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REMEDIES REVEALS THE “SEAMLESS WEB”

CANDACE SAARI KOVACIC-FLEISCHER*

INTRODUCTION

Remedies is a course that consolidates many of the concepts learned in the first year of law school and some from the second. A typical Remedies course will reintroduce principles from constitutional law, compare and contrast torts and contracts, and apply criminal concepts in civil contexts. Teaching Remedies can be both challenging and rewarding. Challenging because it crosses a wide variety of subject areas. Rewarding because it weaves a variety of subject areas into the “seamless web” of the law, eliciting from students an occasional “aha.”

Early classes in law school tend to separate courses into discrete subject areas, including Contracts, Torts, Property, Civil Procedure, Constitutional Law, and Criminal Law; later classes, into statutory areas such as Environmental Law, Antitrust, Securities, Intellectual Property, and Antidiscrimination, to name a few. In law schools where core first-year courses are limited to four hours in one semester, and many statutory courses limited to three, professors may well be unable to reach the remedial section of their courses or, if they do, must give it short shrift. Nor do most courses offer students an opportunity to compare and contrast legal theories to determine which would provide a client with the best relief.

Most law schools offer Remedies as a stand-alone course. That at least three credit hours can be devoted to it demonstrates that remedial theory cannot be summarized into a few simple principles. Compounding its complexity is that some remedial principles are applicable across many subject areas while others diverge dramatically from subject to subject. At times, the same terminology can be used, unhelpfully, to express dramatically different concepts depending on the subject matter.

As a result, I think remedies should be a capstone course that all students take after having some expertise in a variety of subject matters. I know of no

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law school that offers Remedies as a first-year course. Most offer it to students in either their second or third years. While I think Remedies is best appreciated in the third year, difficulties law schools have in scheduling competing demands likely would prevent limiting it to third-year students.

Below follow examples of how I teach students in Remedies to think across course lines while learning remedial theory.

I. EQUITY

A. *Injunctions, Subject Matter Jurisdiction, and Constitutional Law*

One of the “aha” moments that comes early in the course involves Article III of the Constitution. My coauthors’ and my textbook begins with equity.¹ After covering temporary restraining orders (“TROs”), preliminary injunctions, and permanent injunctions, we study the appealability of each. The students read *Chicago United Industries, Ltd. v. City of Chicago*,² and *Romer v. Green Point Savings Bank*.³ They discover that preliminary and permanent injunctions may be appealed, but not TROs unless they have the effect of a preliminary or permanent injunction.

I ask, “Why not?”

Possible answers include “judicial efficiency” and “fair opportunities for parties to present their case.”

Students may point to the quote from Note 1 of the Text, which says that a goal of nonappealability of TROs is “to give the trial court an opportunity to conduct a hearing in which there was a ‘full presentation of both sides’ prior to any exercise of appellate jurisdiction over an interlocutory order.”⁴ Generally, there has not been a full presentation of the issues or evidence in a TRO hearing. As Rule 65 of the *Federal Rules of Civil Procedure* provides, the duration of a TRO is limited,⁵ and under specified circumstances a TRO even

1. See CANDACE S. KOVACIC-FLEISCHER, JEAN C. LOVE & GRANT S. NELSON, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS* (8th ed. 2011) [hereinafter TEXT].

2. 445 F.3d 940 (7th Cir. 2006), as reprinted in TEXT, *supra* note 1, at 148–52.

3. 27 F.3d 12 (2d Cir. 1994), as reprinted in TEXT, *supra* note 1, at 153–58.

4. TEXT, *supra* note 1, at 152 (quoting *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414, 418 (5th Cir. 1957)).

5. See FED. R. CIV. P. 65(b), as reprinted in TEXT, *supra* note 1, at 16–17. Rule 65 provides that a TRO expires no later than fourteen days after entry unless “for good cause” it is extended for a similar time or unless the adverse party consents to a longer duration. *Id.* *Chicago United Industries* applied Rule 65 when the stated expiration date was ten days after entry and the district court extended the duration of the TRO without the adverse party’s consent. 445 F.3d at 942–43. Most states either have adopted the Federal Rules or have similar counterparts, but I tell students to make sure they read the rule applicable to the jurisdiction in which they are litigating.

may be issued *ex parte*,⁶ with the restrained party able to file, on two days' notice, a motion to vacate the order with the district judge.⁷ A preliminary injunction hearing is to follow in the district court, taking precedence over most other matters.⁸

I have students discuss the considerations of administrative practicality and fairness supporting the nonappealability of a TRO. The courts of appeals cannot routinely be expected to hold emergency hearings each time a TRO that does not operate as a preliminary or permanent injunction is at issue. Furthermore, the ground is often shifting in a case that starts with a TRO motion. Rather than allowing immediate appellate review, the rule permits the district judge to weigh evidence that might not have been available at a TRO hearing. In addition, students should remember or be reminded that it is not the role of an appellate court to weigh evidence; rather, its role is only to determine both whether errors of law have been made and whether the findings are infected by erroneous assumptions of law or are clearly erroneous.⁹

Having discussed the practical workings of a TRO proceeding, I move to the constitutional and statutory underpinnings of the proceedings. I want students to see how the Constitution governs even the nonappealability of TROs, and I want to enable students to review (or in some circumstance fill in what they missed) subjects covered in Civil Procedure and Constitutional Law courses.

I ask, "Why else is a TRO not appealable? What authority does the court use to hold that TROs are not appealable?"

A. 28 U.S.C. §§ 1291 and 1292(a)(1).¹⁰

Q. What is the significance of § 1291?

A. Section 1291 provides that appellate courts "shall have jurisdiction of appeals from all final decisions of the district courts."¹¹ Thus, permanent injunctions are appealable. Because preliminary injunctions as well as TROs are interlocutory decrees, neither would be appealable but for § 1292(a)(1).

Q. Where in § 1292(a)(1) does it say that TROs are not appealable?

6. *See* FED. R. CIV. P. 65(b)(1)(A) ("The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition . . .").

