages

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

14. Lessons learned?. . . .

Robert Rabin uses Feinberg's administration of the 9/11 Victims' Compensation Fund as a jumping off point for considering the tort system and alternatives for handling natural and human-caused disasters. Robert L. Rabin, *Some Thoughts on Compensation and Remedial Relief for Disasters in the American Legal System*, 115 Nw. U. L. Rev. Online 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.

A judge appointed to deal with compensating the victims of the 2021 collapse of the Surfside condominiums in a Miami suburb, from a fund paid for by the sale of the property and from defendants and their insurers, looked to Feinberg for advice on streamlining the process and getting compensation quickly to the victims. See Patricia Mazzei, *Lawsuits Over Tragedies Can Drag On. Not in the Florida Condo Collapse.*, N.Y. Times (Sept. 3, 2022). In computing lost earnings and pain and suffering, the judge and a retired colleague assisting him "did not rely on any formula. Instead, they hired an accountant to assist with economic valuations and scheduled several three-hour hearings a day. They considered each victim's age, occupation and potential lifetime earnings, as well as intangibles about how survivors have coped since their loved one's death." "Individual awards ranged from $50,000 for some post-traumatic stress disorder claims to more than $30 million for some wrongful death claims."

G. Damages Where Value Cannot Be Measured in Dollars

1. Personal injuries and death

Page 171. At the end of the first paragraph of note 4, add:

4. Emotional adaptation. . . .

In litigation over deaths caused in the crash of a Boeing 737 Max airplane in Ethiopia, Boeing argued that those who died in the crash could not recover for emotional distress suffered in the moments before the plane crash. The press quoted observers who said that "potentially millions of dollars per plaintiff" were at stake. Andrew Tangel, *Boeing's Legal Dispute: Did 737 Max Victims Suffer Pain Before the Crash?*, Wall St. J. (Mar. 15, 2023). The trial court ruled that the jury could infer "that the passengers experienced emotional distress as the aircraft rose and fell, rose again, then plunged," and that Illinois law (which the parties had apparently stipulated to apply) permitted recovery for such distress. In re: Ethiopian Airlines Flight ET 302 Crash, 675 F. Supp. 3d 879, 887

(N.D. Ill. 2023). Shortly before trial, the parties notified the court that they had reached a tentative settlement. *Id.* Document 1777 (June 16, 2023).

Page 172. At the end of note 6, add:

6. Monstrous verdicts. . . .

A trial judge upheld a $183 million verdict against the University of Pennsylvania's hospital for medical negligence in the delivery of a child born with cerebral palsy. "The jury's verdict for the now 5-year-old boy included $10 million for past pain and suffering, $70 million for future pain and suffering, and $1.7 million for lost earnings. Those amounts are to be paid in a lump sum, minus a share for his attorneys. Another $101 million [for future medical expenses] will be paid out in annual installments through 2088. If the beneficiary dies before 2088, the remainder of the $101 million would not have to be paid." Harold Brubaker, *Jury Verdicts Such as the $183 Million Award Against Penn Medicine Can Be Tied Up for Years, But Usually Stand*, Phil. Inquirer (May 1, 2023); Harold Brubaker, *Record $183 Million Medical Malpractice Verdict Against HUP Upheld by Philadelphia Judge*, Phil. Inquirer (Jan. 29, 2024). The verdict is said to be the largest medical malpractice verdict in Pennsylvania history. Shaurya Singhi, *Penn Med hospital loses attempt to overturn record $183 million medical malpractice settlement* [sic], Daily Pennsylvanian (Feb. 6, 2024). The case is on appeal.

2. The Controversy over Tort Law

Page 192. Before note 1, add:

0.5. An as-applied challenge. The Supreme Court of Ohio distinguished *Arbino* as a facial challenge to Ohio's damage caps and struck down the caps in an as-applied challenge in Brandt v. Pompa, 220 N.E.3d 703 (Ohio 2022). Plaintiff sued defendant in tort for rape and other horrendous sexual abuse committed while plaintiff was a child. On a 4-3 vote, the court held that under the state constitution's "due course of law" clause, the cap "is unconstitutional as applied to [plaintiff] and similarly situated plaintiffs (i.e., people like [plaintiff] who were child victims of intentional criminal conduct and who bring civil actions to recover damages from the persons who have been found guilty of those intentional criminal acts) *to the extent that it fails to include an exception to its compensatory-damages caps for noneconomic loss for plaintiffs who have suffered permanent and severe psychological injuries*." *Id*. at 716 (original emphasis). This would seem to be an application of Morris v. Savoy, briefly summarized in the *Arbino* opinion, which held that damage caps must contain an exception for the most severe or catastrophic injuries. The exception for such injuries in the Ohio legislation applied only to physical injuries and not to severe psychological injuries. The court also held it irrelevant that plaintiff was unlikely to collect the damages from the incarcerated defendant.

The dissenting justices pulled no punches on what they perceived as the retreat from *Arbino*: "By resolving the merits of this case, the majority opinion improperly involves the judiciary in matters that belong exclusively and fundamentally to the General Assembly. It is this type of result-oriented judicial activism that blurs the line in the public's eye about which branch of government is truly responsible for the policies of this state. It erodes the public's confidence in the judiciary to resolve problems within the confines of the law and places an unrealistic expectation on the members of the Ohio judiciary to resolve all society's problems. Policy-making is not our job. If policy changes are desired, then the members of the majority opinion can take the short walk to Capitol Square to speak with their legislators—the people who are elected to create and set policy

for Ohioans. [Plaintiff's] situation is certainly sad, but we cannot provide her with compensation simply because it may be our personal policy preference to do so. This activism from the bench needs to stop." *Id.* at 723-724 (dissenting opinion).

Page 193. At the end of note 1, add:

1. The "tort reform" agenda. . . .

Professor Avraham has posted an updated database of state tort law reforms at: https://ssrn.com/abstract_id=902711.

2. Damage caps. . . .

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

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

6. Counting jurisdictions. . . .

More recently the Kansas court overruled an earlier decision and struck down a $250,000 cap on "noneconomic damages" for personal injury. Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019). And see Ohio's "as applied" decision in this Update to page 192.

3. Dignitary and Constitutional Harms

Page 211. After note 2.j, add:

2. Other examples. . . .

k. Journalist E. Jean Carroll sued former president Donald Trump in tort for rape, sexual abuse, and defamation arising out of an incident in a department store dressing room in 1996. Trump had denied the contact and accused Carroll of lying about it. A jury found Trump not liable for rape, but liable for sexual abuse and defamation. The jury awarded $2 million in compensatory damages, and $20,000 in punitive damages, for the sexual abuse. It also awarded $2.7 million in compensatory damages for defamation: $1 million for Carroll's losses from the defamation unrelated to the costs for repairing her reputation and $1.7 million for reputation repair. It awarded another $280,000 in punitive damages on the defamation claim. Lola Fadulu, *Here's a Closer Look at the $5 Million in Damages That the Jury Awarded Carroll*, N.Y. Times (May 9, 2023). Trump is appealing the verdict. The jury's verdict form is available at: https://perma.cc/5W74-PHJG.

Carroll sued Trump a second time for further defamatory statements he made in relation to her claims against him. The jury awarded an additional $83.3 million, $18.3 million in compensatory damages and $65 million in punitive damages. Larry Neumeister, Jake Offenhartz, and Jennifer Peltz, *Donald Trump Must Pay an Additional $83.3 Million to E. Jean Carroll in Defamation Case, Jury Says*, Associated Press (Jan. 26, 2024). The trial court rejected a challenge to the compensatory damages as excessive and the punitive damages as unconstitutionally high (under the standards addressed in the next chapter). Carroll v. Trump, Case 1:20-cv-07311-LAK (Document 338, Apr. 25, 2024), https://perma.cc/U5G2-X3F6. Trump is appealing this one too.

Josh Gerstein, *Trump Gets $91.6 Million Bond While He Appeals Verdict in E. Jean Carroll Defamation Case*, Politico (Mar. 8, 2024).

Page 216. After note 5, add:

6. Civil rights claims under Spending Clause statutes. The Supreme Court held that a plaintiff alleging disability discrimination by a medical provider and suing under the Rehabilitation Act and the Affordable Care Act cannot recover damages for emotional distress. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022). The relevant anti-discrimination provisions of these statutes apply only to defendants who accept federal funds. The Court has held that submitting to regulation in exchange for funding forms a sort of contract, so that the appropriate remedies for violation are contract remedies. Barnes v. Gorman, 536 U.S. 181 (2002), summarized at page 572 of the main volume and holding that punitive damages are unavailable.

Relying on *Barnes*, the Supreme Court held that emotional distress damages are generally not available in contract, and that it did not have to follow the exception for contracts where breach is especially likely to cause emotional distress, because that exception was not the consensus among jurisdictions applying contract law. Therefore, the recipient of federal funds was not on notice of the potential liability. The Supreme Court's decision will likely apply to other Spending Clause statutes, including Title VI on racial discrimination and Title IX on sex discrimination in education. Justices Breyer, Sotomayor, and Kagan dissented. For a different argument about the contract analogy, see Health & Hospital Corp. v. Talevski, in this Update to page 565.

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, 558 & 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 behind the title 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 page 130.

CHAPTER THREE

PUNITIVE REMEDIES

A. Punitive Damages

1. Common Law and Statutes

Page 235. At the end of note 5, add:

5. Vicarious liability. . . .

A cable company employee brutally stabbed to death an elderly woman who was a customer of the company a day after a service call. Relatives sued the killer (who was serving a life sentence for the murder) and the cable company. The jury found that the company knew of the employee's erratic and desperate behavior and did not do anything to keep customers safe. It also found that the company forged a document purporting to show that the woman agreed to arbitrate any disputes with the company, which would have limited her relatives' claim to $200. The jury awarded $7 billion in punitive damages against the company both for gross negligence in relation to the employee and for the forged documents. The relatives voluntarily remitted to just under $1 billion. Marissa Sarnoff, *Texas Judge Reduces Multi-Billion Dollar Verdict, But Charter Spectrum Must Still Pay Up for Cable Installer's Murder of Elderly Woman*, Law & Crime (Sept. 21, 2022). The case settled pending appeal. Charter Communications, LLC v. Goff, 2023 WL 4117059 (Tex. Ct. App. June 22, 2023).

Page 237. At the end of note 2, add:

2. A hard ratio. . . .

Texas imposes a cap of twice a plaintiff's economic damages plus $750,000 for a punitive damage claim, but a trial court upheld a $45 million punitive award on top of a $4 million compensatory award against *Infowars* host Alex Jones for the emotional distress he caused to parents of a child killed at the Sandy Hook school shooting. Jones lied, repeatedly claiming the shooting was a hoax, and his followers harassed and threatened the parents of the murdered children. He has been sued in a number of courts and has declared bankruptcy. The trial judge in the Texas case "questioned the constitutionality of the Texas cap, and called the verdict 'a rare case' in which the emotional damage inflicted on [the parents] was so severe that 'I believe they have no recourse.'" Elizabeth Williamson, *Judge Upholds $49 Million Verdict Against Alex Jones, Despite Cap*, N.Y Times (Nov. 22, 2022). This judgment came shortly after eight families who sued Jones in Connecticut won compensatory damages totaling nearly $1 billion. Elizabeth Williamson, *'We Told the Truth': Sandy Hook Families Win $1 Billion from Alex Jones*, N.Y. Times (Oct. 12, 2022).

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

8. Other federal claims. . . .

The Court in *Exxon* permitted the award of punitive damages under the general maritime law (though it was equally divided on whether a corporation could be held vicariously liable for managerial conduct). In Dutra Group v. Batterton, 588 U.S. 358 (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, 590 U.S. 418 (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 supporting acts of terrorism. Congress later changed federal law to expressly allow punitive damages in such cases. Sudan argued as a matter of statutory interpretation that the amended law could not be applied retroactively. The Court disagreed, noting that Congress in its later statutes clearly and expressly authorized punitive damages in suits for past state-sponsored terrorist conduct. Sudan had argued against retroactivity citing constitutional concerns; the Court responded that Sudan should have raised any constitutional arguments directly.

2. The Constitution

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

3. Ratios again. . . .

A new study of 167 punitive damages awards, each over $100 million, finds that the ratios imposed in cases such as *Campbell* give little predictability to the award of punitive damages in these cases. Benjamin J. McMichael and W. Kip Viscusi, *Bringing Predictability to the Chaos of Punitive Damages*, 54 Ariz. St. L.J. 471 (2022). The authors suggest a set ratio of 3:1 except for cases involving personal injury or death.

Page 253. After note 5, add:

5.1. The Johnson & Johnson litigation. Consumer products manufacturer Johnson & Johnson has been plagued by lawsuits alleging that its baby powder causes cancer. J&J says its product is safe and that the lawsuits are based on bad science, but it has taken the product off the market in the United States and now around the world.

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

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

J&J is now in its third attempt to use a bankruptcy filing to settle all current and future cases, for $11 billion. It also faces a new suit alleging that it is abusing the bankruptcy system and fraudulently transferring assets between related entities to avoid full payment. Jef Feeley and Evan Ochsner, *Johnson & Johnson Talc Bankruptcies Abused System, Suit Says*, Bloomberg News (May 22, 2024).

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). 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 269. At the end of note 2, add:

2. Overview. . . .

The Supreme Court has held that in civil forfeiture cases involving personal property, the Due Process Clause requires a timely forfeiture hearing but it does not require a preliminary hearing on the right to possession while the final hearing is pending. Culley v. Marshall, 601 U.S. 377 (2024). Plaintiffs were car owners whose vehicles were seized in connection with drug arrests of friends or relatives who had borrowed the cars. They unsuccessfully argued that the state should not be able to seize their cars without a preliminary hearing. Three justices dissented and two more indicated interest in reexamining whether civil forfeiture practices comport with due process, especially as many governments rely on forfeiture proceeds to fill government coffers.

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

4. The Excessive Fines Clause. . . .

d. Against the states. In Timbs v. Indiana, 586 U.S. 146 (2019), the Supreme Court unanimously held that the Eighth Amendment's Excessive Fines Clause is incorporated against the states, meaning that defendant could invoke the Clause to challenge the penalties imposed on him. The Court called the protection against excessive fines

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

Id. at 153-154 (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 (Public Affairs, 1st ed. 2011). Indiana did not argue seriously against incorporation. Instead, it argued that the Court should overrule *Austin*'s holding that in rem forfeitures fall within the

Clause's protection when they are at least partially punitive. The Court held that this question was not properly before it.

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

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

CHAPTER FOUR

PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF

A. The Scope of Injunctions

1. Preventing Wrongful Acts

Page 278. At the end of note 10, add:

10. How high a standard? . . .

The Court once again required only a "substantial risk" in Murthy v. Missouri, 2024 WL 3165801, at *2 (U.S. June 26, 2024), although it also cited the "certainly impending" language from *Driehaus* and *Clapper*. *Id.* at *2, *15.

Page 288. After note 4, add:

5. The continuing battle over universal injunctions. 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).

Justice Kagan, speaking at an event at Northwestern, expressed similar sentiments:

> This has no political tilt to it . . . You look at something like that and you think, that can't be right . . . In the Trump years, people used to go to the Northern District of California, and in the Biden years, they go to Texas. It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process.

Josh Gerstein, *Kagan Repeats Warning That Supreme Court is Damaging Its Legitimacy*, Politico (Sept. 14, 2022).

A large fraction of federal policies subject to legal challenge are initiated by agencies issuing regulations subject to the Administrative Procedure Act. If vacating such a regulation has the same effect as a nationwide injunction, but is not subject to the same analysis, this would seem to open an enormous loophole in any efforts the Court may make to limit nationwide injunctions. Professor Harrison addresses this potential loophole in John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37 (2020). Justice Ginsburg, joined by Justice Sotomayor, endorsed the power to "set aside agency action" as a basis for universal injunctions in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657, 731 n.28 (2020) (Ginsburg, J., dissenting).

Professor Ronald Levin defends the use of universal injunctions, at least in the context of review of administrative agency action. He finds the remedy justified as both longstanding historical practice and as practically necessary. Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA,* 98 Notre Dame L. Rev. 1997, 2005 (2023): "[T]he courts' ability to order the nullification of rules on an across-the-board basis is, in many instances, a practical necessity. This is particularly true in an extensively regulated industry governed by a host of complex rules. If the agency is to be able to administer its program in a coherent manner, let alone a well-considered manner, it needs to be able to develop and implement these rules on a uniform, or at least holistically designed, basis. If a single company—say, one pharmaceutical

manufacturer, or one airline, or one auto manufacturer, or one pipeline company—seeks judicial review of one of these rules and prevails on the merits, the court cannot award relief only to that company without creating chaos. If the rule is to be revised, it must be revised to apply to all similarly situated companies."

