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2021

2022

OPENING REMARKS

SQUARE DANCING AND A CAT AT THE SUPREME COURT

JUSTICE HARRY A. BLACKMUN'S FIRST MOMENT IN CHARGE

Ross E. Davies[†]

Associate Justice Harry A. Blackmun served on the Supreme Court of the United States from June 1970 to August 1994. He had mixed feelings about the Chief Justices with whom he served. To oversimplify a bit, Blackmun was not entirely happy with how Chief Justice Warren E. Burger presided over the Court (1969-1986), but later on was pleased with Chief Justice William H. Rehnquist's leadership (1986-1994[1]). Burger was, or Blackmun perceived him to be, an energetic yet ineffective manipulator and a poor administrator, while Rehnquist was forthright, even-handed, and efficient.[2]

Whatever might be said, pro or con, about Chief Justice Burger or Chief Justice Rehnquist, no one would say either was a slacker. Their diligence is reflected in "the official minutes of the Court," the *Journal of the Supreme Court of the United States*:

> It is published chronologically for each day the Court issues orders or opinions or holds oral argument. The Journal reflects the disposition of each case, names the court whose judgment is under review, lists the cases argued that day and the attorneys who presented oral

[†] Editor-in-chief, the *Green Bag*; professor of law, George Mason University.

[1] After Blackmun's retirement in 1994, Rehnquist remained Chief Justice for another 11 years that we will not deal with here.

[2] Linda Greenhouse, *Becoming Justice Blackmun* 126-27, 153-60, 234-36 (2005).

> argument, contains miscellaneous announcements by the Chief Justice from the Bench, and sets forth the names of attorneys admitted to the Bar of the Supreme Court.[3]

According to the *Journal* (summarized in Table 1 on page 3), Chief Justices Burger and Rehnquist had a combined average of less than two absences per year during the 24-plus years Blackmun served with them.

By statute[4] and by long tradition,[5] when the Chief Justice is not available, the most senior available Associate Justice steps in. That is why William O. Douglas (senior Associate Justice, 1971-1975) and William J. Brennan (senior Associate Justice, 1975-1990) dominate the tally of presiding Justices in Table 1. Potter Stewart appears once — on a day when neither the Chief Justice nor Brennan was available — because he was the second-most senior Associate Justice at that time. Byron R. White was the second-most senior Associate Justice from 1981 to 1990 (thus his four presiding appearances during that period, on days when neither the Chief Justice nor Brennan was available), and the most senior Associate Justice from 1990 to 1993 (thus his four presiding appearances during that period, on days when the Chief Justice was not available).

When White retired in June 1993, Blackmun became senior Associate Justice. He finally got his chance to preside when Rehnquist missed two days in 1994 — May 16 and 23 — just a few weeks before Blackmun's own retirement on August 3, 1994. They were uneventful sittings, during which Blackmun's presiding role consisted of running the agenda, certifying the day's orders by the Court, and announcing (in addition to his own opinions) the opinions per curiam and of members of the Court not present (Rehnquist and Sandra Day O'Connor).[6] Eventful or not, sitting in the pilot's seat must have been at least a small thrill, even for someone who breathed the rarefied air of the Supreme Court on a daily basis.

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[3] *Journal*, www.supremecourt.gov/orders/journal.aspx. Scans of printed volumes of the *Journal*, dating back to 1890, are available on the Court's website.

[4] *See* 28 U.S.C. § 3 ("Whenever the Chief Justice is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon the associate justice next in precedence who is able to act, until such disability is removed or another Chief Justice is appointed and duly qualified.").

[5] *See, e.g.,* George Lee Haskins & Herbert A. Johnson, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15*, at 87 (1981); 3 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 1 (Maeva Marcus et al. eds., 1990).

[6] *Journal of the Supreme Court of the United States, October Term 1993*, at 801, 831, 835, 854 (May 16 & 23, 1994).