7. *See* FED. R. CIV. P. 65(b)(4).

8. *See id.*

9. *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

10. I have posted both statutes on a website. They can also be displayed by a projector in class.

11. 28 U.S.C. § 1291 (2006).

Students are directed to the language of § 1292(a)(1):

Except as provided . . . the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;¹²

Students see that § 1292(a)(1) does not include a mention of TROs. The students see that when they condense its language, the rule covers “[i]nlocutory orders . . . granting . . . [or] refusing . . . injunctions,”¹³ but is silent as to “restraining orders.” Therefore, by silent implication TROs are not appealable.

Q. Why can’t courts decide that the omission of the term “temporary restraining orders” should not preclude appealability of TROs? Why can’t such orders be implied in § 1292(a)(1) or included in the definition of injunctions? Why must it be interpreted so literally?

At this point I refer students back to *Chicago United Industries*¹⁴ and Judge Posner’s interpretation of Rule 65. He said a “plausible reading” of the durational limit for a TRO would be to apply it only to the “issued without notice” provision in Rule 65.¹⁵ Judge Posner applied an earlier version of Rule 65, but both that version and the current one contain the “without notice” provision. Current Rule 65(b)(2) provides:

Every temporary restraining order *issued without notice* must state the date and hour it was issued The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension.¹⁶

12. *Id.* § 1292(a)(1).

13. *Id.*

14. *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940 (7th Cir. 2006), as reprinted in TEXT, *supra* note 1, at 148–52.

15. *Id.* at 946, as reprinted in TEXT, *supra* note 1, at 151.

16. FED. R. CIV. P. 65(b)(2) (emphasis added), as reprinted in Text, *supra* note 1, at 16. The version of Rule 65 in force in 2006 provided:

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance . . . and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

28 U.S.C. app. (2006) (amended 2007) (emphasis added).

Students can see from the language of Rule 65 that Judge Posner is correct about how the rule could be read. But then they note that he said that such a reading “would not make any sense” because “it would enable a district court to issue a preliminary injunction of indefinite duration without any possibility of defendant’s appealing, simply by calling the injunction a temporary restraining order and being careful to notify the defendant in advance of issuing it.”¹⁷ Judge Posner then concluded that even TROs issued with notice are limited in duration by Rule 65.¹⁸

Judge Posner did not read the rule literally, nor did he look to the history of the rule to define its meaning.¹⁹ I ask, “Why should a judge read § 1292(a)(1) literally, or if not reading it literally, look to legislative intent to determine its meaning if Rule 65 can be read more loosely?” I prompt, “How do § 1292(a)(1) and Rule 65 differ structurally?”

A. Rule 65 is a rule, and § 1292(a)(1) is a statute.

Q. Why should that make a difference? Who drafts and adopts rules, and who drafts and adopts statutes?

A. The Supreme Court drafts (through advisory committees) and “prescribe[s]” the *Federal Rules of Civil Procedure*,²⁰ and Congress drafts and enacts federal statutes.²¹

Q. By what authority does Congress draft and enact statutes?

A. The Constitution.

Q. What provision? It is not based on the Commerce Clause or the taxing authority provisions of the Constitution most familiar to students.²²

A brief discussion could then occur here about Congress’s power to pass statutes in light of the Supreme Court’s current and important decision on the validity of the Affordable Care Act. The majority held that the Act was constitutional under the taxing provisions but not the Commerce Clause, holdings that drew vehement dissent.²³

17. *Chicago United Industries*, 445 F.3d at 946, as reprinted in TEXT, *supra* note 1, at 151.

18. *Id.*, as reprinted in TEXT, *supra* note 1, at 151.

19. Judge Posner did, however, cite a number of cases holding the same, including *Nutrasweet Co. v. Vit-Mar Enterprises*, 112 F.3d 689, 693 (3d Cir. 1997), which noted that in a Supreme Court case involving the appealability of a TRO, the Court “fail[ed] to make a finding as to whether there had been notice before the restraining order was entered.” From that, the court in *Nutrasweet* “deduce[d] that the Court implicitly held that the existence of notice would not make the provisions of Rule 65(b) inapplicable.” *Id.* (citing *Sampson v. Murray*, 415 U.S. 61, 86–88 (1974)).

20. See 28 U.S.C. §§ 2071–2074 (2006).

21. U.S. CONST. art. I.

22. See *id.* art. I, § 8.

23. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591, 2600, 2642 (2012).

After the class discusses that Supreme Court holding, I then repeat, “What part of the Constitution authorizes Congress to draft § 1292(a)(1)?”²⁴

A. Article III.

Q. What is the purpose of Article III?

A. To establish the federal judiciary.

Q. What federal courts does Article III establish?

A. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²⁵ While Article III establishes the judiciary, a provision in Article I, Section 8 gives Congress the explicit power to “constitute” the lower federal courts.²⁶ The courts that Congress “constitute[s]” only can hear disputes that Congress gives them jurisdiction to hear. Section 1292(a)(1) is a subject matter jurisdiction statute.

At this point, some students look as if they have just realized how Article III ties in with what they thought was a rather esoteric subject (appealability of TROs). Here, students see a jurisdictional statute beyond §§ 1331 and 1332 of Title 28, which they studied in Civil Procedure, and beyond other federal statutes providing for judicial review of federal agency actions, which they may have studied in courses on federal subject areas.

Just to make one more point about the *Federal Rules of Civil Procedure*, I ask, “Why isn’t the appealability of a TRO part of § 1331, the statute governing federal question jurisdiction for federal courts?”

A. Because § 1331 governs the jurisdiction of federal district courts.²⁷ Separate statutes are necessary to create and govern the jurisdiction of the federal appellate courts.²⁸

From there one can get briefly into issues usually devoted to a course in Federal Courts. I remind students that the only court established by the Constitution is the Supreme Court. District and circuit courts are established by Congress.

24. I post the language of Article I, Section 8 and Article III on the computer for students. It could also be displayed by a projector in class.