Justice Kavanaugh offered a different and perhaps less debatable explanation in a concurring opinion in Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 2024 WL 3237691 (U.S. July 1, 2024). Any person "adversely affected or aggrieved" by a regulation can challenge that regulation. 5 U.S.C. §702. This standard includes many people who are not themselves subject to the regulation. Often they are customers or competitors of a regulated entity.

The regulation at issue in *Corner Post* limits how much banks can charge for each transaction using a debit card. Corner Post operates a truck stop and convenience store. It accepts debit cards and pays the fees, and it argued that the authorized fees were too high—that the Fed had set the limit higher than the underlying statute allowed.

If Corner Post prevails, the court cannot order the Fed not to apply the regulation to Corner Post; the regulation doesn't apply to Corner Post. If an injunction against enforcement against the plaintiff were the only possible remedy, banks could sue alleging that the allowed fees were too low, but no one could ever sue alleging that the allowed fees were too high. That would create seriously unbalanced incentives at the Fed. Corner Post cannot sue the banks, because the Administrative Procedure Act does not authorize suits against private parties. Justice Kavanaugh argued that the only workable remedy is to vacate the regulation. *Id.* at *16. And he said that this case is typical, not unusual. *Id.* at *15.

A court might conceivably craft an individualized remedy by ordering the Fed to order the banks to charge a lower rate to Corner Post. But there are more than 4500 banks in the United States; that really does seem unworkable. Perhaps it is so unworkable that it would induce the Fed to change the regulation for everybody. But a court could not assume that. Kavanaugh did not consider the possibility, perhaps because it seemed obviously unworkable. And so, he concluded, workable remedies must operate against the regulation itself; it must be vacated as to everybody. *Id.* at *17.

The issue of universal injunctions presents particularly acute issues for cases that come to the Supreme Court on an emergency basis (under the so-called "shadow docket," as described in the main volume at pages 481-482). When a state passes a new law or begins a new practice, those individuals or entities adversely affected often seek a preliminary injunction barring its enforcement until the matter can be fully resolved, and often litigants will ask for the preliminary relief to be applied universally. Many major cases in which a universal injunction has been issued end up at the Supreme Court. As Justice Kavanaugh recently explained, "It is critical to appreciate the significance of the decision that this Court is being asked to make in emergency cases involving new laws. Keep in mind how much time it takes for the litigation process to run its course and reach a final merits ruling in the district court, court of appeals, and potentially this Court—often one to three years or even longer. The final merits decision, when it occurs, will of course be important. But the interim status of the law—that is, whether the law is enforceable during the several years while the parties wait for a final merits ruling—*itself* raises a separate question of extraordinary significance to the parties and the American people. And *that* is the question this Court often must address when deciding emergency applications involving new laws." Labrador v. Poe, 144 S. Ct. 921, 928-929 (2024) (Kavanaugh, J., concurring in the grant of a stay).

Labrador concerns an Idaho law prohibiting certain gender-affirming care for minors. Two named plaintiffs wanted continued access to puberty blockers that the Idaho law would bar. The

district court not only granted an injunction barring enforcement of the provision barring drug access for these two minors; it also blocked enforcement of the entire Idaho law, including its other provisions, against anyone from enforcement pending resolution of the merits. The Ninth Circuit affirmed.

Idaho convinced the Supreme Court to stay the preliminary injunction except as to drug access for the two named plaintiffs. Justice Gorsuch, for himself and Justices Alito and Thomas, used the dispute to argue again that universal injunctions are inconsistent with traditional equity practice and can lead to forum shopping. *Id.* at 921-928 (Gorsuch, J., concurring in the grant of a stay). Justice Kavanaugh, for himself and Justice Barrett, agreed that a partial stay was appropriate in this case, but he was more ambivalent about the propriety of universal injunctions, even in the context of the Court's emergency docket. He raised three sets of issues: First, "there is ongoing debate about whether any such rule would apply to Administrative Procedure Act cases involving new federal regulations, given the text of the APA." Second, "[e]ven if a district court enjoins a new federal statute or state law only as to the particular plaintiffs, that injunction could still have widespread effect." *Id*. at 932. Third, courts of appeals' decisions may create circuitwide precedent, and allowing circuits to create such precedent but preventing the Supreme Court from issuing nationwide rules could lead to circuit splits and disuniformity across the country.

Justice Jackson, joined by Justice Sotomayor, dissented, arguing for greater deference to lower courts when they decide the scope of relief at the preliminary injunction stage. Justice Kagan would have denied the stay but did not join Justice Jackson's opinion. Chief Justice Roberts said nothing and joined no opinion. See also Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 2 (2023) (statement of Kavanaugh, J., joined in part by Barrett, J., respecting denial of application for a stay) ("The question of whether a district court, after holding that a law violates the Constitution, may nonetheless enjoin the government from enforcing that law against non-parties to the litigation is an important question that could warrant our review in the future.").

Scholarly debate over universal injunctions continues as well. See, for example, Howard M. Wasserman, *Congress and Universal Injunctions*, 2021 Cardozo L. Rev. De-Novo 187; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020); Samuel Bray, *A Response to the Lost History of the "Universal" Injunction*, Yale J. Reg.: Notice & Comment (Oct. 6, 2019); Mila Sohoni, *A Reply to Bray's Response to The Lost History of the "Universal" Injunction*, Yale J. Reg.: Notice & Comment (October 10, 2019); Michael T. Morley, *Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni*, 72 Ala. L. Rev. 239 (2020); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They are Never Appropriate*, 22 Lewis & Clark L. Rev. 335 (2018).

The *Harvard Law Review* has done an extensive survey, complete with appendix, of nationwide injunctions issued by district courts. The *Review* identified 96 nationwide injunctions issued by district courts from 2001 to 2023. *Developments — Chapter Four — District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701, 1705 (2024). Of the 96, 64 were issued enjoining a policy of the Trump administration. *Id*. "Of the 12 nationwide injunctions issued in response to Obama Administration policies, 7 were issued by judges appointed by a Republican President. . . . Of the 64 nationwide injunctions issued against Trump policies, only 5 were issued by judges appointed by a Republican, leaving 92.2% of injunctions issued by a judge appointed by a Democrat." *Id*.

Page 290. At the end of note 2, add:

2. Cessation and propensity. . . .

In Murthy v. Missouri, 2024 WL 3165801 (U.S. June 26, 2024), the Court emphasized that "because the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value. 'Past exposure to illegal conduct' can serve as evidence of threatened future injury but 'does not in itself show a present case or controversy regarding injunctive relief.'" *Id.* at *8 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974)).

Murthy was not argued in terms of voluntary cessation. Plaintiffs alleged that the government had pressured social media firms to censor plaintiffs' allegedly false posts about the Covid pandemic and other issues. There were serious disputes about the defendants' past conduct and about whether any such conduct had caused any of the alleged harm to plaintiffs. And in any event, the disputed conduct had largely ended as the Covid pandemic subsided, before the plaintiffs filed suit. The Court declined to infer a substantial risk of future harm from what it viewed as a very weak showing of past harm.

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, 592 U.S. 279 (2021). The facts were parallel to those in *Flanigan's*. 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 286. 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 289.

Chief Justice Roberts dissented, and Justice Kavanaugh in a concurring opinion suggested that a defendant could moot a claim for nominal damages by offering plaintiff a dollar. Would such a gambit work? "Time will tell." Douglas Laycock, *Supreme Court Says a Claim for Nominal Damages Avoids Mootness—But When Does That Matter?*, ALI Adviser (Mar. 22, 2021), https://perma.cc/P5G5-PTH6. For an argument against allowing this strategy because it would undermine the vindication purpose of some nominal damages awards in §1983 litigation, see Michael L. Wells, Uzuegbunam v. Preczewski*, Nominal Damages, and the Roberts Stratagem*, 56 Ga. L. Rev. 1127 (2022).

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

Page 293. After note 10, add:

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

12. Another Supreme Court example. The Court relied on the voluntary cessation doctrine to reach the merits in West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022). In the Obama years, the EPA issued a set of regulations it called its Clean Power Plan. In the Trump years, the EPA issued less demanding regulations that repealed the Clean Power Plan. Multiple litigants sued, and the D.C. Circuit vacated the Trump regulations. American Lung Association v. Environmental Protection Agency, 985 F.3d 914 (D.C. Cir. 2021).

The EPA under the Biden Administration asked the D.C. Circuit to stay its mandate insofar as it reinstated the Clean Power Plan, and announced its intention to craft a new set of regulations. Meanwhile, West Virginia and others successfully petitioned for certiorari. The Court held that the case was not moot. The EPA had not promised that its new regulation would not include the substance of the provisions that West Virginia was challenging. The burden of proving mootness is on the party asserting mootness, and "[t]hat burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct.'" *West Virginia*, 597 U.S. at 719, quoting Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000).

2. Preventing Lawful Acts That Might Have Wrongful Consequences

Page 301. At the end of note 2, add:

2. The inevitable-disclosure theory. . . .

The Federal Trade Commission has adopted a rule, now being challenged in court, that bans non-compete agreements for employees. It does not ban nondisclosure agreements, as in *Pepsico*, in which an employee promises to protect confidential information. But it bans agreements that function as a noncompete, and the explanation of the rule says that overly broad nondisclosure agreements are within that definition if they make it too difficult for an employee to move. The explanation also recognizes a split in the states on the inevitable-disclosure theory and does not take any position on it. Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912), at 38365 (on nondisclosure agreements), 38427 (on the inevitable disclosure theory), 38502-38505 (stating the rule itself). As this Update was being completed, a federal district court postponed the effective date of this rule as to the named plaintiffs in a lawsuit. Ryan, LLC v. FTC, No. 3:24-CV-00986-E, 2024 WL 3297524 (N.D. Tex. July 3, 2024).

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*, Vox (Jan. 19, 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.

Page 344. At the end of note 7, add:

7. The long aftermath. . . .

An empirical study found no overall increase in the rate of crime after the release of California prisoners following *Brown*. Jody Sundt, Emily J. Salisbury, and Mark G. Harmon, *Is Downsizing Prisons Dangerous?*, 15 Criminology & Public Policy 315 (2016).

C. The Rights of Third Parties

Page 377. After note 4, add:

4.1. Internet defamation. Consider Hassell v. Bird, 420 P.3d 776 (Cal. 2018). A disgruntled former client posted a defamatory review of the plaintiff lawyer and her firm on Yelp, a website that publishes consumer reviews of businesses. The lawyer got a large damage judgment against the former client and an injunction ordering her to remove the review. The former client ignored the injunction.

The lawyer also got an injunction ordering Yelp to remove the review. Yelp had not been a party to the case, but it now intervened to argue that it could not be enjoined. The plurality held that the injunction against Yelp violated §230 of the Communications Decency Act, which provides that websites that host material written by others shall not "be treated as a publisher or speaker of any information provided by" anyone else, 47 U.S.C. §230(c)(1), and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." §230(e)(3).

Justice Kruger, concurring for the decisive fourth vote, did not reach the §230 issue. She would have held simply that the court could not enjoin a person who had not been party to the case and who was acting independently of the defendant who had been a party. Three dissenters argued that Yelp could be enjoined because it was aiding and abetting the former client, in the language of a leading California case, or acting "in concert" with the former client and as her agent, in the language of Federal Rule 65(d)(2), which addresses who is bound by an injunction against a named defendant. See section 9.A.4 in the main volume. The dissenters equated these varied formulations.

The principal disagreement between the dissenters and Justice Kruger seemed to be more about facts than law: how to characterize the relationship between Yelp and the individuals who post on Yelp. No one relied on the federal theory that the order against Yelp was "minor and ancillary."

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, 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 and Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, Associated Press (Jan. 16, 2021).

b. Specific performance of contracts

Page 401. At the end of note 1, add:

1. What is specific performance? . . .

There is another debate about the distinction in Wudi Industrial (Shanghai) Co. v. Wong, 70 F.4th 183 (4th Cir. 2023). The parties settled a trademark dispute with an agreement that defendant would pay plaintiff a fee for the right to use its allegedly infringing product name, but that it would not advertise using that name in any of 53 named countries. Plaintiff then filed a motion to enforce the agreement, alleging that defendant was advertising with the name in some of the prohibited countries. The district court ordered defendant to "immediately cease" all such advertising, and to remove, within seven days, all such ads previously posted to the internet. *Id.* at *2. It later entered a second order, making this order final.

The majority in the court of appeals held that these two orders were a preliminary and permanent injunction, respectively. It said that an injunction is an "equitable decree compelling obedience under threat of contempt." *Id.* at 189 (quoting International Longshoremen's Assn. Local 1291 v. Philadelphia Marine Trade Assn., 389 U.S. 64, 75 (1967)). More colorfully, it invoked the "duck test"—"if it looks like a duck, walks like a duck, and quacks like a duck, then it's a duck." *Id.* at 191.

Both orders had to be reversed, because the trial court had not complied with procedural rules governing injunctions (see Federal Rules 52 and 65(d), at pages 478 and 853-860 of the main volume), and it had not applied the Supreme Court's current tests for either preliminary or permanent injunctions (see eBay Inc. v. MercExchange, LLC at page 441, and Winter v. Natural Resources Defense Council, Inc. at page 449, of the main volume).

Judge Rushing, dissenting, thought the orders were summary grants of specific performance of the settlement agreement that complied with circuit precedent. She thought that the orders were not injunctions for purposes of *eBay* or *Winter*. She seemed to concede that they were injunctions for purposes of the Federal Rules, but she said that the trial court had sufficiently complied with those rules.

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

13. Business preferences. . . .

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

Recent experiments with ordinary people found that they expect a court would give a nonbreaching party specific performance if involved in a contract dispute. But when experimenters "told subjects that damages were a *possible* remedy (not even a preferred or default regime), their estimates of the likelihood of specific performance plummeted. Simply being told that the law *might not* order performance depressed estimates of the likelihood of equitable relief. It is as if a lot of people expected specific performance only when they hadn't thought seriously about it." Tess Wilkinson-Ryan, David A. Hoffman, and Emily Campbell, *Expecting Specific Performance*, 98 N.Y.U. L. Rev 1633, 1639-1640 (2023).

14. A confession of error. Dean Robert E. Scott, now Professor Emeritus at Columbia, was one of the founders of the law and economics movement. He was not the first to propose the idea

of efficient breach, but he promoted the idea and he coined the phrase. In an admirable, even remarkable, example of academic integrity, he has confessed error. After briefly reviewing the early literature on efficient breach, and his article, co-authored with Charles Goetz, in which he first used the phrase, he said:

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

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

2. Burdens on Defendant or the Court

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

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

The White Flint mall property remains largely undeveloped, but some progress has been made. Montgomery Planning, 2023 Biennial Monitoring Report for the North Bethesda (White Flint) Sector Plan Area, https://perma.cc/JDR9-RRVH.

Lord & Taylor closed its White Flint property in 2020, Dan Schere, *Lord & Taylor Closing in White Flint After Company Files for Bankruptcy*, MoCo360 (Aug. 4, 2020), and the company closed all its stores in 2021, Nathan Bomey, *Lord & Taylor Going Out of Business: Store Closings, Liquidation Sales Begin*, USA Today (Aug. 27, 2020). So much for projecting the future of the mall and store out to 2042 or 2057. Even if the court had ordered specific performance of the contract, Lord & Taylor would have been able to reject the contract in its bankruptcy and release its rights under the specific performance decree.

3. Other Policy Reasons

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

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

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

Constantakis v. Bryan Advisory Services, LLC, 275 A.3d 998 (Pa. Super. Ct. 2022), discussed *Willing* extensively, but for its prior restraint holding, not its irreparable injury holding. Plaintiffs

and defendants were in business as investment advisers; plaintiffs were the principals of an affiliate of the corporate defendant. Plaintiffs sought to separate from defendants and become an independent company; defendants accused them of wrongdoing, and included those accusations in regulatory filings with the Securities and Exchange Commission. These filings brought plaintiffs' business to an effective halt.