TABLE 1: PRESIDING ASSOCIATE JUSTICES DURING THE TENURE OF HARRY BLACKMUN, 1970-1994

Term	Total Chief Justice Absences	Presiding Associate Justices(s)	Date(s)
1969	0	none	none
1970	0	none	none
1971	1	Douglas	Oct. 26, 1971
1972	1	Douglas	June 11, 1973
1973	2	Douglas	Apr. 24 & 25, 1974
1974	1	Brennan	June 2, 1975
1975	0	none	none
1976	0	none	none
1977	3	Brennan	May 22, 30 & 31, 1978
1978	2	Brennan	May 21, 1979
		Stewart	June 28, 1979
1979	2	Brennan	June 2 & 10, 1980
1980	3	Brennan	May 4, June 1, Sept. 9, 1981
1981	5	Brennan	Jan. 25, Apr. 5, May 31, 1982
		White	July 1 & 2, 1982
1982	4	Brennan	Jan. 24, Mar. 7, June 24, Aug. 5, 1983
1983	6	Brennan	Jan. 23, May 15 & 21, June 18, 28 & 29, 1984
1984	0	none	none
1985	8	Brennan	Jan. 27, May 5, June 3, 26 & 27, July 1, 1986
		White	June 2 & 9, 1986
1986	1	Brennan	May 18, 1987
1987	1	Brennan	June 30, 1988
1988	0	none	none
1989	0	none	none
1990	0	none	none
1991	3	White	Apr. 27, May 4, June 26, 1992
1992	1	White	June 25, 1993
1993	2	Blackmun	May 16 & 23, 1994
1969-93	**46**		**average Chief Justice absences/year <2**

But how about days when the Court does not "issue[] orders or opinions or hold[] oral argument"[7] — days when it does not engage in its formal, external, public-facing activities? Someone is still needed to preside over the internal, day-to-day operations of the Court. Usually, the Chief Justice is available to do that work, too. But not always, and then the same tradition involving the most senior available Associate Justice applies. Blackmun had at least one opportunity to serve as a substitute in that context as well. It occurred on February 9, 1990, when he was the *fourth*-most senior Associate Justice, behind Brennan, White, and Thurgood Marshall. On that occasion, Blackmun issued a memorandum to his colleagues, spelling out his leadership agenda as "acting Chief Justice." It is reproduced on page 5 below, followed by replies from Associate Justices Sandra Day O'Connor and Anthony M. Kennedy (pages 6 and 7), and a note from Blackmun's secretaries, Dooley Stephanos Peratino and Wanda S. Martinson, reporting on reactions in the Rehnquist, Brennan, and Kennedy chambers (page 8).[8]

Declaring that "I might as well make use of my newly found status," he presented a wild plan for a Blackmun-led Court that included

> reassigning cases, striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat … .

One element of Blackmun's plan received quick, strong support from a colleague — O'Connor responded, "By all means sign me up for the square dancing" — and there was, as you can see on the following pages, plenty of amusement from jolly Justices and their staffs.[9]

Alas, when the Court next convened, on February 20, Rehnquist was in the center chair and there were no signs of dancing, or of a cat. And so the world is left to wonder how exciting a Blackmun Chief Justiceship could have been.

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[7] *Journal*, www.supremecourt.gov/orders/journal.aspx.

[8] Harry A. Blackmun, Memorandum to the Conference (Feb. 9, 1990), Papers of Harry A. Blackmun, Manuscript Div., Libr. of Cong. (hereafter "HAB Papers"), box 538; Sandra Day O'Connor, Memorandum to Harry A. Blackmun (Feb. 9, 1990), HAB Papers, box 1406; Anthony M. Kennedy, Memorandum to Harry A. Blackmun (Feb. 9, 1990), HAB Papers, box 538; Dooley Stephanos Peratino and Wanda S. Martinson, Memorandum to Harry A. Blackmun (Feb. 9, 1990), HAB Papers, box 538. *See also* David J. Garrow, *There's Nothing to Fear in Those Papers*, Wash. Post, May 27, 1993, at A25.

[9] *Cf.* Jay D. Wexler, *Laugh Track*, 9 Green Bag 2d 59 (2005).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 9, 1990

MEMORANDUM TO THE CONFERENCE

The Chief Justice, Justice Brennan, Justice White, and Justice Marshall are all out of the city. This means, to use Byron's tired expression, that I am "acting Chief Justice."

It occurs to me that in this happy state of affairs things ought to be done, such as reassigning cases, striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat to chase down the mice and "Boris," who, I am told, is the rat upstairs. I have discussed this with many who labor in the building and find unanimous consent for all these worthy projects.

I might as well make some use of my newly found status. We juniors on the Court seem to be the only Members who are doing any work these days.

H.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 9, 1990

Dear Harry:

By all means sign me up for the square dancing. And I might offer some suggestions for those cases which are too difficult to decide.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

February 9, 1990

Dear Harry,

I too was working most productively this morning until I was diverted by your memo. But rank does have its privileges, and I do think you are proceeding in the right direction.

Yours,

AMK/ej

Justice Blackmun

02-09-90

Mr. Justice:

Re: Your memo as "acting CJ"

We thought you might be interested in reactions, as we hear, from other chambers:

Dean from AMK's chambers asked me to tell you that you have her vote (except as to the July and August sessions).