25. U.S. CONST. art. III, § 1.

26. *Id.* art. I, § 8, cl. 9. Article I, Section 8 grants Congress the power “[t]o constitute Tribunals inferior to the supreme Court.” *Id.*

27. *See* 28 U.S.C. § 1331 (2006) (“The *district courts* shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” (emphasis added)).

28. *See id.* § 1291 (“The *courts of appeals* (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of . . .” (emphasis added)); *id.* § 1292(a)(1) (“Except as provided . . . the *courts of appeals* shall have jurisdiction of appeals from . . .” (emphasis added)). Just as there are separate statutes creating federal district and appellate courts, so too are there separate rules of procedure for each. *See* FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . .”); FED. R. APP. P. 1(a)(1) (“These rules govern procedure in the United States courts of appeals.”).

Q. Does Article III require Congress to create any lower federal courts?

A. No, it says, "[A]s the Congress *may* from time to time ordain and establish."²⁹ Thus, those courts exist only at the will of the legislative branch, which is a reason lower courts need federal jurisdictional statutes.

Q. Can passage of jurisdictional statutes become political?

A. Yes. Congress has the power to take away federal court jurisdiction in subject matter areas. For example, when the federal courts were enjoining labor disputes in the early twentieth century, Congress passed the Norris-LaGuardia Act, which provides in part: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute"³⁰ In other times, when courts have granted controversial remedies, such as busing for school integration, Congress has tried to take away federal courts' jurisdiction to order those remedies.³¹

Q. What if Congress should decide to repeal all jurisdictional statutes?

A. An unlikely event, but interesting to contemplate—what is the role of the federal district courts? Appellate courts? How would the country function without them? These questions reach the bottom line concept of the rule of law.³² These questions also provide a segue into the next case, which is less profound but discusses a difference between federal district and appellate courts.

B. *Injunctions, Personal Jurisdiction, and Federal Courts*

In *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*,³³ Nevada, Washington, and South Carolina each had an agency that administered disposal of low-level radioactive waste in its state.³⁴ These states had the only low-level radioactive waste disposal facilities in the United States at that time.³⁵ In 1990, each agency forbade Michigan's radioactive waste users from disposing of their waste at any of the three sites, on the

29. U.S. CONST. art. III, § 1 (emphasis added).

30. 29 U.S.C. § 104 (2006).

31. See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895–96 (1984).

32. See generally Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005), and discussing Justice Breyer's views on the importance of the rule of law); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the rule of law in the context of Supreme Court rulings in controversial cases, and reviewing literature on the rule of law).

33. 945 F.2d 150 (6th Cir. 1991), as reprinted in TEXT, *supra* note 1, at 160–65.

34. *Id.* at 152, as reprinted in TEXT, *supra* note 1, at 160.

35. *Id.*, as reprinted in TEXT, *supra* note 1, at 160–61.

ground that Michigan was not in compliance with a federal statute.³⁶ The Michigan Coalition of Radioactive Material Users filed suit in the District Court for the Western District of Michigan.³⁷ That court permanently enjoined the state agencies from denying Michigan radioactive waste users access to their state disposal sites.³⁸ The district court found that it had jurisdiction over the defendants because “the long-standing business relationship between the plaintiffs and defendants, coupled with the fact that the defendants’ actions were felt in Michigan, provided sufficient grounds for jurisdiction.”³⁹ The state agencies appealed to the Sixth Circuit and sought from it a stay pending appeal of the district court’s permanent injunction order.⁴⁰ The Sixth Circuit granted the stay because, in discussing the likelihood of success on the merits, “we feel it a close question as to whether the defendants’ contacts to Michigan were sufficient ‘such that [they] should reasonably anticipate being haled into court there.’”⁴¹ After concluding that the likelihood of success was a close question, the appellate court applied the “serious question going to the merits” requirements for preliminary relief.⁴² It held that the state agencies would suffer irreparable injury if the ruling stood, harm to the plaintiffs and others was minimal, and that the public interest would not be served by the injunction.⁴³

I note that “the merits,” for purposes of deciding the likelihood of success, can include jurisdictional issues as well as all other issues that go to the strength of the plaintiff’s case. I ask students:

Q. What type of jurisdiction is at issue here and what authority from the text of the opinion supports your answer?

A. Personal jurisdiction. The Sixth Circuit assessed the “defendants’ contacts to Michigan” and quoted *World-Wide Volkswagen Corp. v. Woodson*⁴⁴ (a case students may well have studied in Civil Procedure).

36. *Id.*, as reprinted in TEXT, *supra* note 1, at 161.

37. *Id.* at 150.

38. *Griepentrog*, 945 F.2d at 152, as reprinted in TEXT, *supra* note 1, at 161.

39. *Id.* at 154, as reprinted in TEXT, *supra* note 1, at 163.

40. *Id.* at 152, as reprinted in TEXT, *supra* note 1, at 160.

41. *Id.* at 155 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)), as reprinted in TEXT, *supra* note 1, at 163.

42. *Id.* at 155, as reprinted in TEXT, *supra* note 1, at 163–64. There is a dispute among the circuits, which is beyond the scope of this Article regarding teaching techniques, as to whether the “serious questions going to the merits” test survives the Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), as reprinted in TEXT, *supra* note 1, at 71. See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35–37 (2d Cir. 2010), as reprinted in TEXT, *supra* note 1, at 83–85.

43. *Griepentrog*, 945 F.2d at 155, as reprinted in TEXT, *supra* note 1, at 163–64.

44. 444 U.S. 286, 297 (1980) (holding that a defendant must have sufficient contacts with a jurisdiction so that it “should reasonably anticipate being haled into court there”).

Q. Why do you suppose the district court and the Sixth Circuit came to opposite conclusions as to personal jurisdiction? Where was the district court located?

A. Michigan—this raises the question whether the Michigan court might have been too close to the interests of the Michigan plaintiff.