The Court of Common Pleas found, in a two-day preliminary injunction hearing, that there was no basis for the charges of misconduct. It ordered defendants to amend the regulatory filings to conform to the court's fact finding, and to refrain "from making false, unsubstantiated, and defamatory statements" about plaintiffs. *Id.* at 1007. The Superior Court vacated the preliminary injunction against future false statements as a prior restraint, citing *Willing*. But it affirmed the order to correct the regulatory filings, holding that this was a subsequent remedy and not a prior restraint.

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

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

3. Prior restraints against unprotected speech. . . .

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

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

Although the court framed its order in terms of lack of irreparable injury, it also could have written that the request was moot (see pages 290-293 in the main volume), or that it was barred by laches, a doctrine taken up in section 11.D, 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 section 8.C.1. In a famous earlier case involving breach of a prepublication review requirement for books by former CIA agents, the Supreme Court approved such a constructive trust remedy. Snepp v. United States, 444 U.S. 507 (1980).

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

6. Developments in the lower courts. . . .

Professor Volokh counts 34 states and nine federal circuits that allow anti-libel injunctions in at least some circumstances. Eugene Volokh, *Anti-Libel Injunctions*, 168 U. Pa. L. Rev. 73, 137 app. A. (2019). As a matter of both First Amendment law and sound policy, Volokh recommends what he terms a "hybrid permanent injunction" against libelous speech. In the context of his example of Don having falsely accused Paula of cheating him, Volokh favors an injunction along the lines of "Don may not libelously accuse Paula of cheating him." *Id.* at 105-106 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." *Id.* at 77, 106. 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 section 9.A.

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

7. Are prior restraints special? . . .

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

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

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

Id. at 279-280.

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

Page 446. After note 6, add:

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

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

7. A broader assessment. . . .

Elizabeth A. Rowe, eBay, *Permanent Injunctions, and Trade Secrets*, 77 Wash. & Lee L. Rev. 553 (2020), examined 150 federal trade secret cases between 2000 and 2014 with damages totaling $2 billion. "All were successful on their trade secret claims and received damages but most did not receive a permanent injunction." *Id.* at 578. Many plaintiffs received no injunction because they didn't ask for one. Professor Rowe found that courts are not necessarily strictly applying the four factors from *eBay*, and that the injunctions issued and the opinions (if any) explaining the injunction decisions were generally perfunctory. In those cases where courts denied an injunction and gave a reason, the lack of irreparable harm seemed to have been the factor most often articulated as the reason for the denial. Damages for the past are not inconsistent with an injunction for the future, and damages for the past do not necessarily indicate that future damages can be reasonably proved and measured. But a large award of damages may suggest to some judges that they have granted an adequate remedy.

Colleen V. Chien and 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 in which the court found liability fell from 95 percent to 75 percent in the first six years after *eBay*.

A study by Matthew Sag and Pamela Samuelson found that injunctive relief in copyright cases is also less common post-*eBay*. Matthew Sag and Pamela Samuelson, *Discovering eBay's Impact*

on Copyright Injunctions Through Empirical Evidence, 64 Wm. & Mary L. Rev. 1447 (2023). Samuelson's separate qualitative study of such cases concludes that "[i]n the past decade, courts have generally been dutifully analyzing each of the *eBay* factors and seem to be granting injunctions less frequently now than before *eBay*." Pamela Samuelson, *Withholding Injunctions in Copyright Cases: The Impact of eBay*, 63 Wm. & Mary L. Rev. 773, 779-780 (2022). Professor Samuelson's solo-authored 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.

Page 449. After note 13, add:

14. *eBay*'s chilly reception in the states. Citing the scholarly criticism of *eBay*, the Chancery Court of Delaware rejected its application to the decision whether or not to grant or withhold a permanent injunction in state court. In re COVID-Related Restrictions on Religious Services, 285 A.3d 1205 (Del. Ch. 2022).

Most state courts have simply ignored *eBay*. "The most important fact about *eBay* and *Monsanto* for this Restatement is that the state courts have largely ignored them. As of March 1, 2023, *eBay* has been cited in 4969 federal cases and only 34 state cases. *Monsanto* has been cited by 1171 federal cases and nine state cases. A significant fraction of the state citations to these cases were to incidental points separate from the four-part test, or they appeared in cases of federal claims asserted in state court, or they contrasted the state rule with the federal rule. The bottom line is that *eBay* and *Monsanto* have had no significant effect on the state law of injunctions against tort." Restatement Third, Torts: Remedies §43, rptrs. note *h* (Am. Law. Inst. Tent. Draft No. 2, 2023).

B. Preliminary or Permanent Relief

1. The Substantive Standards for Preliminary Relief

Page 453. At the end of Note 3, add:

3. The four-part test. . . .

The Supreme Court recently reaffirmed, without further clarifying, *Winter*'s four-part test in Starbucks Corporation v. McKinney, 144 S. Ct. 1570 (2024). The context was a statute authorizing a court to grant a preliminary injunction that the National Labor Relations Board could seek during the pendency of administrative proceedings in a labor dispute. The Court held that the language of the statute allowing a court to grant preliminary relief sought by the Board if "just and proper" did not alter application of the four-part test. *Id*. at 1575-1576. Justice Jackson, dissenting in part, wrote that the statute required courts to defer more to the Board's expertise in labor matters. *Id*. at 1579-1588 (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part).

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 per cent likelihood" of success on the merits, but only "a fair chance of prevailing." Jet Midwest International Co. v. Jet Midwest Group, LLC, 953 F.3d 1041, 1044-1045 (8th Cir. 2020). It did not discuss *Winter*; it cited and quoted several of its own cases, all of which predate *Winter*.

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

The Supreme Court has again said that plaintiff must show that future wrongful conduct causing harm to plaintiff is "*likely*." Murthy v. Missouri, 2024 WL 3165801, at *13 (U.S. June 26, 2024) (emphasis in original). But it once again gave no indication of *how* likely. And once again, it did *not* say "more likely than not."

Page 455. At the end of note 5, add:

5. More recent Supreme Court cases. . . .

Sometimes before a court of appeals decides whether or not to issue a stay pending appeal it issues an "administrative stay," which is a stay that lasts just long enough for the court to determine whether or not to issue a stay that would last until the appeal is decided. In *United States v. Texas*, 144 S. Ct. 797 (2024), the Supreme Court considered overturning an administrative stay issued by the Fifth Circuit that would have allowed Texas to enforce a controversial state immigration law that, among other things, would have permitted Texas to remove noncitizens from the United States. The Court declined to overturn the stay, with Justices Barrett and Kavanaugh indicating that they would not apply the *Nken* factors to administrative stays. *Id*. at 797-800 (Barrett, J., concurring in the denial of a stay). Justice Barrett added that "The real problem—and the one lurking in this case—is the risk that a court will avoid *Nken* for too long. An administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal. Once the court is equipped to rule, its obligation to apply the *Nken* factors is triggered—a point that some judges have pressed their Circuits to consider. . . . The time may come, in this case or another, when this Court is forced to conclude that an administrative stay has effectively become a stay pending appeal and review it accordingly." *Id.* at 799-800. The Texas law was in effect for a few hours after the Supreme Court denied the stay; the Fifth Circuit soon thereafter quickly issued its own stay on a 2-1 vote. Kirk McDaniel, *Fifth Circuit Rejects Texas' Attempt to Enforce State Immigration Law*, Courthouse News Service (Mar. 27, 2024).

In Ohio v. Environmental Protection Agency, 2024 WL 3187768 (U.S. June 27, 2024), the Court considered the *Nken* factors in a request for a stay of Biden Administration anti-pollution rules. The Court found strong arguments about irreparable harm on both sides. Citing *Nken*, the Court wrote that: "Because each side has strong arguments about the harms they face and equities involved, our resolution of these stay requests ultimately turns on the merits and the question who is likely to prevail at the end of this litigation." *Id.* at *7.

Page 456. After note 7, add:

7.1. One more example. In Roman Catholic Diocese v. Cuomo, 592 U.S. 14 (2020), the Court granted an injunction pending appeal that blocked an expiring New York order limiting capacity at religious services during the early months of the COVID-19 pandemic. The Court held that 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 16. 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 32 (Roberts, C.J., dissenting).

Justice Breyer, dissenting for himself and Justices Sotomayor and Kagan, also cited this language from *Nken*, and added that such a remedy is especially inappropriate "where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts' determination." *Id*. at 36 (Breyer, J., dissenting). Stays and injunctions pending appeal are discussed in the main volume at page 481 and more extensively in this Update to page 481.

Page 459. After note 14, add:

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

In opposing the grant of the preliminary injunction, the government "concede[d] that the plaintiffs will suffer irreparable harm if . . . the Final Rule is not enjoined." But the government argued that the public interest supported denying an injunction. The Sixth Circuit denied an injunction pending appeal, as did the Supreme Court without comment. 139 S. Ct. 1406 (2019). (Ruling two years later on the merits, the Sixth Circuit on a 2-1 vote held that ATF's interpretation of a criminal statute is not entitled to *Chevron* deference and that as a matter of statutory interpretation, a weapon with a bump stock could not be considered a machine gun under the statute. Gun Owners of America v. Garland, 992 F.3d 446, 475-476 (6th Cir. 2021). The Sixth Circuit took the case en banc and affirmed the district court by an equally divided court. 19 F.4th 890 (6th Cir. 2021) (en banc), and the Supreme Court denied cert. 143 S. Ct. 83 (2022). The Supreme Court then decided a separate case from the Fifth Circuit, Garland v. Cargill, 602 U.S. 406 (2024) holding that bump stocks are not properly classified as machine guns under federal law. The three liberal Justices dissented.

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

16. Preliminary damages? Caution in issuing preliminary injunctions is not resistance to equity; it is resistance to preliminary relief and its greater risk of error. Preliminary relief is often granted in

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

Page 459. At the end of note 1, add:

1. The status quo test. . . .

In 2000, the Food and Drug Administration approved the use of the drug mifespristone for medical abortions under certain circumstances. Beginning in 2016, the FDA issued rulings easing the dispensing of the drug, such as lowering the number of doctor visits before it could be prescribed from three visits to one. In 2021, in the midst of the COVID-19 pandemic, the FDA approved dispensing of the drug by mail. In 2022, a group of doctors sued over the FDA's approval, and in 2023 a federal district court granted a nationwide stay of the FDA's approval of the drug, finding the approval contrary to law. Alliance for Hippocratic Medicine v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023). The decision was quite controversial for multiple reasons: because it seemed unlikely that the doctors who sought to rescind FDA approval had standing; because the lawsuit was filed more than 20 years after the drug was approved; because the drug had been widely used and with apparent safety for all those years; and of course, because the case was part of the bitter national battle over abortion rights. The Fifth Circuit granted an emergency request for a stay in part, allowing the drug to stay on the market pending appeal, but allowing the district court to stay the FDA's easing of the rules beginning in 2016. 2023 WL 2913725 (5th Cir. Apr. 12, 2023).

The Supreme Court granted a stay of the entire district court order pending appeal. Danco Laboratories LLC v. Alliance for Hippocratic Medicine, 143 S. Ct. 1075 (2023). Justice Thomas dissented without opinion. Justice Alito wrote a dissent in which he remarked: "As narrowed by the Court of Appeals, the stay that would apply if we failed to broaden it would not remove mifepristone from the market. It would simply restore the circumstances that existed (and that the Government defended) from 2000 to 2016 under three Presidential administrations." *Id.* at 1076 (Alito, J., dissenting). Whatever one can say about the Fifth Circuit's partial stay order that Justice Alito favored, it did not restore the status quo before litigation. But the Supreme Court's order can be understood either as minimizing irreparable injury or as restoring the pre-litigation status quo. (On the merits, the Court decided that the plaintiff doctors lacked standing, because they had shown no risk that the drug's availability would cause harm to themselves. Food & Drug Administration v. Alliance for Hippocratic Medicine, 602 U.S. 367 (2024).)

One context in which the status quo test seems to work well is where the preliminary injunction would inflict only delay on the defendant, but allowing the defendant to proceed with its plans might inflict permanent harm on the plaintiff. An example is Sharp v. 251st St. Landfill, Inc., 810 P.2d 1270 (Okla. 1991), where plaintiffs alleged that defendant's proposed landfill would contaminate their well water. The preliminary injunction delayed defendant's landfill, and the delay no doubt imposed costs, but it did not permanently prevent the landfill. If plaintiffs were right, allowing the landfill to go forward would have permanently contaminated their well water before a trial could be held. This preliminary injunction can be equally well explained as

minimizing irreparable injury or as preserving the status quo, and the court alluded to both explanations.

2. The Procedure for Obtaining Preliminary Relief

Page 471. After note 5, add:

5.1. Inadvertently withholding notice? In one of the many foibles connected to 2020 post-election litigation brought by Trump supporter Sidney Powell, Powell filed a motion for a TRO in federal court in Wisconsin without verification (that is, without any witness swearing to the truth of the allegations in the complaint and motion) 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, Document 7 (E.D. Wis. Dec. 2, 2020).

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

8. What counts as an injunction? . . .

One section of the Immigration and Nationality Act, 8 U.S.C. §1252(f)(1), says, with some exceptions, that no court has jurisdiction "to enjoin or restrain the operation of" certain other provisions of the Act. The Court quoted three dictionaries, Justice Story's treatise, and Nken v. Holder, 556 U.S. 418 (2009), to conclude that to "enjoin or restrain" means to tell the defendant what to do or not to do. It said that to "enjoin" is to "issue an injunction," but it recognized multiple possible meanings for "restrain," and did not consider the possibility that in such close association with "enjoin," "restrain" merely meant to issue a temporary restraining order. Garland v. Gonzalez, 596 U.S. 543 (2022).

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

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

9. Appealing TROs. . . .

e. Exception 4: TRO has the "qualities" of a preliminary injunction. . . .

Professor Genetin finds "expansive" doctrine allowing appeals in three circuits, and scattered decisions allowing appeals elsewhere. Bernadette Bollas Genetin, *Appealable TROs: Restoring Irreparable Harm as the Touchstone for Instant Interlocutory Appeal of Temporary Restraining Orders*, 75 Baylor L. Rev. 372 (2023). She criticizes these decisions for violating the congressional policy against piecemeal appeals and for effectively allowing courts of appeals broad discretion to

decide which cases they want to hear and intervene in early. She would narrow the exceptions, but she would not entirely eliminate all appeals of TROs.

Page 481. After note 10, add:

10. Stays and injunctions pending appeal. . . .

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

In Roman Catholic Diocese v. Cuomo, 592 U.S. 14 (2020), described in this Update to page 456, the Court granted an injunction pending certiorari that blocked an expiring New York order limiting the number of persons attending 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, 593 U.S. 61 (2021).

Professor Vladeck is the leading critic of the shadow docket. Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books 2023). He notes that 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 in the Trump applications, granting 28 in full or in part. Most of these cases involved stays of preliminary injunctions issued by lower courts, but a few involved injunctions pending appeal, where the Supreme Court enjoined the challenged government policy pending further litigation even though the lower courts had refused. He argues, with considerable support in both the cases and in theory, that appellate injunctions pending appeal should be far more rare than stays pending appeal. *See* Respect Maine PAC v. McKee, 562 U.S. 996 (2010). Stays pending appeal are expressly authorized by 28 U.S.C. §2101(f), but an injunction pending appeal is an exercise of judicial authority under the much more general provisions of the All Writs Act, 28 U.S.C. §1651, which says that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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

> Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow. . . .
>
> [T]his Court is partly to blame for the breakdown in the appellate process. That is because the Court—in this case, the New York cases, and many others—has been all too

quick to grant the Government's "reflexiv[e]" requests. But make no mistake: Such a shift in the Court's own behavior comes at a cost.

Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay. . . . They demand extensive time and resources when the Court's intervention may well be unnecessary—particularly when, as here, a court of appeals is poised to decide the issue for itself.

Perhaps most troublingly, the Court's recent behavior on stay applications has benefited one litigant over all others. This Court often permits executions—where the risk of irreparable harm is the loss of life—to proceed, justifying many of those decisions on purported failures "to raise any potentially meritorious claims in a timely manner." Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of a 20-year status quo in one State. I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.

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

In another case, the Court stayed an order from the federal Occupational Safety and Health Administration imposing a COVID-19 vaccination requirement on many employees, on the ground that the order was beyond the authority that Congress had delegated to the agency. Note that this characterization undermines the Court's distinction between stays and injunctions pending appeal; staying the agency's order was roughly equivalent to enjoining enforcement of the order. More dramatically, the Court suggested that at least in this context, the balance of hardships or equities was irrelevant:

The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations.