Q. Is Michigan the only state in the Sixth Circuit?

A. No, it also includes Ohio, Tennessee, and Kentucky. As of now, no circuit has only one state.⁴⁵

Q. Why do the circuits have more than one state?

A. A possible reason is to avoid parochial decisions by a district court more familiar with and attuned to the interests of one state. Other reasons are efficiency and promoting more uniformity in the application of federal laws.

I tell the students that a number of people have suggested that the Ninth Circuit is too big and should be split.⁴⁶ The Fifth Circuit was split into the Fifth and Eleventh in 1981.⁴⁷ The Fifth Circuit now has Louisiana, Mississippi, and Texas; the Eleventh has Alabama, Florida, and Georgia.⁴⁸

Q. Why has the Ninth Circuit not been split? The Ninth Circuit contains Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Mariana Islands.⁴⁹

A. Possibly for a number of reasons. First, geographic. Separating one or more states from California would create a somewhat less populous circuit than at present while creating another considerably less populous circuit. Splitting California in half and allocating the remaining states to each half would raise the probability of having different federal decisional law for each half of California. Splitting all the other Ninth Circuit states from California would create a single state federal circuit, which would create risks of insularity, and loss of efficiency and uniformity of the laws. Second, political. Possibly an even more compelling explanation for the status quo is that, at present, California tends to be more liberal than the less populous states contained in the Ninth Circuit, and the Ninth Circuit as a whole tends to be more liberal than some other federal circuits.⁵⁰ Political differences in Congress would likely prevent agreement on whether and how to split it.

45. See 28 U.S.C. § 41 (2006).

46. See, e.g., David S. Law, *How To Rig the Federal Courts*, 99 GEO. L.J. 779, 789 (2011) (noting that the suggestions to split the Ninth Circuit "have been circulating for some time now").

47. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

48. 28 U.S.C. § 41.

49. *Id.*

50. See Law, *supra* note 46, at 789 (arguing that a major motivation of suggestions that the Ninth Circuit be split is "to quarantine the court's liberal judges in a smaller, less powerful circuit" and possibly to prevent those judges "from deciding environmental cases of particular importance to the northwestern states in the circuit").

Thus, in this unit, students go from discussing the requirements for a stay of restraining orders and injunctions to discussing the wisdom of Congress when it created the federal circuit courts. They also explore the wisdom of the founders in creating a federal judiciary to oversee a union of states with different interests. Of course, avoiding the primacy of parochial state interests is one of the very reasons for the creation of a federal judiciary, as is plain from the constitutional provisions for lifetime tenure and non-diminishing of compensation of federal judges,⁵¹ and the federal courts' power, inter alia, over disputes concerning the Constitution and laws of the United States, and cases between two or more States, and citizens of different states.⁵²

II. DAMAGES: CONFUSION CAUSED BY COMPARING TORT AND CONTRACT THEORIES

A. *Foreseeability*

In most law schools, Torts and Contracts are separate courses. The split is useful in teaching the subject matter of each, but limits consideration of their intersections and the confusions those cause. In my course in Remedies, I assume that students know the substance of tort and contract law from their first year. I do not assume, however, that they understand the differences between the two in measuring damages. Nor do I assume that they are familiar with the confusion caused by terminology that has different meanings in tort and contract. For example, I do not assume that students know that “consequential damages” in contracts are entirely different than “consequential damages” in torts. Nor do I assume that students know that “consequential damages” and “special damages” are synonymous in contracts, but that “special damages” are a subset of “consequential damages” in torts.

To demonstrate the difference between tort and contract damages, I compare the general principles students know from torts with *Hadley v. Baxendale*, the leading contracts damages case.

1. Torts

Q. Assume a tortfeasor injures someone with an eggshell skull, to use a familiar example. What can the injured plaintiff recover?

A. Damages to make him or her whole.

Q. Would that include damages that come from the injured skull even though most people do not have such a fragile skull? Even though the tortfeasor did not know that the victim had an eggshell skull?

51. See U.S. CONST. art. III, § 1.

52. See *id.* art. III, § 2.

A. Yes, in torts generally one takes the victim as one finds him or her.⁵³

Q. What limits damages?

A. Proximate cause, that is, damages that are no longer a consequence of the tort.

2. Contracts

Using the familiar (or what will become familiar) case of *Hadley v. Baxendale*,⁵⁴ I ask

Q. What was the contract in *Hadley*?

A. The contract was for a carriage company to expedite the carriage of a miller's broken crankshaft to the repair shop. The miller paid an extra fee for the special handling.⁵⁵

Q. What was the breach?

A. The crankshaft delivery was delayed.⁵⁶

Q. What damages did the miller seek?

A. His lost revenue from his customers because his mill could not run without the crankshaft.⁵⁷

Q. Was he able to recover them?

A. No. The court held that special damages could only be recovered if "they were foreseeable and within the contemplation of the parties at the time the contract was made."⁵⁸

Q. Looking at the contract between the parties, can you see why the court said that the lost revenues were not contemplated by the parties? Why was the loss of revenue damages considered "special"?

A. The court in *Hadley* said that it would not necessarily follow that one damaged crankshaft would necessitate the closure of the mill.⁵⁹ And there was nothing in the contract referencing customers of the mill.

53. *Aisole v. Dean*, 574 So. 2d 1248, 1253 (La. 1991), as reprinted in TEXT, *supra* note 1, at 378.

54. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

55. *Id.* at 147 (The plaintiff's "mill was stopped by a breakage of the crank shaft The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. . . . [T]he sum of 2l. 4s. was paid . . . at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery.").

56. *Id.* ("The delivery of the shaft at Greenwich was delayed by some neglect . . .").

57. *Id.* (stating the plaintiffs lost "the profits they would otherwise have received").

58. *Am. List Corp. v. U.S. News & World Report, Inc.*, 549 N.E.2d 1161, 1164 (N.Y. 1989) (citations omitted) (citing *Hadley*, 156 Eng. Rep. at 145), as reprinted in TEXT, *supra* note 1, at 290.

59. *See Hadley*, 156 Eng. Rep. at 151 ("Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above

Q. Why doesn't the defendant in *Hadley* take the plaintiff as he finds him, with a mill that is not running because of the broken crankshaft, as in torts? In other words, why doesn't the court award the plaintiff his lost revenues?

A. If the miller recovered his profits, shipping might be curtailed or become very expensive. Carriage companies might not want to take the risk of having to pay damages well in excess of what they expect to gain from the contract; rather, they might not ship goods without their owner or owner's agent traveling with them. Or if carriage companies were willing to take the risk, they might need to raise their prices in order to cover the cost of that risk.

Q. How are the goals of tort and of contract law similar and how do they differ?

A. Both want to compensate plaintiffs. Damages in tort are designed to make the plaintiff whole.⁶⁰ Damages in contract are designed to give the plaintiff the benefit of his or her bargain, but not more.⁶¹ They differ because a goal of tort law is to deter torts, while a goal of contract law is to compensate without deterring contracting.

Q. To ask an obvious question, why not deter contracting?

A. Society needs contracting to make commerce flow. Society, however, neither needs nor wants torts committed.

Q. Are pain and suffering damages recoverable in contract law?

A. No. Since pain and suffering damages can vary substantially from jury to jury, a contracting party would not be able to assess the potential risk of entering into a contract that might be breached. Thus, again, contracting could be deterred.⁶²

Q. Why is *Hadley* a desirable rule in modern society? Why shouldn't a party who wants to protect itself from having to pay consequential (special) damages just include an exclusionary clause in a contract or buy insurance?

A. Many contracts, especially many drafted by lawyers, do exclude payment of consequential damages, but requiring such a contract clause would disadvantage those who do not know the need for it and those who have very informal contracts. In addition, a well-established default rule brings stability in commercial relations.

Q. Is there ever a circumstance in which personal injury damages can be recovered for a breach of contract?

A. Yes, tort damages are available when a breach of contract is also an independent tort, causes physical bodily injury, or causes property damage to

circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill.").

60. See TEXT, *supra* note 1, at 283.

61. *Id.*

62. See *Erllich v. Menezes*, 981 P.2d 978, 988 (Cal. 1999), as reprinted in TEXT, *supra* note 1, at 307.

property that was not the subject of the contract.⁶³ This answer is easy to state, but difficult to apply.

B. *Special Versus General Damages*

In contract law, special damages are also known as consequential damages.⁶⁴ General damages “are those which are the natural and probable consequence of the breach, while special damages are extraordinary in that they do not so directly flow from the breach.”⁶⁵ These definitions are not particularly useful unless one knows what is considered a “natural and probable consequence of the breach.” As the students have just discussed, “natural and probable” damages are those that are related to the explicit promises in the contract, not other unnamed consequences, no matter how proximately caused.

General and special damages have different meanings in tort than they do in contract. I use *Wheeler v. Huston*,⁶⁶ a personal injury case, to illustrate the distinction. There the jury awarded the defendant the exact amount of his special damages, which was an amount just over \$9,000 to cover his lost wages and medical expenses.⁶⁷ The issue in *Wheeler* was whether the jury could award special damages without awarding general damages.⁶⁸ It turns out courts are divided as to the answer, which turns on what each state presumes that particular verdict means.⁶⁹

Q. What are general damages in tort according to *Wheeler*?

A. Pain and suffering.⁷⁰

Q. What are special damages?

63. TEXT, *supra* note 1, at 308–09.

64. See *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Ams.*, 618 F. Supp. 2d 280, 292 (S.D.N.Y. 2009), as reprinted in TEXT, *supra* note 1, at 292.

65. *Am. List Corp. v. U.S. News & World Report, Inc.*, 549 N.E.2d 1161, 1164 (N.Y. 1989) (citation omitted).

66. 605 P.2d 1339 (Or. 1980), as reprinted in TEXT, *supra* note 1, at 293–97.

67. *Id.* at 1340, as reprinted in TEXT, *supra* note 1, at 293.

68. *Id.* at 1340–41, as reprinted in TEXT, *supra* note 1, at 294.

69. See *id.* at 1341–45, as reprinted in TEXT, *supra* note 1, at 294–96. The question involves creating a rule, which makes a presumption as to what the award of special damages without general damages means. Does it mean that the jury compromised the verdict by awarding only specials when it believed that there were problems with the plaintiff’s case? Or does it mean that the jury misapplied the evidence in determining that there was no pain and suffering? Or does it mean something else? Courts in different jurisdictions create different presumptions. As this is a matter of state law, the rules need not be the same from state to state.

70. See *id.* at 1344 (“[W]e believe that the first verdict for special damages only was improper in this case, and that the court correctly refused to receive it. The evidence disclosed that plaintiff sustained an injury from the accident and that he sustained some pain and suffering.” (quoting *Brannan v. Slemp*, 490 P.2d 979, 983 (Or. 1971))).

A. Easily measurable monetary damages, such as lost wages and medical bills.⁷¹

Q. Since both, if proven, are proximately caused by the tort, why do they need separate terms?

A. Usually it does not matter because both are recoverable if proven.⁷² No extra proof is needed to recover one or the other. For some torts, however, such as defamation per quod or trespass to chattels, special damages are an element of the cause of action.⁷³ Without special out-of-pocket monetary damages, there is no tort.

Q. Why would there be such a rule?

A. Defamation per quod involves statements that require explanation to be defamatory.⁷⁴ Trespass to chattels involves an interference with a chattel, but not necessarily an interference that causes damage to the chattel or deprives its owner of its possession.⁷⁵ To early common law courts, as well as modern courts, whether such torts cause any damage may be doubtful. Thus, if some measurable monetary harm can be traced to those torts, it demonstrates objectively that the torts caused damage and that they will be worth the court's time to hear.

III. ENFORCEMENT, CIVIL PROCEDURE, CRIMINAL, AND CONSTITUTIONAL LAW

A. *The Distinction Between Law and Equity*

One of the important concepts students study in Remedies is the difference between law and equity. I find that most students in the class have only a vague idea of what equity is. To them, equity may only mean "fairness" or "the length of the chancellor's foot." While those are some definitions of the word equity, actions at equity are governed by procedures and provide relief different from actions at law.