It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84

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

National Federation of Independent Business v. Department of Labor, 595 U.S. 109, 120 (2022).

Justice Breyer, dissenting for himself and Justices Kagan and Sotomayor, did not think the equity question was a close call. "This Court should decline to exercise its equitable discretion in a way that will—as this stay will—imperil the lives of thousands of American workers and the health of many more." *Id.* at 137 (Breyer, J., dissenting). The majority's statement apparently abdicating equity left some commentators puzzled. Richard Re, *Did the Supreme Court Overrule Equity?*, Re's Judicata (Jan. 14, 2022); Will Baude, *Balancing the Equities in the Vaccine Mandate Case*, Volokh Conspiracy (Jan. 14, 2022). It is unclear if this statement will get applied in other cases.

Professor Samuel Bray, in testimony prepared for the Presidential Commission on the Supreme Court of the United States, argues that the dramatic increase in stays and injunctions pending a cert petition is not so much a result of the nation's polarization or of the Trump Administration's challenges to legal norms, but rather a response to the rise of the universal 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 universal injunction, see the main volume and this Update to pages 285-288.

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

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

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

There was no majority opinion. The main concurrence came from Justice Kavanaugh who advanced a very strong notion of the *Purcell* principle (and offered two separate additional reasons for supporting the affirmance of the stay). He cited seven other Supreme Court orders issued during the 2020 election season that he said reflected application of the principle: "This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Id.* at 30.

> 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" (internal quotation marks omitted)). And that means courts must consider all relevant factors, not just the calendar. Yes, there is a danger that an autumn injunction may confuse voters and suppress voting. But no, there is not a moratorium on the Constitution as the cold weather approaches. Remediable incursions on the right to vote can occur in September or October as well as in April or May.

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

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

> Some of this Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may never enjoin a State's election laws in the period close to an election. As I see it, however, the *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context—a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. Although the Court has not yet had occasion to fully spell out all of its contours, I would think that the *Purcell* principle thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the

complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

Id. at 881.

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

In Moore v. Harper, 142 S. Ct. 1089 (2022), the Supreme Court refused to stay a North Carolina Supreme Court order requiring new congressional districts against a claim that the state court exceeded its powers under the Constitution. Justice Kavanaugh, citing *Milligan* and its similar time frame, concurred on *Purcell* grounds even as he expressed sympathy with the petitioners' claim on the merits. *Id.* (Kavanaugh, J., concurring). Justice Alito dissented for himself and Justices Thomas and Gorsuch, without mentioning *Purcell*. *Id.* at 1089-1092 (Alito, J., dissenting). The Court later granted certiorari to review the claim on the merits. Moore v. Harper, 142 S. Ct. 2901 (2022).

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

On the merits in *Milligan*, the Supreme Court affirmed the lower court in Allen v. Milligan, 599 U.S. 1 (2023). The upshot is that under *Purcell*, plaintiffs were denied their remedy for the 2022 election season but got a remedy beginning with the 2024 election season. The Court affirmed on the merits in *Moore* as well, rejecting the claim that the state court had exceeded its powers. Moore v. Harper, 600 U.S. 1 (2023). More recently, in a Louisiana racial gerrymandering case, the Supreme Court once again cited *Purcell* in blocking a lower court's attempt to impose a new congressional map many months before the election. Here the politics were more scrambled. The Supreme Court's order applying *Purcell* ended up favoring voting rights litigants: two of the three liberal justices voted to deny the stay; a third, Justice Jackson, dissented from the grant of a stay: "In my view, *Purcell* has no role to play here. There is little risk of voter confusion from a new map being imposed this far out from the November election." Robinson v. Callais, 144 S. Ct. 1171, 1172 (2024) (Jackson, J., dissenting from grant of applications for stay). The liberal justices likely were focused on the fact that application of *Purcell* usually hurts voting rights plaintiffs, even if it helped them in this case.

C. Prospective or Retrospective Relief

1. Suits Against Officers in Their Official Capacities

Page 489. After note 1, add:

1.1 Evading the core compromise. Texas enacted a sophisticated attempt to wholly prevent any judicial review of a statute that was, at the time of its enactment, flagrantly unconstitutional. The scheme and the response to it are somewhat complicated to explain, and the repudiation of any constitutional right to abortion in Dobbs v. Jackson Women's Health Organization, 597 U.S.

215 (2022), has mostly mooted the dispute for now. But it is worth taking time to understand, because it reveals a serious gap in the Court's doctrinal structure for reconciling constitutional rights with sovereign immunity.

Texas prohibited all abortions after a fetal heartbeat can be detected. The law has been widely referred to as SB 8; it is codified in Tex. Health & Safety Code §§171.201 et seq. and in Tex. Civ. Prac. & Remedies Code §33.22.

Section 171.207 provides that no effort to enforce the law "may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208." And §171.208 provides that "[a]ny person, other than an officer or employee of a state or local government entity in this state," with respect to any actual or intended violation of the statute, may sue for an injunction to prevent the violation, for statutory damages of not less than $10,000, and for costs and attorneys' fees. The amount of statutory damages is not capped, but there can be no more than one judgment against the same defendant for the same abortion. Reliance on a decision valid at the time of the abortion, but later overruled (e.g., Roe v. Wade), is not a defense.

The genius of §171.207 is that no state official can be named as a defendant in an Ex parte Young action, because no state official has enforcement authority. There are nearly 8 billion potential individual plaintiffs, plus countless potential corporate plaintiffs, under §171.208, no one of whom is at all likely to file a lawsuit, and any one of whom could deny any such intention if an abortion clinic sued to enjoin enforcement of the law. Showing a ripe claim for an injunction against any particular private defendant would be difficult or impossible. And even if a plaintiff surmounted that hurdle, won on the merits, and got an injunction against enforcement on the ground that the law is unconstitutional, that judgment would not be claim- or issue-preclusive in a suit by any of the other billions of potential plaintiffs. §171.208(e)(5). Nor would reliance on that injunction be any protection if the injunction were later vacated or reversed. Such a decision would provide a measure of protection only if it were affirmed on appeal and became a binding precedent.

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

A group of abortion clinics sued the state's attorney general, a state judge, a court clerk, the executive directors of the state's medical licensing boards, and a private citizen, for an injunction against enforcing the law. Whole Woman's Health v. Jackson, 595 U.S. 30 (2021). Plaintiffs indicated their intention to eventually seek an injunction against a defendant class of all state judges and all court clerks, ordering them not to decide or accept for filing any lawsuits under §171.208. The Court dismissed the claim against the attorney general, because he had no enforcement authority, and the claim against the private party, because he denied any intention to enforce the law. It dismissed the claim against the judge and the clerk because they do not enforce laws; they neutrally adjudicate disputes between litigants or facilitate the filing and adjudication of such disputes.

But the Court held that the claims against the directors of the medical boards could go forward. A savings clause in §171.207(b)(3) said that it did not "limit the enforceability of any other laws that regulate or prohibit abortion." Under some of those other laws, the boards could revoke the license of any medical provider who performed an illegal abortion, so despite the language elsewhere in §171.207, these boards still had enforcement authority. "[T]his is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed." 595 U.S. at 47-48. Justice Thomas would have dismissed all the claims; Chief Justice Roberts, joined by Justices Breyer, Sotomayor, and Kagan, concurred as to the directors of the medical boards and would also have let the case proceed against the court clerks.

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

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

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

Meanwhile, a state trial judge declared the private enforcement provisions of §171.208 unconstitutional on state law grounds. Van Stean v. Texas Right to Life, No. D-1-GN-21-004179 (Travis Cnty. Dist. Ct. Dec. 9, 2021). The court held that authorizing damages to persons who had not been harmed violated the state's Open Court Clause, that the statutory damages awarded to persons who had not been harmed were punishment without due process, and that the delegation of state enforcement authority to private citizens who had not been harmed violated the separation of powers. Defendants moved to have the case dismissed on a collateral issue, and when that motion was denied, took an immediate interlocutory appeal. The state's Third Court of Appeals affirmed the denial of that motion. Texas Right to Life v. Van Stean, 2023 WL 3687408 (Tex. Ct. App. May 26, 2023). The case is currently before the state supreme court on a petition for review, No. 23-0468.

What is to stop any legislature from using the Texas technique to eliminate judicial enforcement of any constitutional right it dislikes? Chief Justice Roberts, concurring in part and dissenting in part in the Supreme Court's case, said that the "clear purpose and actual effect of SB 8 has been to nullify this Court's rulings. . . . The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake." 595 U.S. at 61-62. Justices Breyer, Sotomayor, and Kagan joined this opinion.

Justice Sotomayor, in a separate opinion for herself and Justices Breyer and Kagan, described the Texas law as "a brazen challenge to our federal structure." *Id.* at 71. She compared it to John Calhoun's antebellum claims that states could "nullify" federal law, and she argued that Ex parte

Young must be expanded as necessary to address such schemes. If the whole purpose of the *Young* fiction is to make judicial review possible, doesn't it have to expand to fit that purpose?

The Texas law further deterred litigation with unusual provisions for attorneys' fees. Prevailing plaintiffs suing to enforce SB 8 are entitled to fees; prevailing defendants are not. §§171.208(b)(3) and 171.208(i). Any person who sues to prevent enforcement of any Texas law regulating or restricting abortion, including both plaintiffs and their attorneys, is jointly and severally liable for a prevailing defendant's fees. Tex. Civ Prac. & Remedies Code §30.22(a). And such a defendant is prevailing if judgment is entered in his favor, *or* if any one of plaintiff's claims is dismissed, whether or not on the merits, and even if plaintiff prevails on all other claims and judgment is entered for plaintiff. §30.22(b). These rules are designed to deter parties from suing and to deter attorneys from representing anyone brave enough to sue. They are carefully explored in Rebecca Aviel and Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 Yale L.J. 2048 (2023).

One-way fee shifting is common under statutes designed to *encourage* litigation and assertion of rights, especially in contexts where most defendants have greater financial resources than most plaintiffs. See section 10.A and especially pages 928-932 in the main volume. The far more draconian Texas provisions are designed to *deter* litigation and assertion of rights. Awards under the older provisions for one-way fee shifting are required to be "reasonable," a limitation omitted from the Texas law, and unlike the explicit provisions of the Texas law, fee awards under the older laws are proportioned to the extent to which a plaintiff prevailed.

California enacted gun control legislation with provisions, closely modeled on the Texas law, to prevent constitutional challenges. Cal. Bus. & Prof. Code §§22949.60-22949.71 and Cal. Civ. Proc. Code §1021.11. These provisions lapse if the Texas law is invalidated by the U.S. or Texas Supreme Court. Cal. Bus. & Prof Code §22949.71. A federal court held the California attorneys' fees provisions unconstitutional in South Bay Rod & Gun Club, Inc. v. Bonta, 646 F. Supp. 3d 1232 (S.D. Cal. 2022).

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

One way to provide judicial review of a statute on the Texas model is to simply ignore the problem. See Oklahoma Call for Reproductive Justice v. State, 531 P.3d 117 (Okla. 2023). The court issued a declaratory judgment invalidating an Oklahoma statute that stringently restricted abortion. Plaintiffs named as defendants the state of Oklahoma and the court clerk of each Oklahoma county. The court recited that no state agent could enforce the law, but that the law created a cause of action enforceable by any person not a state agent. Then it went directly to the merits and never mentioned the enforcement provisions again.

Page 489. After note 3, add:

3.1. Declaratory judgments. In a dispute over a temporary and private display at the state capitol, the district court entered a declaratory judgment as follows: "IT IS FURTHER DECLARED that defendants violated [plaintiff's] First Amendment rights and engaged in viewpoint discrimination as a matter of law when the [plaintiff's] exhibit was removed from the Texas Capitol building under the circumstances of this case." Freedom from Religion Foundation v. Abbott, 955 F.3d 417, 423 (5th Cir. 2020). The Fifth Circuit held that this "backwards-looking,

past-tense declaratory judgment" is retrospective relief barred by sovereign immunity and by *Edelman*, even though there was a continuing controversy about future displays. *Id.* at 425.

Page 491. After note 6, add:

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

Yes to both questions, the Court said in PennEast Pipeline Co. v. New Jersey, 594 U.S. 482 (2021). The case fractured the Court's usual ideological lines. Chief Justice Roberts wrote the opinion, joined by Justices Breyer, Sotomayor, 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 page 496 of the main volume.

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

6.2. A military exception to sovereign immunity. The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 et seq., gives military veterans a right to return to their old job in the civilian economy, or to a job with comparable pay if they are unable to perform their old job due to a service-connected injury. The Act authorizes veterans to sue for reinstatement or damages, in state or federal court, and it explicitly authorizes suits against states. The Court held that states waived their immunity to these suits in the plan of the Convention. Torres v. Texas Department of Public Safety, 597 U.S. 580 (2022).

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

In *Torres*, the Court said that the power to raise armies and make war is complete in itself in the sense that it is totally delegated to the federal government and excluded from the states. When a power is complete in itself, states cannot obstruct the exercise of that power, by asserting sovereign immunity or otherwise, and in the plan of the Convention, states implicitly waived immunity to suits that Congress authorizes pursuant to that power. *Torres* says that *PennEast* made this the test for whether a waiver of immunity is inherent in the structure of the Constitution. The opinion puts a similar spin on *Katz*, the bankruptcy case in note 6 on page 494. The Court also notes that the complete congressional power to raise armies would be undermined if it could not protect the rights of state employees who volunteer for military service. Justice Breyer wrote the opinion, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh.

Justice Thomas's dissent for the other four Justices is nearly twice as long as the majority opinion. He traced the phrase "complete in itself" back to Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), which said that the commerce power "like all others vested in Congress, *is complete in itself*, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." 597 U.S. at 624 (emphasis in the original). If every federal power is complete in itself, and if a power complete in itself overrides state sovereign immunity, then all federal powers override state sovereign immunity. The Court denied that it meant any such thing. It said that the power to regulate commerce is shared with the states, and therefore is not complete in itself. Whether any other federal powers are complete in themselves in the *Torres* sense remains to be seen.

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

Page 496. After note 10, add:

10.1. The Copyright Act. In the Copyright Remedy Clarification Act of 1990, 17 U.S.C. §511, Congress authorized suits against states for copyright infringement, explicitly overriding any claim of sovereign immunity. In Allen v. Cooper, 589 U.S. 248 (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 11, add:

11. The clear-statement rule. . . .

The Court has held that Congress must give a clear statement when it abrogates the immunity of Puerto Rico as well. Financial Oversight & Management Board of Puerto Rico v. Centro de Periodismo Investigativo, Inc., 594 U.S. 482 (2023). The majority assumed but did not decide that Puerto Rico could assert sovereign immunity and considered only the question of abrogation of

that immunity by Congress. Justice Thomas dissented on this point, saying that the board had not established Puerto Rico's immunity.

The Court unanimously held that the Fair Credit Reporting Act clearly waives the immunity of the United States. The Act imposes liability on any person, expressly defined to include any "government or governmental subdivision or agency." 15 U.S.C. §1681a(b). But it does not expressly mention federal agencies or the United States. Department of Agriculture Rural Development v. Kirtz, 601 U.S. 42 (2024).

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, 587 U.S. 230 (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 236. The Court split along its now common conservative-liberal line.

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, was 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 increased property taxes and sales taxes in its effort to raise the money to pay, but those taxes raised only $4 to $5 million a year. It 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 liability 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 remained. 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.

The county paid the final installment of its debt in 2023. Scott Koperski, *Gage County Makes Final Payment in $28 Million Judgment in Beatrice Six Case*, Omaha World-Herald (Mar. 8, 2023; updated Apr. 12, 2023).

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, 594 U.S. 482 (2021), described in this Update to page 491. His dissenting opinion says that there are really two distinct immunities. The structural immunity implicit in the Constitution is a privilege of each state, and it is waivable. But the Eleventh Amendment immunity is jurisdictional: "The judicial power of the United States shall not be construed to extend" to diversity suits against a state. That deprives the federal courts of subject matter jurisdiction, and subject matter jurisdiction cannot be created by consent, so no state can waive the Eleventh Amendment. The plaintiff, PennEast, was incorporated in Delaware, so it could not sue New Jersey in federal court even if New Jersey had consented. This theory would probably affect few cases if adopted by the Court, but conceptually, it would be a substantial extension of state sovereign immunity.

Page 499. At the end of note 19, add:

19. Indian tribes. . . .

The Court held that the Bankruptcy Code overrides the immunity of Indian tribes, just as it does for states. See note 6 in the main volume at 491. And it held that Congress had enacted a sufficiently clear statement, even though it had not mentioned tribes. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023). 11 U.S.C. §106 very explicitly overrides immunity for any "governmental unit," and §101(27) defines "governmental unit" to mean any of a long list of federal, state, local, domestic, or foreign governmental units, "or other foreign or domestic government." The Court said that this definition "exudes comprehensiveness from beginning to end," and that the final catchall expressed comprehensiveness by pairing two extremes. *Id.* at 388. Justice Gorsuch dissented. Justice Thomas concurred in the judgment, questioning whether tribes have immunity at all and concluding that any such immunity certainly does not extend to commercial activities off the reservation.

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

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

6. Developments since *Harlow*. . . .

a. Specificity. . . .

v. The Court continues to apply qualified immunity aggressively. In City of Escondido v. Emmons, 586 U.S. 38 (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 42. 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 43.

In October 2021, the Supreme Court issued unanimous per curiam opinions summarily reversing two more cases in which appeals courts had rejected qualified immunity for police officers. Rivas-Villegas v. Cortesluna, 595 U.S. 1 (2021); City of Tahlequah v. Bond, 595 U.S. 9 (2021).

More recently, Justice Sotomayor dissented from cert in two cases in which circuit courts relied upon the clearly established law prong of qualified immunity to reject lawsuits based upon excessive use of force by police. In one case, she argued that the prong "can pose a very high bar for plaintiffs seeking to vindicate their rights. . . . When taken too far, as here, this requirement allows lower courts to split hairs in distinguishing facts or otherwise defining clearly established law at a low level of generality, which impairs the ability of constitutional torts to deter and remedy official misconduct." Lombardo v. City of St. Louis., 143 S. Ct. 2419, 2421 (2023) (Sotomayor, J., dissenting from denial of certiorari). She added that a "court may grant qualified immunity based on the clearly established prong without ever resolving the merits of plaintiffs' claims. This inhibits the development of the law." *Id.* In the other case, Justice Sotomayor lamented the "dual mistakes—resolving factual disputes or drawing inferences in favor of the police, then using those inferences to distinguish otherwise governing precedent—[that] have become the calling card of many courts' qualified immunity jurisprudence." N.S. v. Kansas City Board of Police Commissioners, 143 S. Ct. 2422, 2424 (2023) (Sotomayor J., dissenting from denial of certiorari). She added: "The result is that a purportedly 'qualified' immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations." *Id.* Justice Jackson also voted to granted cert in *Lombardo* but she did not join Justice Sotomayor's statement.

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

b. Obvious applications. . . .

Despite repeatedly questioning the whole doctrine of qualified immunity (see note 12 in the main volume and this Update at page 513), Justice Thomas was the sole dissenter (without explanation) in a rare Supreme Court case holding that a lower court erred in granting qualified immunity to a government official. In Taylor v. Riojas, 592 U.S. 7 (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 7-8 (quoting Taylor v. Stevens, 946 F.3d 211 (5th Cir. 2019)).

The Fifth Circuit agreed that this was cruel and unusual punishment in violation of the Eighth Amendment, but it held that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." The Supreme Court thought

otherwise: "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Justice Alito concurred, but wrote that the Court should not have taken the case for simple error correction purposes. One might respond to Justice Alito that *Taylor* shows that there is a bar (however low) below which government officials may not go, and that this is a lesson that the Fifth Circuit and other courts need to learn. The Court cited *Lanier*; some idea of applications too obvious to have been previously litigated appears to survive.

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

g. Places outside the law? . . .

The Supreme Court took up the case again in Hernández v. Mesa, 589 U.S. 93 (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. Most of these cases in the Supreme Court 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. A major new study of appellate court cases filed from 2010 to 2020 raising qualified immunity found a wide distribution of the types of cases in which the defense was raised. Police misconduct cases were the biggest category, but not nearly as dominant as one might infer from just the Supreme Court cases. A quarter of the cases alleged excessive force, and a quarter false arrest. The next biggest group, at 18%, were First Amendment cases of various kinds. More than half the First Amendment cases alleged 'premeditated' retaliation for something the plaintiff said. Jason Tiezzi, Robert McNamara, and Elyse Smith Pohl, *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, Institute for Justice (Feb. 2024), https://perma.cc/QZK9-UPV4.

The Eighth Circuit has held that officials at the University of Iowa do *not* have qualified immunity for a free-speech violation. Business Leaders in Christ v. University of Iowa, 991 F.3d 969 (8th Cir 2021). The University requires all student organizations to commit to nondiscrimination on the basis of a long list of protected categories, including race, sex, sexual orientation, and gender identity. Business Leaders in Christ (BLinC), an organization of conservative Christian business students, provides that LGBTQ students can be members of the organization but cannot hold leadership positions. A gay student who aspired to a leadership position complained to the University, which revoked BLinC's status as a registered student organization.

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

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

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

Justice Thomas again attacked the qualified immunity doctrine in a dissent from a denial of cert in Baxter v. Bracey, 140 S. Ct. 1862 (2020). The undisputed facts proved that police unleashed a dog that bit the plaintiff, who had already surrendered after being caught in the act of burglary. The plaintiff brought a §1983 claim for excessive force in violation of the Fourth Amendment. The Sixth Circuit held the claim barred by qualified immunity, and the Supreme Court refused to hear the case. Justice Thomas in dissent argued that the qualified immunity doctrine lacked support in the text of §1983. He also asserted that "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. . . . [W]e at least ought to return to the approach of asking whether immunity 'was historically accorded the relevant official in an analogous situation at common law.'" *Id.* at 1864.

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

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

In Rogers v. Jarrett, 63 F.4th 971 (5th Cir. 2023), Judge Don Willett concurred separately in his own majority opinion applying qualified immunity against a prison employee to cite and discuss Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023). Reinert argues that the original version of §1983 as passed by Congress included language that expressly precluded common law defenses such as qualified immunity for government officials.

As enacted by Congress, the statute included the following italicized language:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress...

The italicized language was omitted from the first compilation of federal statutory law in 1874. *Rogers*, 63 F.4th at 979-980 (Willet, J. concurring). Enacted language that appears in the Statutes at Large is part of the law even if omitted from later codifications. United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993). Judge Willett called this new evidence "game-changing" and hinted that the Supreme Court should take up the issue and perhaps reverse its qualified immunity jurisprudence. *Id.* at 980. The italicized language could be read to include "notwithstanding any immunity rules."

The textual argument might not be a slam dunk. The originally enacted version of §1983 could be read as simply intended to say that the Black Codes, and other state law authorizing or requiring unconstitutional conduct, would be no defense. Immunity rules could be conceived of as federal law, outside the scope of this clause. But immunity rules purport to be derived from the common

law of torts, and that is mostly state law. Maybe less so in the time of *Swift v. Tyson* and the general common law.

In footnote 2 of Baxter v. Bracey, 140 S. Ct. 1862 (2020), Justice Thomas 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 any other unconstitutional conduct are contrary to state law. But the missing statutory language that Professor Reinert found, italicized above, could easily be read to negate the relevance of any provision of state law either prohibiting or purporting to authorize unconstitutional conduct.

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

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

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

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.

13.1. Other emerging arguments. 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 L. Nielson and Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229 (2020). They contend that eliminating qualified immunity would greatly harm the finances of state and local governments.

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

In the wake of the George Floyd protests in the spring and summer of 2020, national attention focused strongly on the role of qualified immunity in leaving victims of police misconduct uncompensated. An extensive report from Reuters detailed how Supreme Court qualified immunity doctrine has shielded police officers in egregious cases of police brutality. Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, Reuters (May 8, 2020). Multiple bills were introduced in both houses of Congress to abolish or reform qualified immunity, but they reportedly faced stout Republican opposition in the Senate. Luke Broadwater & Catie Edmondson, *Police Groups Wield Strong Influence in Congress, Resisting the Strictest Reforms*, N.Y. Times (June 25, 2020). None of the bills were enacted.

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

Alexander A. Reinert, *Asymmetric Review of Qualified Immunity Appeals*, 20 J. Empirical Legal Stud. 4 (2023), 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 and Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 Wake Forest L. Rev. 501 (2021), arguing that the Court has increasingly protected elected officials against victims of constitutional violations rather than protecting those victims from unconstitutional government action.

13.2. Judicial attacks. For a passionate attack on qualified immunity, see Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020), involving a prolonged pretextual search of an African-American man whose offense appears to have been that he drove a nice car. Despite his dislike for the doctrine, the judge felt obliged to grant the officer's motion for qualified immunity. The judge collected many examples of "terrible cases" granting immunity, and in note 165, six other federal judges and a state supreme-court justice attacking the doctrine, including judges appointed by Lyndon Johnson, George W. Bush, Barack Obama, and Donald Trump. And see the attacks by Justice Thomas and Judge Willett, summarized in note 12 in the main volume and this Update to page 513.

Page 518. At the end of note 9, add:

13. The big picture. . . .

The Court's latest word came in Office of United States Trustee v. John Q. Hammons Fall 2006, LLC, 144 S. Ct. 1588 (2024). The Supreme Court had held in an earlier case, Siegel v. Fitzgerald, 596 U.S. 464 (2022), that charging debtors in bankruptcy court different fees depending upon which district they filed in violated the constitutional requirement that bankruptcy laws be "uniform . . . throughout the United States." *Id.* at 478. In the new case, the Court held that debtors who had paid the higher fees before the Court decided *Siegel* were not entitled to a refund and that the rule in *Siegel* would apply prospectively only. The court held that prospectivity comported with congressional intent, was consistent with the Court's usual remedial principles, and did not violate the Due Process Clause. "Here, Congress would have wanted prospective parity, and that remedy is sufficient to address the small, short-lived disparity caused by the constitutional violation we identified in *Siegel.*" *Hammons*, 144 S. Ct. at 1596. Justice Gorsuch, joined by Justices Barrett and Thomas, dissented.

CHAPTER SIX

REMEDIES AND SEPARATION OF POWERS

A. More on Governmental Immunities

1. Consented Suits Against the Government

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

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

The Supreme Court granted cert in *Thacker* but only on the question of the scope of TVA's sovereign immunity. It reversed the lower court's determination that "TVA remains immune from all tort suits arising from its performance of so-called discretionary functions," because the legislation creating the TVA says that it can sue and be sued. This is a far more general waiver of sovereign immunity than the Tort Claims Act (see note 8 in the main volume at page 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, 587 U.S. 218, 220 (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." *Id.* The Court emphasized that this judicially implied exception is narrow, available only when allowing the suit to proceed would cause "grave interference" with a governmental function. It remanded the case for further consideration, but it is hard to see how fishing an electric line out of the water could be anything different from what would have to be done by "a private corporation supplying electricity." On remand, the Sixth Circuit briefly summarized the Court's new exception to sue-and-be-sued clauses and remanded the case to the district court. 773 F. App'x 598 (11th Cir. 2019).

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

2. The Federal Tort Claims Act. . . .

In Daniel v. United States, 139 S. Ct. 1713 (2019), the Supreme Court denied cert in a case asking the Court to overrule *Feres*. Justices Ginsburg and Thomas dissented. Justice Thomas, writing only for himself, quoted an earlier statement of Justice Scalia that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Id.* at 1713 (internal citation omitted) (Thomas, J., dissenting). 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).

Congress has fixed *Feres*, but only for medical malpractice, and only for the service member, not for family members treated by military doctors. 10 U.S.C. §2733a. The former green beret who lobbied Congress for the change in law still had his claim denied after the U.S. Army Claims

Service found that any negligent delay in diagnosing his cancer did not affect his prognosis or chance of survival. Ian Shapira, *A Green Beret's Cancer Changed Military Malpractice Law. His Claim Still Got Denied*, Wash. Post (Mar. 29, 2023).

Page 535. After note 3, add:

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

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

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

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

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

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

more. The district court in the Texas case has rejected similar government arguments about the lack of any analogous state-law duty. Holcombe v. United States, 2021 WL 67217 (W.D. Tex. Jan. 6, 2021).

The Texas case was tried, and the court entered a judgment against the United States totaling some $450 million, itemized by plaintiff and category of damage. Holcombe v. United States, 584 F. Supp. 3d 225 (W.D. Tex. 2022). Pending an appeal to the Fifth Circuit, the parties settled the case for $144.5 million. Department of Justice Office of Public Affairs, *Justice Department Reaches Multimillion Dollar Civil Settlement in Principle in Sutherland Springs Mass Shooting*, Justice News (April 5, 2023). The settlement required court approval, because some of the plaintiffs were minors. The court approved in unreported orders in early May 2023.

2. Suits Against Officers—Absolute Immunity

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

2. Investigative activities. . . .

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

Page 550. At the end of note 2.c, add:

2. Judicial immunity. . . .

c. Judicial act. . . .

A Missouri judge hearing a child custody dispute ordered that the children spend 30 days with their mother. The children protested vigorously, and the judge personally took them to jail and had them locked up. He returned an hour later, asked if they were ready to cooperate, and had them released. The federal court held that personally taking them to jail was not a judicial act. But it suggested, without deciding, that he might have held the children in contempt and ordered a marshal or other official to take them to jail. Rockett v. Eighmy, 71 F.4th 665 (8th Cir. 2023).

A month later, in the same case, the judge issued a "pick up order" after the children failed to appear at a hearing. He sent the order to Louisiana, where the children were by then living. Louisiana officers picked up the children, gave them *Miranda* warnings, and had them confined in solitary confinement in a juvenile detention facility. Issuing the pick up order was a judicial act, and the judge was absolutely immune from suit. The children were soon released after their father got a writ of prohibition from the Missouri Supreme Court. For prohibition, see the main volume at 308.

A family court judge was not entitled to judicial immunity when she participated in searching the home of a litigant who had allegedly failed to turn over certain property to his ex-spouse as he had been ordered to do in the divorce proceedings. Part of the search was recorded. "The video painted a striking picture. Judge Goldston, her list of unproduced assets in hand, directed proceedings. When the ex-wife identified some photos hanging on the wall as being on the list, Judge Goldston told her to 'take 'em.' When the ex-wife opened a closet to reveal some yearbooks, Judge Goldston said, 'Get 'em.' And when the ex-wife said that their old DVD collection was downstairs, Judge Goldston accompanied her down and told her to 'go in there and pick the ones

you want.' The ex-wife sifted through the DVDs as Judge Goldston sat in a rocking chair, shoes off, supervising and giving orders." Gibson v. Goldston, 85 F.4th 218, 221 (4th Cir. 2023). The Fourth Circuit concluded that the "search of someone's home and the seizure of its contents are executive acts, not judicial ones. We thus hold that her activities are not eligible for the protections of judicial immunity." *Id*. at 224.

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 as the defendant. 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.

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, 591 U.S. 786 (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, 591 U.S. 848 (2020), the Court held that lower courts had given insufficient attention to separation of powers concerns arising from the 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 869, and three more specific factors that appeared to help implement this overarching factor.

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

The D.C. Circuit affirmed in part and reversed in part. Trump v. Mazars USA, LLP, 39 F.4th 774 (D.C. Cir. 2022). It required the disclosure of all documents from 2014-2018 indicating "any undisclosed, false, or otherwise inaccurate information" or concerns about information that might be "incomplete, inaccurate, or otherwise unsatisfactory," all documents from November 2016 to 2018 relating to the Trump's lease of the Old Post Office in Washington for conversion into a luxury hotel or relating to the Trump entity that held that lease, and all documents from 2017 to 2018 relating to any "financial relationships, transactions, or ties" between any Trump entity and any foreign government, or any federal or state government, or any government official.

Mazars turned over some documents to the House and ended the litigation in September 2022. Luke Broadwater, *Trump's Former Accounting Firm Begins Turning Over Documents to Congress*, N.Y. Times (Sept. 17, 2022). Once Republicans took control of the House after the 2022 midterm elections, they stopped the investigations of Trump and refused to enforce the settlement agreement with Mazars. Luke Broadwater and Jonathan Swan, *House Republicans Quietly Halt Inquiry into Trump's Finances*, N.Y. Times (Mar. 13, 2023).