71. See *Wheeler*, 605 P.2d at 1340 ("The plaintiff prayed . . . for special damages of \$9,120.25 (lost wages of \$6,000 and medical expenses of \$3,120.25)."), as reprinted in TEXT, *supra* note 1, at 293.

72. See *id.* at 1345, as reprinted in TEXT, *supra* note 1, at 296. The court in *Wheeler* did not need to decide whether different levels of proof had been established for an award of general and special damages; rather, it decided whether a jury could refuse to award general damages when a plaintiff had sustained an accident in which there were special damages.

73. See *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 726 (7th Cir. 2004) (defamation), as reprinted in TEXT, *supra* note 1, at 1028; *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1023 (S.D. Ohio 1997) (trespass to chattels), as reprinted in TEXT, *supra* note 1, at 648.

74. See *Tacket v. Delco Remy Div. of Gen. Motors Corp.*, 937 F.2d 1201, 1204 (7th Cir. 1991), as reprinted in TEXT, *supra* note 1, at 1028.

75. See *CompuServe*, 962 F. Supp. at 1023, as reprinted in TEXT, *supra* note 1, at 648.

Differences between equitable and legal actions evolved from procedures governing early English tribunals. In earlier years, courts in law and equity in England were separate and had mutually exclusive jurisdictions.⁷⁶ They also had mutually exclusive remedies. Equity courts, also known as the Courts of Chancery, issued orders directly to a defendant, in personam.⁷⁷ Legal courts, also known as the King’s Courts, however, resolved disputes in rem, determining who was entitled to what property.⁷⁸

In most courts in the United States equitable and legal actions have been merged into one action.⁷⁹ For example, Rule 2 of the *Federal Rules of Civil Procedure* abolished the duality by providing: “There is one form of action—the civil action.”⁸⁰ The term “equitable jurisdiction” is a misnomer. Even England long ago abolished the jurisdictional distinction between law and equity.⁸¹ “Equitable jurisdiction” now refers to nonjurisdictional procedural differences between actions at equity and those at law.⁸² As a carryover from the two court system in early England, equitable remedies continue to be in personam and legal to be in rem.⁸³ Students learn that equitable orders are court orders to a defendant to do or not do something, while legal judgments are court mandates determining whether or not a plaintiff is entitled to property, including money, from the defendant.⁸⁴ While some students may initially view the difference between the two as nonmonetary versus monetary relief, they see cases holding monetary child support equitable but nonmonetary ejectment legal.⁸⁵

Students review the in personam/in rem concept when they read *Kossian v. American National Insurance Co.*,⁸⁶ an unjust enrichment case in which a plaintiff, who had cleaned up property pursuant to a contract with its owner,

76. See TEXT, *supra* note 1, at 3.

77. *Id.* at 3–4.

78. *Id.*

79. A few states still maintain a distinction between legal and equitable actions. See *id.* at 10.

80. FED. R. CIV. P. 2.

81. TEXT, *supra* note 1, at 7.

82. In some circumstances, pursuant to the doctrine of “equitable clean-up,” a court ordering an equitable remedy will also award ancillary legal damages. *Id.* at 1373. Another difference between actions at law and equity is the availability of a jury trial at law, but not at equity. Sometimes the decision whether an action is legal or equitable for purposes of the right to a jury trial is based on the nature of the remedy; sometimes it is based on whether the cause of action was historically legal or equitable. *Id.* at 1355–1405.

83. See *id.* at 182 (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 93–94 (1973)).

84. *Id.*

85. See *Wronke v. Madigan*, 26 F. Supp. 2d 1102, 1105–06 (C.D. Ill. 1998), as reprinted in TEXT, *supra* note 1, at 218 (child support); *Heroux v. Katt*, 68 A.2d 25, 28–29 (R.I. 1949), as reprinted in TEXT, *supra* note 1, at 742 (ejectment).

86. 62 Cal. Rptr. 225 (Cal. Ct. App. 1967), as reprinted in TEXT, *supra* note 1, at 525–28.

sought compensation for his work from the company that later acquired the property after a bankruptcy proceeding.⁸⁷ In that opinion, students see confusing statements such as an “equitable obligation imposed by law” and the “equitable doctrine of unjust enrichment.”⁸⁸ I direct students to the last substantive paragraph of the opinion where the court says “plaintiff should recover.”⁸⁹ The court does not say “the defendant is ordered to.” Thus, the action is at law.

B. Contempt

1. Application of Criminal Law to Equitable Civil Procedures

Actions at law and equity are both civil actions. Because of the in personam/in rem remedial distinction, issues of criminal law can arise in the enforcement of equitable, but not legal, remedies. A court cannot compel a defendant to pay an in rem judgment; rather, an officer such as a sheriff can attach property or assets to satisfy a monetary judgment, pursuant to plaintiff’s judgment lien.⁹⁰ On the other hand, a court can enforce an equitable order directed to a defendant by fining or imprisoning the defendant in contempt.⁹¹

A fine or prison contempt sanction can be either civil or criminal, which introduces criminal law into civil matters. If a court seeks to coerce a defendant into complying with an injunction, which will benefit the plaintiff, the contempt is civil.⁹² If a court seeks to punish the defendant for not complying with the order, the contempt is criminal.⁹³ As cases such as *International Union, United Mine Workers of America v. Bagwell*⁹⁴ and *Jones v. Clinton*⁹⁵ illustrate, determining whether a contempt sanction is civil or criminal can pose considerable difficulty.

Once the students and I discuss the issues surrounding such a determination, I ask:

Q. Why does the distinction matter?

A. Courts must use criminal procedures in criminal contempt hearings and civil procedures in civil contempt hearings.⁹⁶

Q. What happens if a court fails to use criminal procedures in a criminal contempt?

87. *Id.* at 225–27, as reprinted in TEXT, *supra* note 1, at 525–27.