The Supreme Court considered the question of Trump's absolute immunity from *criminal* prosecution in Trump v. United States, 2024 WL 3237603 (U.S. July 1, 2024). The case arose out of criminal charges connected to Trump's alleged attempt to overturn the results of the 2020 presidential election. Dividing 6-3 along ideological lines, the Court held that Trump was likely entitled to absolute immunity for at least some of the acts charged in the indictment, and it remanded the case for further proceedings.

The majority tentatively divided potential immunity claims into three buckets. For what the Court considered "core" presidential functions, including speaking with officials at the United States Department of Justice, absolute immunity is appropriate. *Id.* at *8-*12. For cases involving the use of presidential power up to the "outer perimeter" of presidential power, there is a presumption of absolute immunity. Under this presumption, "the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch." *Id*. at *12 (internal quotation marks omitted). There is no immunity for unofficial acts. *Id.* The Court held that evidence of official acts could not be introduced in a trial of a former president for charged with illegal unofficial acts. *Id*. at *19.

The Court was not clear on whether using what would appear to be illegal means to commit an act that is clearly within the power of the President could count as unofficial and be prosecuted. As Justice Jackson wrote in her dissent: "While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death." *Id*. at *49 n.5 (Jackson, J. dissenting). In a footnote, the Court seemed to assume that the President could be prosecuted in a bribe-for-pardon scheme, though evidence of the official act of pardoning itself would be inadmissible. *Id*. at *20 n.3 ("the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act.").

The majority left many of these issues open for future development.

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), which effectively makes any recognition of a *Bivens* claim immediately appealable. Bryan Lammon writes that in light of *Wilkie* and other developments described below, "nearly every civil-rights suit against a federal official will require addressing the *Bivens* question both in the district court and, if the district court holds that a *Bivens* remedy exists, in an interlocutory qualified-immunity appeal." Bryan Lammon, *Making* Wilke *Worse: Qualified Immunity Appeals and the* Bivens *Question After* Ziglar *and* Hernandez, U. Chi. L. Rev. Online (July 24, 2020).

In Hernández v. Mesa, 589 U.S. 93 (2020), further described 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 96.

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

Page 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, and 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.

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

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

In Egbert v. Boule, 596 U.S. 482 (2022), the Court refused to recognize a *Bivens* claim for alleged excessive force in violation of the Fourth Amendment, where the defendant was a Border Patrol agent. The Border Patrol was a new context.

Special factors counseling hesitation became any factor "indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* at 492 (quoting Ziglar v. Abbasi, 582 U.S. 120, 136 (2017)). "If there is even a single 'reason to pause before applying *Bivens* in a new context,' a court may not recognize a *Bivens* remedy." *Id.* (quoting Hernández v. Mesa, 589 U.S. 93, 100 (2020)). Each partial quote was substantially beefed up with new language: "at least arguably," and "even a single." And it is not enough that a claim closely parallels the claim in *Bivens* itself, or in *Passman* or *Carlson* (see note 1.a at 558-559), unless the claim "also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law." *Id.* at 501.

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

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

Professors Mascott and McCotter argue that *Egbert* "puts squarely on Congress the future question of the extent to which monetary damages recovery must be available against individual federal officials for unconstitutional acts not directly governed by *Bivens* and its several follow-on cases." Jennifer L. Mascott and R. Trent McCotter, Egbert v. Boule*: Federal Officer Suits by Common Law*, 2021-2022 Cato Sup. Ct. Rev. 111, 113.

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, 592 U.S. 209 (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 218.

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

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

But the Court has now held that plaintiffs can sue under §1983 for at least some violations of the Federal Nursing Home Reform Act, 42 U.S.C. §1396r, which provides minimum standards and a set of patient rights for nursing homes that receive federal money under Medicaid, a program that provides medical care for the poor. Health & Hospital Corp. v. Talevski, 599 U.S. 166 (2023). The Court held that the Act had sufficient rights-creating language focused on individual patients, and that its provisions for government inspections and enforcement were not inconsistent with a §1983 remedy. The Court implied, but did not quite say, that only statutory remedies that can be invoked by an individual plaintiff are inconsistent with a §1983 remedy. The Court rejected defendant's argument, based on a contested history of nineteenth-century contract doctrine, that §1983 should never be available to enforce any statute that imposes conditions on recipients of federal funds. This decision may have limited scope; the Court noted that most nursing homes are

privately owned and therefore not subject to §1983. But it has broader implications for the survival of §1983 remedies for statutory violations.

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

Now the Court has held that *Miranda* cannot be enforced with a suit for damages under §1983. Vega v. Tekoh, 597 U.S. 134 (2022). In the process, the Court appears to have created a narrow new category of §1983 exceptions. The Court said, not for the first time, that *Miranda* is a prophylactic rule rooted in the Constitution, and thus binding on the states, but that a *Miranda* violation is not itself a constitutional violation. Therefore, there is no §1983 claim for violating the Constitution. *Miranda* may or may not be a federal "law," but there is no §1983 claim for violating the laws unless the Court decides that the advantages of a damage remedy outweigh the costs. And for *Miranda*, they do not. Justice Kagan dissented, joined by Breyer and Sotomayor.

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

Page 565. After note 6, add:

6.1. "Appropriate relief." The Religious Freedom Restoration Act provides that a victim of a violation of the act "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. §2000bb-1(c). "Government" is defined to include federal officials and any person acting under color of federal law. The Court unanimously held that the statute authorizes damages against federal employees. Tanzin v. Tanvir, 592 U.S. 43 (2020). Muhammad Tanvir and other plaintiffs alleged they were put on the federal "No Fly" list for their refusal to serve as informants against their religious communities, and that doing so violated RFRA. The Court agreed that the case could go forward. "In the context of suits against Government officials, damages have long been awarded as appropriate relief. . . . A damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction." *Id*. at 49-51.

Page 572. At the end of note 6, add:

6. Defining the remedies for implied causes of action. . . .

Professor Vladeck doubts that an originalist case could be made in implied cause of action cases distinguishing between a court's power to award damages and its power to grant an injunction. Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 Notre Dame L. Rev. 1869 (2021).

C. The Right to Jury Trial

Page 587. After note 5, add:

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

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

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

Page 588. At the end of note 1, add:

1. Administrative agencies. . . .

The Court severely limited the public rights doctrine in Securities & Exchange Commission v. Jarkesy, 2024 WL 3187811 (U.S. June 27, 2024). There, the Court held that the SEC violated the Seventh Amendment rights of an investment promoter and his adviser by using the SEC's internal processes to impose a $300,000 civil fine for fraud. An SEC-employed administrative law judge first imposed the fine, which was reviewed by the full commission. The order was subject to judicial review, but under a standard deferential to the SEC.

The Court first held that the imposition of a civil fine for fraud implicated the right to a jury trial under the Seventh Amendment. "The Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.' *Granfinanciera* [described in note 4 in the main volume]. As we made clear in *Tull* [described in notes 7 and 8 at pages 582-583 of the main volume], whether that claim is statutory is immaterial to this analysis. . . . To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the 'more important' consideration. . . . In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy." *Jarkesy*, at *8. Again quoting *Tull*, the Court concluded that "the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "'a type of remedy at common law that could only be enforced in courts of law.'" *Jarkesy*, at *9.

The Court's statement that SEC penalties are not designed "to compensate" is confusing. Compare its entirely accurate statement shortly before that "money damages are the prototypical common law remedy." *Id.* at *8. The reference to compensation appears to be a way of referring to the Court's statement that pre-merger "courts of equity could order a defendant to return unjustly retained funds." *Id.* So it probably should have said that civil penalties "are designed to punish and deter, not to make restitution."

The Court next rejected the argument that the public rights doctrine could save the case from the requirement that the SEC bring these charges in federal court before a jury. It said that securities fraud could not be a public right because it was closely analogous to common law fraud. It didn't matter that securities fraud was statutory or that its elements are not identical to common law fraud

or that the government, and not a victim of the fraud, was the plaintiff. The Court appeared to treat *Granfinanciera* as establishing a rule that no claim analogous to a common law claim could be a public right. *Jarkesy*, at *13-*14. It distinguished *Atlas Roofing* on the ground that the Occupational Safety and Health Act created a large body of novel safety regulations that were not analogous to common law suits for personal injury. "Because the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, that case does not control." *Jarkesy*, at *15.

Justice Gorsuch, concurring for himself and Justice Thomas, emphasized that procedure before an SEC Administrative Law Judge provided many fewer protections for defendants than procedure in an Article III court.

Justice Sotomayor dissented for herself and Justices Kagan and Jackson. She argued that the case fell squarely under the public rights doctrine as described in *Atlas Roofing*. She noted that Congress "has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years." *Jarkesy*, at *30 (Sotomayor, J., dissenting). She called the decision a "power grab" that violated the separation of powers, saying that the Court "prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority." *Jarkesy*, at *46.

CHAPTER SEVEN

PREVENTING HARM WITHOUT COERCION: DECLARATORY REMEDIES

A. Declaratory Judgments

1. The General Case

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

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

In California v. Texas, 593 U.S. 659, 672-673 (2021), the Supreme Court suggested that a plaintiff has no standing for Article III purposes to seek a declaratory judgment if plaintiff would not be entitled to other relief (whether or not such relief is actually sought). That requirement seems to reject the idea that declaratory judgments have a lower standard of constitutional ripeness than claims for injunctions. It is at odds with the statute, which authorizes declaratory judgments "whether or not further relief is or could be sought."

But the Court's statements made sense as applied to its unusual context. Plaintiffs were seeking a declaration that an extra tax of zero percent on the income of persons who failed to buy medical insurance was unconstitutional. Absolutely nothing turned on such a declaration; plaintiffs would pay zero percent whether they did or did not buy insurance. Setting the tax rate at zero had been an indirect way of repealing the requirement to buy insurance. There was clearly no case or controversy here, and any broader statement was dictum. But of course, lower courts take Supreme Court dicta very seriously.

Page 596. After the first paragraph of note 5, add:

5. Claim and issue preclusion. . . .

The Court reemphasized the preclusive effects of declaratory judgments in Haaland v. Brackeen, 599 U.S. 255 (2023). "Without preclusive effect, a declaratory judgment is little more than an advisory opinion." *Id.* at 293. But it also emphasized that the judgment is binding only on the parties.

2. The Special Case of Interfering with State Enforcement Proceedings

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

2. The myth of mildness. . . .

In Ohio litigation during the 2020 election season, a trial court issued a declaratory judgment stating that the Ohio Secretary of State's interpretation of Ohio law to limit the use of drop boxes to deposit mail-in ballots was contrary to Ohio law. The Ohio Secretary of State refused to abide by the declaratory judgment, and the court promptly followed it up with an injunction.

> [T]he court purposely did not include an injunction because the court understood the Secretary favored allowing additional ballot drop boxes and would follow a legal ruling recognizing them as lawful. . . . However, public statements of a "spokesperson" for the Secretary after the Opinion issued as reported by news media (and now in the record) that the Secretary would not comply with the declaratory judgment without also being under an injunction required the court to reevaluate the matter. On the morning of September 16, the

court ordered the Secretary to explain his position. In response, the court has been advised the Secretary will not abide by the declaratory judgment alone. The Secretary urges the court to grant an injunction so that he may appeal.

Ohio Democratic Party v. LaRose, 2020 WL 5580378, at *1 (Ohio Ct. Com. Pl. Sept. 16, 2020). The court did so, the Secretary appealed, and the injunction was reversed 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 Secretary thought that the declaratory judgment was not appealable. Perhaps the court considered the declaratory judgment to also be preliminary; there are references to such a thing in Ohio cases. Whatever the answer to these puzzles, the case highlights that litigants who are not at all scofflaws may flout a declaratory judgment if they gain some procedural or substantive advantage from being enjoined.

Page 617. After note 6, add:

6.1. Self-inflicted injuries? The Court decided two standing issues in Federal Election Commission v. Cruz for Senate, 596 U.S. 289 (2022). The case involved a challenge to federal law rather than state law, and an injunction against enforcement rather than a declaratory judgment, but neither distinction affected the issues presented.

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

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

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

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

Page 620. At the end note 3, add:

3. The limits of preliminary relief. . . .

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

D. Declaratory Relief at Law

Notes on Nominal Damages

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, 592 U.S. 279 (2021). See this Update to page 293.

Page 637. At the end of note 2, add:

2. Attorneys' fees. . . .

Maureen Carroll, *Fee Shifting, Nominal Damages, and the Public Interest*, 97 St. John's L. Rev. 1 (2023), criticizes *Farrar* and urges the Supreme Court or Congress to overturn it. She argues it is inconsistent with courts' treatment of nominal damages, including in *Uzuegbunam*, summarized in this Update to page 293. For more on *Farrar*, see the main volume at page 932, note 3.

Notes on Quo Warranto

Page 638. At the end of note 2, add:

A more novel use of quo warranto emerged following the invasion of the United States Capitol on January 6, 2021, connected to disputes over the resolution of the 2020 U.S. presidential election. Section 3 of the Fourteenth Amendment provides for disqualification from office for those who had previously sworn an oath to uphold the United States Constitution and who later participated in an insurrection. This part of the Amendment was originally aimed at former confederates after the Civil War.

Couy Griffin, a New Mexico county commissioner and member of "Cowboys for Trump," who invaded the Capitol, was convicted in federal court for trespassing. He was then removed from office through a writ of quo warranto. The court found that Griffin was disqualified under Section 3. State v. Griffin, 2022 WL 4295619 (N.M. Dist. Ct. Sept. 6, 2022). The state supreme court refused to take up the matter on technical grounds, Griffin v. New Mexico ex rel. White, No. S-1-SC-39571 (N.M. Nov. 15, 2022), and the Supreme Court denied cert. Griffin v. New Mexico, 144 S. Ct. 1056 (2024). John Fritze and Marshall Cohen, *Supreme Court Won't Review Ruling That Removed New Mexico Official from Office Over January 6 Insurrection*, CNN (Mar. 19, 2024).

Voters also sought to remove Donald Trump from the 2024 U.S. presidential ballot, relying on Section 3 disqualification. After the Colorado Supreme Court ordered Trump's removal, the Supreme Court unanimously restored him to the ballot, ruling that states do not have the power to remove federal candidates from the ballot on the basis of Section 3. Trump v. Anderson, 601 U.S. 100 (2024).

CHAPTER EIGHT

BENEFIT TO DEFENDANT AS THE MEASURE OF RELIEF: RESTITUTION

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

1. Introducing Restitution—Mistake

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

9. Law and equity. . . .

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

There are important restitutionary remedies that originated in equity, including constructive trust. Plaintiff needs a constructive trust when she seeks to recover a specific asset from a specific fund. Blue Cross sought a constructive trust, but the court denied that relief, because Blue Cross didn't allege the existence of specific and identifiable property 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 way, derived from the pre-merger law courts, 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. Constructive trusts and related remedies are treated in section 8.C.

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, 591 U.S. 71 (2020), the Court took up the issue it had reserved in *Kokesh*. The statute authorized the SEC to seek and obtain "equitable relief," which the statute did 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 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. Courts of appeals are now trying to decide whether the amendment codifies or repudiates *Liu*. A recent article finds this question difficult, but concludes that the statute requires unjust enrichment and therefore precludes joint and several liability and is limited to net profits, but that it does not require the SEC to try to pass the recovered profits on to the defendant's victims. Andrew N. Vollmer, Liu *and the New SEC Disgorgement Statute*, 15 Wm. & Mary Bus. L. Rev. 307 (2024).

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 appears to mean joint and several liability in disgorgement for some defendants. The Vollmer article does not consider the §78t issue.

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.

A variation on this issue is presented in Dewberry Group, Inc. v. Dewberry Engineers, summarized in this Update to page 688.

9.2. Injunctions to pay restitution? The Court addressed a similar but distinct issue in AMG Capital Management, LLC. v. Federal Trade Commission, 593 U.S. 67 (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 wrongdoing. More important, other sections of the FTC Act do expressly authorize monetary redress to consumers. Those sections include more safeguards for defendants and require the FTC to go through its administrative process first; under §13(b), it can avoid those safeguards and go directly to court.

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

Page 683. After note 6, add:

7. Adequate remedy at law irrelevant (if there is any other basis for equitable jurisdiction). The Delaware Court of Chancery, which necessarily still views claims for an equitable remedy in jurisdictional terms, has issued a substantial opinion on the adequate remedy issue. Garfield on behalf of ODP Corp. v. Allen, 277 A.3d 296 (Del. Ch. 2022).

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

The court squarely rejected this argument, quoting comments to the Restatement §4 and also quoting Palmer's treatise. Because the law of unjust enrichment arose at law as well as in equity, lack of an adequate remedy at law is no element of a substantive claim for unjust enrichment. And it is not essential to jurisdiction in the Delaware Chancery Court if there is any other basis for equitable jurisdiction; the fiduciary duty claim was plainly a basis for equitable jurisdiction here. In states that have fully merged law and equity, the jurisdictional issue would not arise, and the key holding would be that lack of an adequate remedy at law is not an element of the substantive claim to recover unjust enrichment. The court expressly disapproved earlier Delaware cases that had suggested otherwise. *Id*. at 346-351.

The court also reaffirmed that plaintiff could recover in unjust enrichment without proving any damages to himself. *Id.* at 342-346. Cases that required both an enrichment and a corresponding "impoverishment" are properly understood as requiring only that the enrichment be acquired "in violation of the other's legally protected rights," citing §§1 and 3 of the Restatement and earlier Delaware cases.

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

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

a. Trademark. . . .

The Supreme Court resolved a six-six circuit split over whether the current version of 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., 590 U.S. 212 (2020). The statutory language reads:

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

The Court refused to read a willfulness requirement into the statute, but suggested willfulness may still be relevant to the award of profits. Justice Gorsuch, offering a textualist interpretation for the majority, emphasized that the relevant part of the Lanham Act contains no express willfulness requirement, while other parts of the Lanham Act do have such a requirement or other rules about mental states. 590 U.S. at 215. 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 217.

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 219. 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.* at 220. 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 221.

The Supreme Court has agreed to hear another Lanham Act case, this one involving whether a parent corporation can be forced to disgorge the profits of its corporate subsidiaries from trademark violations apparently committed by both parent and subsidiaries. Dewberry Group, Inc. v. Dewberry Engineers, No. 23-900 (cert. granted June 24, 2024). The Fourth Circuit allowed the recovery of the affiliates' profits, without the usual requirement for piercing the corporate veil, without the affiliates being joined as defendants, and without mentioning the usual rule that each defendant is liable only for its own unjust enrichment. 77 F.4th 265 (4th Cir. 2024). See Liu v. Securities & Exchange Commission, summarized in this Update to page 684.

The plaintiff defends the judgment in part on the basis of the statutory text quoted at page 684 in the main volume: "If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." The Fourth Circuit does not appear to have relied on this provision, but the district court did.

3. Breach of Contract

a. Disgorging the Profits from Opportunistic Breach

Page 711. At the end of Note 8, add:

8. A general rule. . . .

e. Law and economics. Francesco Parisi, Ariel Porat, and Brian H. Bix, *Opportunistic Breach of Contract*, 37 Canadian J. L. & Juris. 199 (2024), argue in favor of §39 from a law and economics perspective. They contend that disgorgement is an economically efficient remedy for "gain-seeking" breaches and that expectation damages are efficient when the breaching party breaches only to avoid loss.

C. Restitutionary Rights in Specific Property

2. Tracing the Property

Page 753. Make the following corrections to Problem 8-3:

In line 1, Scum sells 100 shares of Walmart from **his** mother's account . . .

In line 4, General Electric drops to $10, so the **300** shares are now worth $3,000.

3. Equitable Liens and Subrogation

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

5. A novel context. . . .

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

D. Defenses and the Rights of Third Parties

2. Payment for Value

Page 783. After note 10, add:

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

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

Some issues were clear. Citi could ordinarily recover money paid by mistake, but not if the payment went to a creditor who was actually owed the money and received it without notice of the mistake. 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 or simultaneously with receiving 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 district 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 district 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.

The court of appeals reversed. Citibank, NA v. Bridge Capital Management, LP, 49 F.4th 42 (2d Cir. 2022). The court convincingly argued that the creditors were on notice of the mistake. The creditors knew that Revlon was insolvent; it had no apparent source of funds with which to prepay the loan. Shares in the loan were trading at 30 cents on the dollar; it would have been much cheaper for Revlon to buy up loan shares rather than prepay in full. Just four days earlier, Revlon had been maneuvering to avoid default in a way that made no sense if it were about to prepay the loan. The loan agreement required advance notice of any prepayment; no creditor had received such a notice.

The district court had believed the creditors' testimony that they had not suspected mistake. This sounds like a finding of fact, and the court of appeals did not say that it was clearly erroneous. Rather, it said that the district court's reliance on this testimony "represented a misunderstanding of the inquiry notice test." *Id.* at 68. There were enough "red flags" suggesting mistake to require further inquiry, whatever the creditors subjectively believed, or even if they hadn't thought about the possibility of mistake at all, which was apparently the case for some of them. The court of appeals said that the standard was not knew or should have known, but rather enough information to lead a reasonably prudent person to inquire further. This reasoning turned the district court's error into an error of law that the court of appeals could review de novo.

If the court of appeals had affirmed the district court, Citi would have been subrogated to the creditors' claims against Revlon, entitled to be repaid pursuant to the original terms and schedule of the loan agreement. But with Revlon in deep financial trouble, this right would likely not have been worth much. Nearly two years after the mistaken payment, Revlon filed for bankruptcy. Lauren Hirsch and Julie Creswell, *Revlon, a Makeup Staple for Generations, Files for Bankruptcy*, N.Y. Times (June 16, 2022).

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

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

CHAPTER NINE

ANCILLARY REMEDIES: ENFORCING THE JUDGMENT

A. Enforcing Coercive Orders: The Contempt Power

1. The Three Kinds of Contempt

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

1. The basic distinctions. . . .

The Supreme Court clarified the required state of mind for civil compensatory contempt, at least in the bankruptcy context and apparently more generally, in Taggart v. Lorenzen, 587 U.S. 554 (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 557 (emphasis in original).

"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 561.

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 563. The Court added that subjective bad faith is not "irrelevant." *Id.* at 561. It can be grounds for civil contempt, but it is not required.

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. In one of those cases from a district court, the court of appeals affirmed the finding of no contempt without discussion, but vacated and remanded on other grounds. Grubbs v. O'Neill, 744 F. App'x 20 (2d Cir. 2018).

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 . . ." *Taggart* 587 U.S. at 564. The order typically says only that the bankrupt debtor is discharged, see *id.* at 556; the statute says that this order operates as an injunction against further collection efforts, 11 U.S.C. §524(a)(2); and the statute also lists 22 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.

Taggart does not seem limited to bankruptcy cases, yet the D.C. Circuit ignored it in In re Sealed Case, 77 F.4th 815 (D.C. Cir. 2023). "The district court issued a search warrant in a criminal case, directing appellant Twitter, Inc. . . . to produce information to the government related to the Twitter account '@realDonaldTrump.' The search warrant was served along with a nondisclosure order that prohibited Twitter from notifying anyone about the existence or contents of the warrant. Twitter initially delayed production of the materials required by the search warrant while it unsuccessfully litigated objections to the nondisclosure order. Although Twitter ultimately complied with the warrant, the company did not fully produce the requested information until three days after a court-ordered deadline. The district court thus held Twitter in contempt and imposed a $350,000 sanction for its delay." *Id.* at 821.

The appeals court affirmed. It assumed without deciding that good faith would be a defense to civil contempt, but held that the trial court could properly conclude that Twitter did not act in good faith. *Id.* at 835-836. It did not consider whether Twitter's litigation and delay had been objectively reasonable or unreasonable. The court also upheld a "geometric" sanctions schedule with $50,000 fines to double every day. "While a geometric schedule is unusual and generally would be improper without an upper limit on the daily fine, we nonetheless uphold the district court's sanctions order based on the particular facts of this case." It held relevant Twitter's then-$40 billion stock market valuation and the need to coerce compliance. *Id.* at 836. Twitter (now known as X) has filed a cert. petition, No. 23-1264.

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 had 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 this authority is codified in Federal Rule of Criminal Procedure 42. The dissenters argued that it was sufficient to appoint an amicus to defend the judgment below, and that the court's authority to appoint a special prosecutor is exhausted once the government initiates a contempt prosecution—even if it later or immediately drops that prosecution. The majority thought it clear that the court had the authority to see that the prosecution actually be prosecuted.

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

The Second Circuit has rejected arguments that court-appointed special prosecutors in contempt cases violate the Appointments Clause and that a criminal prosecution initiated by a judge violates the separation of powers. United States v. Donziger, 38 F.4th 290 (2d Cir. 2022). But it reached these conclusions only by holding that the Attorney General can at any time remove such a special prosecutor. A dissenter argued that the *Young* case, in note 6 in the main volume, is inconsistent with later separation of powers decisions and is no longer good law. Donziger filed a cert petition, which the Court denied over the dissents of Justices Gorsuch and Kavanaugh. 143 S. Ct. 868 (2023). For more on the spectacular fraud for which he has been held liable, see the main volume and this Update to page 954.

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

a. Perpetual Coercion?

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

6. Too stubborn to be coerced. . . .

Thompson, the treasure hunter, remains in jail as of June 2024. 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 also fined 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 301-302. Such conduct included executing "a limited power of attorney to permit the parties to 'probe' the contents of a Belizean trust." *Id.* at 303. The Sixth Circuit held that §1826's 18-month limit did not apply to his refusal to perform these non-testimonial obligations. *Id* at 303. The court's reasoning would presumably also apply to an explicit order to turn over the coins.

By a September 2022 hearing, Thompson's daily fines exceeded $2.6 million. The frustrated judge planned to schedule a new hearing to consider if there was any benefit to continued incarceration and if there were any alternative tactics to get the coins. But he also considered new

punishment of Thompson for lying to the court about whether or not he had an attorney. Francis X. Donnelly, *Judge Accuses Treasure Hunter of Lying, May Impose Further Punishment*, Detroit News (Dec. 10, 2022), 2022 WLNR 39855606.

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). If she is unable to pay, which seems likely, she cannot be imprisoned for failure to do so.

b. Anticipatory Contempt

Page 820. After note 8, add:

8.1. A reverse twist. In Azar v. Garza, 584 U.S. 726 (2018), it was the plaintiff who beat the defendant to the punch. We are omitting many details, but even so, some chronology is required to explain what was at issue.

In September 2017, Jane Doe entered the United States as an undocumented and unaccompanied minor. She was immediately apprehended and placed in a federally funded shelter in Texas. An initial medical exam revealed that she was eight weeks pregnant. She said she wanted an abortion, but the federal government refused to let her leave the shelter to obtain one.

On October 18, a federal district court issued a temporary restraining order directing defendants to allow Doe to be transported the nearest abortion clinic, first for the mandatory counseling required by Texas law and then for the abortion. Garza v. Hargan, 2017 WL 4707287 (D.D.C. Oct. 18, 2017). On October 19, a panel of the court of appeals stayed that order with respect to the abortion, but she received the counseling that day. 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017).

On October 24, the court of appeals en banc vacated the stay. 874 F.3d 735 (D.C. Cir. 2017). Various lawyers for the two sides e-mailed back and forth through the afternoon and evening and late into the night. Doe's lawyers tried to have her taken to the clinic that evening, but it was too late. In the course of trying to arrange her transportation on the 24th, one of her lawyers said that the doctor who had counseled her was not available that day (the 24th). This implied that she would be counseled a second time by a different doctor, which would trigger a new 24-waiting period under Texas law.

Her lawyers got her an appointment for early on October 25. The government informed her lawyers that on the morning of the 25th, it would seek a stay of the en banc court's decision. At 8:00 a.m. on the 25th, the doctor who had originally counseled Doe on the 19th performed the abortion.

This case is like the anticipatory contempt cases in that she obtained the abortion while knowing that the government was about to seek an emergency stay. It is different in that such a stay, even if obtained, would not have been an order against Doe. It would simply have freed the government from the district court's TRO so that it could again refuse to allow her transport to an abortion clinic. Doe would not have been in contempt even if the stay had been granted and she had somehow gotten the abortion anyway.

So instead of filling a contempt motion against Doe, the government asked the Supreme Court to discipline her lawyers. The government could have filed its stay application on the afternoon or evening of the 24th, but it claimed that Doe's lawyers had led it to believe that she would be counseled by a new doctor on the 25th and that therefore, no abortion could be performed until the 26th. Doe's lawyers responded that nothing in the e-mail trail had made such a representation, and that they had no duty to keep the government continuously updated on her plans or progress.

The Court declined to impose sanctions. It commented on a lawyer's duty not to make false statements; "it is critical that lawyers and courts alike be able to rely on one another's representations." *Azar*, 584 U.S. at 730. But "not all communication breakdowns constitute misconduct." *Id.* The Court declined to investigate the factual disputes about who was to blame for the government being caught by surprise.

6. Drafting Decrees

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

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

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

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

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

B. Collecting Money Judgments

1. Execution, Garnishment, and the Like

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

1. The mechanics of execution. . . .

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

Page 869. At the end of note 10, add:

10. Supersedeas. . . .

Judgments in various civil lawsuits against former president Donald Trump reveal a key truth about obtaining a bond: It is not enough that you have sufficient assets to pay the judgment. You usually must have sufficient *liquid* assets to pay the judgment. Bond-issuing insurance companies do not want real estate as collateral, because it takes time to foreclose on it and sell it, but if the judgment is affirmed, they will have to pay immediately. Trump owns (or has ownership interests in) a great deal of real property, but he was unable to use it to obtain a bond to cover a $454 million judgment against him in a civil fraud case brought by New York. Ben Protess, Maggie Haberman, and Kate Christobek, *Trump Spurned by 30 Companies as He Seeks Bond in $454 Million Judgment*, N.Y. Times (Mar. 18, 2024); Rukmini Callimachi, *Could Trump's Properties Really Be Seized?*, N.Y. Times (Mar. 26, 2024) ("In a letter to the clerk of the court last Thursday, one of Mr. Trump's lawyers reiterated that they had approached 30 bond companies through four separate brokers, and had failed to find any that would underwrite an i.o.u. of such magnitude. The bond companies, the letter said, refused to accept real estate as a collateral and instead required a guarantee in the form of cash or other liquid assets worth around 120 percent of the value of the judgment — or over $557 million."). An appeals court reduced the bond amount to $175 million, and Trump got the bond after placing that amount in a Charles Schwab brokerage account and giving the bonding company control over the account. Michael Kranish and Jonathan O'Connell, *Company Defends Trump's $175 Million Bond in New Filing*, Wash. Post (Apr. 16, 2024).

Page 876. After note 8, add:

9. Venmo, Zelle, and other non-traditional payment methods. How to collect from judgment debtors who do not keep funds in traditional bank accounts? Journalist Yashar Ali owed a Getty heir hundreds of thousands of dollars in unpaid loans. "The debt collector is asking L.A. Superior Court for the power to seize funds sent to Ali on various online platforms, including PayPal, Venmo, Zelle, GoFundMe and Square. The debt collector also wants 'all rights to future payments' that Ali may get from his newsletter on Substack; income he derives from Twitter, where he has more than 700,000 followers; as well as future payments he may get from freelance journalism he publishes at Huffpost, MSNBC News or New York magazine, according to the filing." Matt Hamilton, *Twitter Star Yashar Ali Still Owes $230,000 to Getty Heir. A Debt Collector Now Wants His Income*, L.A. Times (Apr. 24, 2023). Garnishment should be available for these income sources just like any other, but actually identifying and stopping payments might be more difficult in practice.

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

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

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

A creditor of a company owned by West Virginia governor Jim Justice obtained a writ of execution to force the sale of the governor's helicopter. A federal court first blocked execution on the helicopter, but later approved the sale. Brad McElhinny, *Marshals Sent to Seize Helicopter Owned by Justice Business over Debt to Owner of Russian Mining Company*, Metro News (Oct. 6, 2023); Mike Tony, *Judge Oks Sale of Former Justice Coal Company Helicopter to Indian Company*, Charleston Gazette-Mail (June 1, 2024).

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, 586 U.S. 466 (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 475.

Page 880. After note 9, add:

9.1. RICO? A frustrated plaintiff has invoked the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq., in his attempt to collect a judgment. Yegiazaryan v. Smagin, 599 U.S. 533 (2023). The dispute began in Russia, where defendant defrauded plaintiff; defendant then moved to Beverly Hills to avoid criminal prosecution in Russia. Plaintiff got a large arbitration award in London, and then obtained a California judgment enforcing that award. Defendant took aggressive steps to hide assets and prevent collection of the judgment. RICO provides a civil remedy with treble damages for persons injured by two or more violations of any of a set of listed criminal statutes. Plaintiff alleged that much of what defendant had done was wire fraud, witness tampering, and obstruction of justice, all on the list of predicate offenses for RICO.