88. *See id.* at 227, as reprinted in TEXT, *supra* note 1, at 527.

89. *Id.* at 228, as reprinted in TEXT, *supra* note 1, at 528.

90. TEXT, *supra* note 1, at 3–4.

91. *Id.* at 4.

92. *See* TEXT, *supra* note 1, at 201.

93. *Id.*

94. 512 U.S. 821 (1994), as reprinted in TEXT, *supra* note 1, at 221.

95. 36 F. Supp. 2d 1118 (E.D. Ark. 1999), as reprinted in TEXT, *supra* note 1, at 246–51.

96. *See* TEXT, *supra* note 1, at 201.

A. The criminal sanction is vacated.⁹⁷ Therefore, it is important that a court, and the lawyers, know which is which.

Q. Does a defendant who is considering actions that may violate an injunction know whether the contempt will be criminal or civil?

A. Not necessarily since the determination occurs after the violation.⁹⁸ Thus, a lawyer should advise such a client that he or she could be found in criminal contempt.

Q. How do criminal and civil procedures differ?

Recalling their course in Criminal Procedure, students answer that criminal procedures include proof beyond a reasonable doubt and the right to a jury trial, to be free from self-incrimination, to notice, and to a hearing.

Q. What procedures are required in a civil proceeding?

Sometimes students have not focused on the fact that notice and a hearing are required by due process in civil as well as criminal proceedings. While Article III, § 2 and the Sixth Amendment to the Constitution provide the right to a jury trial in criminal cases, the Fifth and Fourteenth Amendments are not limited to criminal proceedings. They prohibit state and federal governments from depriving persons, whether through criminal or civil proceedings, of property without due process of law.⁹⁹ I then say to the students: “As you have noted, one criminal procedural requirement is right to a jury trial.” And I ask further:

Q. When are jury trials required in criminal contempt proceedings?

A. The United States Supreme Court in *Bloom v. Illinois* applied to contempt cases the holding of *Duncan v. Louisiana*, which held that the Constitution requires states to provide jury trials in criminal cases where the punishment is two years imprisonment or more.¹⁰⁰ The two cases were decided the same day.

Q. Are criminal contempt hearings necessarily governed by the same procedures as criminal trials? Did the Supreme Court in *Bloom* merely cite *Duncan* to reach its conclusion? In other words, are criminal contempt hearings treated like other criminal cases for all purposes?

A. Although the Supreme Court’s holding in *Bloom* was the same as in *Duncan*, its reasoning was different. In *Bloom*, the Court acknowledged that its prior precedent on criminal contempts had concluded, although in the context of a six-month criminal sanction, “that all criminal contempts can be

97. See *Bagwell*, 512 U.S. at 838.

98. See *id.*

99. See *Bloom v. Illinois*, 391 U.S. 194, 195 (1968), as reprinted in *TEXT*, *supra* note 1, at 188.

100. See *id.* at 211 (citing *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968)), as reprinted in *TEXT*, *supra* note 1, at 192–93.

constitutionally tried without a jury.”¹⁰¹ The Court in *Bloom* held that “serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution.”¹⁰² Therefore, criminal contemnors who are punished by imprisonment of two years or more are entitled to a jury trial.

Contemnors who are imprisoned until they comply with an order are not entitled to a jury trial.¹⁰³ Even though they may stay in prison longer than two years, they can choose to leave the prison at any time.¹⁰⁴ Their contempt proceeding is to benefit the plaintiff, not to punish the defendant.¹⁰⁵

2. Differences Between Criminal and Equitable Procedures

Despite the similarities between criminal contempts and other crimes, there are significant differences. Students study one difference when they study the collateral bar rule in the five to four Supreme Court decision in *Walker v. City of Birmingham*.¹⁰⁶ In *Walker*, the defendants were Dr. Martin Luther King, Jr. and others.¹⁰⁷ They were planning to march on Good Friday and Easter Sunday to protest segregation, but were served with a temporary injunction issued by a state court to enforce an anti-picketing ordinance and to prevent the march.¹⁰⁸ The defendants chose not to seek further state court review before they marched.¹⁰⁹ After a hearing at which the defendants were not permitted to challenge the constitutionality of the injunction, they were held in contempt and each was sentenced to five days in jail and to a \$50 fine.¹¹⁰

The Supreme Court upheld the contempt conviction and upheld the state court’s use of its collateral bar rule, a rule that prevents a defendant, who did not obtain an order modifying or vacating an injunction before violating it, from arguing that the injunction was unconstitutional or otherwise improperly issued.¹¹¹ That rule permits a defendant to argue during the contempt hearing only that the court did not have jurisdiction to issue the injunction, that the defendant did not have notice of the injunction, or that the defendant did not violate the injunction.

101. *Id.* at 197, as reprinted in TEXT, *supra* note 1, at 188.

102. *Id.* at 198, as reprinted in TEXT, *supra* note 1, at 188.

103. See TEXT, *supra* note 1, at 195–96.

104. See *Wronke v. Madigan*, 26 F. Supp. 2d 1102, 1106 (C.D. Ill. 1998), as reprinted in TEXT, *supra* note 1, at 218.

105. *Id.* at 1105, as reprinted in TEXT, *supra* note 1, at 218.

106. 388 U.S. 307 (1967), as reprinted in TEXT, *supra* note 1, at 263–74.

107. *Id.* at 341 (Brennan, J., dissenting), as reprinted in TEXT, *supra* note 1, at 272.

108. *Id.* at 309–11 (majority opinion), as reprinted in TEXT, *supra* note 1, at 263–64.

109. *Id.* at 310, as reprinted in TEXT, *supra* note 1, at 264.

110. *Id.* at 311–12, as reprinted in TEXT, *supra* note 1, at 264–65.