RICO does not apply extraterritorially, and the issue in the Supreme Court was whether plaintiff had suffered a RICO injury in the United States. The Court said yes. Plaintiff's injury was inability to collect his California judgment, that injury occurred in California, and the whole scheme was organized and carried out from California. It didn't matter that many of the assets had been transferred abroad, or that plaintiff would experience his economic losses in Russia, where he still lived. The Court appeared to assume, but did not decide, that plaintiff had stated a valid RICO claim.

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, who was President Trump's former lawyer and "fixer." Freidman died from a heart attack in 2021. Sam Roberts, *Gene Freidman, 'Taxi King' Who Upended His Industry, Dies at 50*, N.Y. Times (Oct. 25, 2021).

Page 915. After note 9, add:

10. Ending a receivership. The Ninth Circuit has held that a court has discretion to continue a receivership even after a debtor has satisfied the judgment. A court may do so to protect other creditors and to assure that the receiver gets paid. WB Music v. Royce International Broadcasting Corp., 47 F.4th 944 (9th Cir. 2022).

CHAPTER TEN

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

A. Fee-Shifting Statutes

Page 936. At the end of note 7 add:

7. Preliminary relief. . . .

The Supreme Court has agreed to consider "[w]hether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. §1988." Lackey v. Stinnie (No. 23-621), cert. granted Apr. 22, 2024. Plaintiffs had filed suit challenging the constitutionality of a Virginia law that required courts to suspend a convicted criminal's driver's license for failure to pay court-ordered fees or fines. The trial court issued a preliminary injunction barring Virginia from enforcing the law against the named plaintiffs. Before the case could go to trial, the Virginia legislature repealed the law. The trial court then dismissed the case as moot and plaintiffs sought attorneys' fees as prevailing parties under §1988.

The en banc Fourth Circuit held that plaintiffs are entitled to fees:

> Although many preliminary injunctions represent only "a transient victory at the threshold of an action," Sole v. Wyner, 551 U.S. 74, 78 (2007), some provide enduring, merits-based relief that satisfies all the requisites of the prevailing party standard. Because the plaintiffs here "prevailed" in every sense needed to make them eligible for a fee award, we vacate the district court's denial of attorney's fees and remand for further proceedings.

Stinnie v. Holcomb, 77 F.4th 200, 203 (4th Cir. 2023) (en banc).

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 948. At the end of note 2, add:

2. Percentage of recovery. . . .

The Delaware Chancery Court approved a fee of over a quarter of a billion dollars in a one-billion dollar class-action settlement. In re Dell Technologies Inc. Class V Stockholder Litigation, 300 A.3d 679 (Del. Ct. Ch. 2023). In a detailed and scholarly opinion relying in part on competing briefs of law professors, the court rejected the approach, used in many federal courts, of awarding declining percentages of the settlement as the absolute value of the settlement rises. The court described this as "a covert return to the lodestar method," *id.* at 687, which Delaware has rejected. The case is currently on appeal to the Supreme Court of Delaware (No. 349, 2023).

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, 586 U.S. 53 (2019). This will cost Social Security claimants more, but it will also enable them to attract more and better counsel.

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

2. Disparities in wealth. . . .

Donziger was later found guilty of criminal contempt for repeatedly and willfully flouting earlier court orders in the civil case and sentenced to six months in jail. United States v. Donziger, 38 F.4th 290 (2d Cir. 2022).

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

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

The Copyright Act gives district courts discretion to award "full costs" for violations. 17 U.S.C. §505. The Ninth Circuit had read the word "full" in the statute to allow a district court to award expenses beyond the six categories of costs allowed in the general federal costs statutes, 28 U.S.C. §§1821 & 1920. The Supreme Court unanimously reversed, holding that costs under the Copyright Act are limited to the six categories of costs listed in Title 28. Rimini Street, Inc. v. Oracle USA, Inc., 586 U.S. 334 (2019).

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

4. What is included? . . .

The Supreme Court held that when a federal appellate court awards costs on appeal pursuant to Federal Rule of Appellate Procedure 39, a federal district court on remand does not have authority to deny or reduce such costs. City of San Antonio v. Hotels.com, 593 U.S. 330 (2021). A class of 175 Texas municipalities had sued online travel companies, arguing that they were not collecting enough in hotel occupancy taxes. The municipalities initially won in federal district

court, and the companies had to post a supersedeas bond eventually totaling $84 million so that the municipalities could not collect the judgment while the appeal was pending. The premium on the bonds was about $2.2 million. The companies eventually won on appeal on the merits and the Fifth Circuit awarded costs to the companies. Under Rule 39(e), supersedeas bond premiums are included as costs on appeal, and the district court on remand awarded the full amount of the bond premiums over the City of San Antonio's objection, holding that it had no discretion to do otherwise. The Supreme Court agreed, holding that such discretion rests only with the appeals court under Rule 39 as to costs on appeal.

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

CHAPTER ELEVEN

REMEDIAL DEFENSES

A. Unconscionability and the Equitable Contract Defenses

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

4. What's left? . . .

If one objecting customer can mess up arbitration for Fitbit, what could 75,000 customers organized to arbitrate do to Amazon? It potentially can induce a company to abandon arbitration and return disputes to the courts. See Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, Wall St. J. (June 1, 2021). Amazon's terms of service required that customers complaining about its products file a claim in arbitration, and Amazon agreed to pay the filing fee. Typical filing fees are between $100 and $2,000. Plaintiffs' lawyers flooded Amazon with 75,000 individual arbitration claims alleging that the company's Alexa-powered Echo devices recorded people without their permission.

> That move triggered a bill for tens of millions of dollars in filing fees, according to lawyers involved, payable by Amazon under its own policies. . . . In recent years, a few well-resourced law firms have used online marketing and other tools to sign up consumers and employees en masse to file arbitration claims, alleging everything from unfair pay to fraudulent business practices. The filings can overwhelm arbitration providers and the targeted companies, which are accustomed to paying the fees for small numbers of claims but not tens of thousands all at once.

Faced with these costs, Amazon changed its terms of service to require disputes to be filed in court.

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

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

B. Unclean Hands and *In Pari Delicto*

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

1. Two defenses. . . .

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

C. Estoppel and Waiver

1. Equitable Estoppel

Page 997. After note 5, add:

5.1. More on estoppel and federal claims. The Supreme Court has reaffirmed the rule that an owner of a patent who assigns (sells) the patent to another, and explicitly or implicitly represents that the patent is valid, is estopped from later asserting in litigation against the assignee (buyer) that the patent is invalid. Minerva Surgical, Inc. v. Hologic, Inc., 594 U.S. 559 (2021). The issue typically arises when the original inventor who assigned the patent later invents something new and related that competes with the original version.

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

2. Waiver

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

2. Is reliance required? . . .

The Supreme Court has reaffirmed, without discussion, that reliance is not required for waiver under federal law. Morgan v. Sundance, Inc., 596 U.S. 411 (2022). The issue was whether there should be an exception to this rule for waiver of a right to arbitration instead of litigation. Plaintiff sued her employer in a class action alleging systematic violations of the Fair Labor Standards Act. The employer litigated for eight months before first alleging that plaintiff's employment contract contained an arbitration clause. The Eighth Circuit, following most others, held that because of the federal policy favoring arbitration, defendant could not waive its right to arbitration unless plaintiff was prejudiced. The majority found no prejudice in eight months of wasted litigation; the district judge, and the dissenter, found prejudice.

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

D. Laches

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

2. Prejudice and preventive injunctions. . . .

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

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

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

Laches also figured heavily in 2020 post-election litigation. President Trump refused to concede his race to Joe Biden, claiming without evidence that election irregularities led to Biden's victory. Trump and his allies brought over 60 lawsuits, losing all but a few inconsequential ones. A number of courts rejected Trump's 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, 588 U.S. 109 (2019), the Court held that when a §1983 claim accrues, and therefore when the statute of limitations begins to run, is a question of federal law, even though the number of years is borrowed from a state statute. McDonough, a former election official, was

prosecuted for ballot tampering. The first trial ended in a mistrial and the second in an acquittal. McDonough alleged that the prosecution was based on fabricated evidence, and he brought a §1983 suit against the special prosecutor. The Court held that the §1983 action against the special prosecutor accrued upon McDonough's acquittal at the second trial, and not at the earlier times when the fabricated evidence was first used against him or when he first learned that the evidence was fabricated. The Court analogized the claim to accrual rules applicable to common law tort actions for malicious prosecution, and it distinguished the very harsh results in similar false imprisonment claims, summarized at page 1040 of the main volume.

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

The Court held that the statute of limitations begins to run on a §1983 claim to DNA testing when the state litigation ends, in this case when the state court of last resort denied a petition for rehearing. Reed v. Goertz, 598 U.S. 230 (2023). Three Justices dissented.

Page 1023. After note 6, add:

7. Suing to challenge rules issued by administrative agencies. Congress has enacted statutes of limitation for suing the United States. The most general of these, applicable whenever no more specific statute applies, says that suits against the United States must be filed "within six years after the right of action first accrues." 28 U.S.C. §2401(a). If plaintiff sues to challenge the validity of a regulation, the Court has held that no right of action accrues, and limitations does not begin to run, until the plaintiff is injured by that regulation. Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 2024 WL 3237691 (U.S. July 1, 2024).

Justice Barrett, for the majority, wrote a straightforward limitations opinion. Injury in fact is essential to standing and the right to sue, limitations does not begin to run before a plaintiff can sue (except in unusual situations where Congress expressly says so), and therefore, limitations does not begin to run before plaintiff suffers an injury. Probably, the Court should have ruled that in suits for injunctive relief, such as challenges to a regulation, it is enough that plaintiff faces a substantial threat of injury. But that would not have changed the result or the essential point.

Justice Jackson, dissenting for herself and Justices Sotomayor and Kagan, argued that for facial challenges to regulations—challenges seeking to vacate the regulation and not dependent on individualized facts about the plaintiff—limitations runs from the date the regulation becomes final. Otherwise, the regulation is never protected from challenge.

In *Corner Post*, the Federal Reserve issued the regulation in 2011, industry trade groups immediately challenged it, the D.C. Circuit upheld it, and the Supreme Court denied cert. Then in 2021, two trade groups in North Dakota challenged the regulation there, in a suit that would go to the Eighth Circuit. The government moved to dismiss on limitations grounds, and the trade groups filed an amended complaint adding Corner Post as an additional plaintiff. Corner Post was a new business; it had not been injured before 2018 because it did not open until 2018. The addition of

Corner Post changed nothing about the legal challenges to the regulation; the substance of the complaint was identical with and without Corner Post.

If adding Corner Post worked, then anyone seeking to bring a belated challenge to a regulation need only create a new legal entity that could not have been injured before it existed, and have that entity file in a new circuit. Only a decision upholding the regulation on the merits in the Supreme Court would cut off the potential for repeated challenges with no time limit. And even then, a new challenger could file a complaint and try to persuade the Court to overrule its earlier decision.

The ideological lineup of the Justices in *Corner Post*, with conservatives protecting the plaintiff and liberals protecting the defendant, the impassioned tone of the dissent, and the fact that the case was held to the last day of the October 2023 Term all suggest that the Court viewed it not as an ordinary decision about limitations, but as part of the conservative majority's ongoing efforts to rein in the administrative state. For more about the facts of *Corner Post*, see this Update to page 288.

2. The Discovery Rule

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

10. Codification. . . .

The Court in Rotkiske v. Klemm, 589 U.S. 8 (2019), appeared to further close the door on reading discovery rules into federal statutes that do not expressly state the discovery rule. At issue was a limitation clause in the Fair Debt Collection Practices Act (FDCPA) authorizing private civil actions against debt collectors who engage in certain prohibited practices. An action under the FDCPA may be brought "within one year from the date on which the violation occurs." 15 U.S.C. §1692k(d). The Court wrote that "[a]textual 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. 589 U.S. at 14. 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 15. But it held that plaintiff had not preserved the equitable issue for appeal.

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

The Employee Retirement Income Security Act of 1974 (ERISA) requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of gaining that knowledge rather than within the 6-year period that would otherwise apply. 29 U.S.C. §1113. The Court held that a plaintiff does not necessarily have "actual knowledge" of the information contained in disclosures that he receives but does not read or cannot recall reading. Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020).

In *Sulyma*, the plaintiff alleged that Intel invested his retirement funds in unduly risky investments with excessive fees. Intel says that it disclosed all these investments in various plan

documents that were sent to all employees, including fact sheets on individual investments. But plaintiff says he never read those disclosures or at least has no memory of ever seeing them. The Court rejected Intel's argument that it need not prove a plaintiff's "actual knowledge," and remanded for resolution of the factual dispute over plaintiff's knowledge.

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

14. "Jurisdictional" time limits. . . .

The Supreme Court unanimously held that the 14-day deadline for seeking immediate appeal from an order granting or denying class certification is not subject to equitable tolling. Nutraceutical Corp. v. Lambert, 586 U.S. 188 (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 192. 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.

When the Internal Revenue Service notifies a taxpayer that it intends to seize his property for unpaid tax liabilities, the taxpayer is entitled to an administrative hearing. If unsuccessful there, he has 30 days to seek further review in the Tax Court. The Court unanimously held that this 30-day limit is not jurisdictional and is subject to equitable tolling. Boechler, PC v. Commissioner, 596 U.S. 199 (2022). Congress had not clearly indicated otherwise, and time limits are presumptively subject to equitable tolling.

The Court reached the opposite conclusion in Arellano v. McDonough, 598 U.S. 1 (2023). Military veterans who claim a service-related disability can get disability benefits only from the date of their application, "[u]nless specifically provided otherwise in this chapter." 38 U.S.C. §5110(a)(1). The statute goes on to list 16 specific exceptions. Without labeling either the default deadline or any of the exceptions jurisdictional, the Court held that the deadline is not subject to equitable tolling that further extends the exceptions. Arellano argued that his disability had left him unable to file for benefits. But some of the exceptions addressed that and similar issues and extended the deadline for far shorter periods than the length of Arellano's delay.

And in one more in this seemingly endless series of cases, the Court held that the statute of limitations in the Quiet Title Act, 28 U.S.C. §2409a(g), is not jurisdictional. Wilkins v. United States, 598 U.S. 152 (2023). The statute governs claims to property in which the United States claims an interest; the time limit is twelve years from the date the plaintiff or her predecessor in interest "knew or should have known of the claim of the United States." *Id.* at 156.

The Court again said that it would "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is," and that "most time bars are nonjurisdictional." *Id.* at 157-158. The Court emphasized that Congress enacts procedural rules to facilitate orderly litigation, but that treating a requirement as jurisdictional often disrupts litigation, because a party can raise it at any time, wasting months of litigation and enabling parties to resurrect previously waived arguments. Justices Thomas, Roberts, and Alito dissented, arguing that waivers of sovereign immunity are

jurisdictional and that therefore, time limits on suing the government are presumptively jurisdictional.

Time limits on suing are our principal concern in a unit on statutes of limitation, but the same arguments arise with respect to other kinds of procedural rules. In Fort Bend County v. Davis, 139 S. Ct. 1843 (2019), the 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; such a charge is a statutory prerequisite to suing in court but it is not jurisdictional. In MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288 (2023), the Court unanimously held that a limitation on the relief that can be granted after a successful appeal from certain orders of bankruptcy courts is not jurisdictional and had been waived.

And in Santos-Zacaria v. Garland, 598 U.S. 411 (2023), the Court held that a requirement that immigrants must exhaust administrative remedies before challenging removal orders in court is not jurisdictional and had been waived; the Court said that it had not held any exhaustion rule to be jurisdictional since adopting its clear statement rule for identifying procedural prerequisites as jurisdictional. Justices Alito and Thomas would not have reached the issue.

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

CHAPTER TWELVE

FLUID-CLASS AND CY PRES REMEDIES

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

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

The Supreme Court declined to reach the merits, remanding the case to consider potential standing problems under Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (a case further described in the main volume at page 266). Frank v. Gaos, 586 U.S. 485 (2019). The Court then tightened the *Spokeo* standing rules even further in TransUnion LLC v. Ramirez, 594 U.S. 413 (2021). The Court has not yet taken another case to revisit the cy pres issue.