111. See *Walker*, 388 U.S. at 320–21, as reprinted in TEXT, *supra* note 1, at 267.

The majority reasoned that “no man can be judge in his own case.”¹¹² The dissenters argued that the state should not bar a challenge to an ordinance that is unconstitutional “on its face”¹¹³ and that the majority “elevat[ed] a state rule of judicial administration above the right of free expression.”¹¹⁴ At this point, students can debate the wisdom of the collateral bar rule, which not all jurisdictions have.¹¹⁵

In discussing the rule in the context of *Walker*, I direct students to the holding in *Carroll v. President & Commissioners of Princess Anne*, in which the Court held that an ex parte restraining order prohibiting a “white supremacist” organization from holding a rally was a prior restraint of speech in violation of the First Amendment.¹¹⁶ I also direct students to *Shuttlesworth v. City of Birmingham*, in which the Supreme Court unanimously reversed Shuttlesworth’s conviction, holding that the anti-picketing ordinance at issue in *Walker* violated the First Amendment.¹¹⁷

This leads to additional questions and answers, which are designed to again cause students to review more concepts from criminal and constitutional law and to expand the discussion of *Walker*.

Q. If someone violated an injunction after a definitive judicial ruling in another case established the unconstitutionality of the ordinance on which the injunction was based, would the collateral bar rule still apply?

A. The policies of that rule would no longer be served, as the Court in *Walker* acknowledged when it said: “[T]his is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity.”¹¹⁸

Q. Why could Dr. King and others not raise the constitutionality of their conviction, but Fred Shuttlesworth, who marched at the same time, could?

A. Shuttlesworth had been convicted of violating the anti-picketing ordinance.¹¹⁹ Dr. King, et al., had been convicted of violating the injunction that prohibited them from violating the ordinance.¹²⁰

Q. Why should that make a difference?

A. Because of the difference between an ordinance (or statute) and an injunction prohibiting violation of an ordinance (or statute). At a criminal trial, a defendant can raise the unconstitutionality or other infirmity of the ordinance

112. *Id.* at 320, as reprinted in TEXT, *supra* note 1, at 267.

113. *See id.* at 328 (Warren, C.J., dissenting); *id.* at 336 (Douglas, J., dissenting), as reprinted in TEXT, *supra* note 1, at 270.

114. *Id.* at 338 (Brennan, J., dissenting), as reprinted in TEXT, *supra* note 1, at 270.

115. *See* TEXT, *supra* note 1, at 262.

116. 393 U.S. 175, 176, 180 (1968), as reprinted in TEXT, *supra* note 1, at 168–69.

117. 394 U.S. 147, 148–52, 159 (1969), as reprinted in TEXT, *supra* note 1, at 274–75.

118. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967), as reprinted in TEXT, *supra* note 1, at 266.

119. *Shuttlesworth*, 394 U.S. at 150, as reprinted in TEXT, *supra* note 1, at 274.

120. *Walker*, 388 U.S. at 311–12, as reprinted in TEXT, *supra* note 1, at 264–65.

or statute that the defendant is accused of violating,¹²¹ unless the ordinance or statute provides an alternative forum for its challenge.¹²² At a contempt hearing, however, the collateral bar rule can be used to prohibit a defendant from challenging the underlying merits of an injunction.¹²³

To answer the next question, students review the case or controversy provision of Article III,¹²⁴ including concepts of ripeness and standing.

Q. Why should whether one violates an ordinance or an injunction make a difference as to one's ability to raise the merits?

A. It is difficult to challenge a proposed violation of a statute before violating it. A person seeking to violate a statute would be a plaintiff suing the government for a declaratory judgment and injunctive relief. Federal courts will dismiss such a challenge if no case or controversy has yet arisen.¹²⁵ A challenge to a statute may not be ripe, or the plaintiff may not have standing. Perhaps officials will not view the action that the plaintiff plans to take as a violation of the statute or will not prosecute it. Perhaps the plaintiff will not undertake the proposed action.¹²⁶

In contrast, because a contempt hearing involves noncompliance with a court order, there is a case and controversy that has already been adjudicated, or preliminarily adjudicated. A court, therefore, already has jurisdiction and can, at least in theory, quickly hear a motion to vacate or to modify the injunction.¹²⁷

121. See *Younger v. Harris*, 401 U.S. 37, 49 (1971), as reprinted in TEXT, *supra* note 1, at 1019 (holding that only in very narrow circumstances may a federal court enjoin a state criminal proceeding on the ground that the statute is unconstitutional on its face, noting that the pending state proceeding "afford[s] Harris an opportunity to raise his constitutional claims").

122. See, e.g., *Yakus v. United States*, 321 U.S. 414, 429–31 (1944) (holding that because the Emergency Price Control Act provided that a maximum price regulation could be protested administratively and that the Emergency Court of Appeals and Supreme Court had exclusive jurisdiction of any appeal, defendant who did not use this procedure could not raise invalidity of regulation during criminal trial for its violation).

123. See *Walker*, 388 U.S. at 320–21, as reprinted in TEXT, *supra* note 1, at 267.

124. U.S. CONST. art. III, § 2.

125. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937) (holding that the limitation of the Declaratory Judgment Act of 1934 "to 'cases of actual controversy,' manifestly has regard to the constitutional provision"), as reprinted in TEXT, *supra* note 1, at 622.

126. See *Steffel v. Thompson*, 415 U.S. 452, 459–60 (1974), as reprinted in TEXT, *supra* note 1, at 634.

127. If defendants are prevented from being heard quickly, then the collateral bar rule should not apply. See *Walker*, 388 U.S. at 318 (suggesting that the collateral bar rule would not apply had defendants "been met with delay or frustration of their constitutional claims"), as reprinted in TEXT, *supra* note 1, at 266.

CONCLUSION

One can see from this discussion some of the ways in which a course in Remedies can be taught so that it weaves together concepts from a number of subjects that students were, or should have been, exposed to earlier in law school. By reviewing these concepts in an upper-level course, students are often surprised how they come together. As those concepts come together, students see a more complete picture of the "seamless web" of the law. The more complete the picture, the greater the understanding. The greater the understanding, the greater the ability to remember and apply the concepts.