AD said she received a message from one of WJB'S clerks who said that he "thought HAB's memo was hilarious.'"

Barbara in the CJ's chambers called to ask if you really did this or if someone did it as a joke. I confessed on your behalf, of course. She loved it and says she will leave it for the Chief, who "will think it's a riot."

dsp and wsm

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CANDOR, CLIMATE, AND THE ENERGY TRANSITION

Robert A. James[†]

In law school I was a research assistant to a professor writing an article on antidiscrimination law — in particular the gap between the substantive school desegregation rights established in *Brown I* and the "all deliberate speed" remedies of decisions following *Brown II*.[1] The Justices and lower court judges rarely acknowledged that their remedies were wholly unequal to the rights, in part because they were concerned that such acknowledgments would induce backlash and cynicism. Admitting that school busing orders were diluted in anticipation of resistance, they perhaps feared, would invite further resistance and draw outrage from those entitled to constitutional protections.

In the middle of the long draft was a section entitled "Doing and Saying: Remedial Limits and Judicial Candor." I objected that this passage interrupted the flow of discussion of the cases and ought to be a separate essay. The professor stuck to his guns, convinced that the way in which those in power express what they are doing is part and parcel of their power. From the vantage point of today, I see that he was correct. (This confession, that the teacher was right after all, may be a milestone in the annals of research assistantship.)

"This gap between doing and saying," the professor wrote, "like the substantive compromises it hides, may itself reflect an attempt to mediate between the ideal and the real."[2] But, he quoted, "'too much use of [subterfuge] by courts destroys their credibility.'"[3] He concluded that in public

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[†] Partner, Pillsbury Winthrop Shaw Pittman LLP, San Francisco and Houston. Based on a speech given at the Environmental Law & Policy Colloquium at Stanford Law School on October 14, 2020. The views expressed in this article are exclusively those of the author and not those of his colleagues, his firm, or their clients. He nonetheless thanks his colleague Alex Peyton for his research assistance.

[1] Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (discussing Brown v. Board of Educ., 347 U.S. 483 (1954) and Brown v. Board of Educ., 349 U.S. 294 (1955)).

[2] *Id.* at 666.

[3] *Id.* at 667-68 (quoting G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 175, 180 (1982)).

affairs, there should be a presumption of candor: "In making that gap visible, we not only preserve ideals but also foster conditions for giving those ideals greater force in the world."[4]

I raise today the issue of candor in the context of climate change and the astounding transformation under way in the production and use of energy across our nation and planet. Politicians, agencies, think tanks, and academics are boldly announcing goals, research agendas, and policy measures aimed at dramatically decarbonizing our energy sources — towards 90 or 100 percent carbon-free electricity or total energy for the United States or the world by a given year. In many cases, the measures are communicated and popularly reported without understanding by the general public of the context in which they are offered.

That context is vital. It begins where we start today, where we have a total budget, allocated among a variety of primary sources, both carbon and non-carbon, and divided between electricity and other forms of delivered energy. The context continues with what we are doing today, with current annual rates of increase or decrease among those sources and in the degree of electrification. In an analogy from physics, one might say those two measures tell us our position and momentum! And the context ends with the target year, in which these pronouncements envision a new budget, taking into account population growth and expanded energy uses, but reflecting anticipated gains in productivity and efficiency. When the new budget reflects a conversion of primary sources to non-carbon fuels — whether in whole or in very substantial part — that is referred to as deep decarbonization.

To continue the physics metaphor, a decarbonization policy describes the forces that will now be applied to our energy condition. When a candidate or institute announces a goal, say, of 100 percent green power by 2035 or 2050, on that context is overlaid an implicit *project* — the necessary changes in individual or collective sources — and some sense of what it would take to effect such changes.

What does it take to increase one source and retire another? Which actors need to take (or refrain from) what actions? If the needed technology or infrastructure is not available today, how will it be available tomorrow? What life-cycle costs, risks, and obstacles will be encountered while mak-

[4] *Id.* at 674.

ing these changes? How will the changes be paid for and who will make the payments? What are the foregone benefits of the sources that are being discontinued or not pursued? In answering these questions is where the hard work takes place.

This article first describes the energy transition itself. Different participants express this concept in different ways. Certainly the transition is founded on decarbonization, the climate-conscious emergence from an economy based on fossil fuel. But what "decarbonization" means has evolved over time — significant shifts have occurred in just the last few years, for example, on the role of natural gas and the rise of low-carbon hydrogen. And too often the transition is simply equated with decarbonization. It is more than decarbonization. The transition has several other objectives, some of which are complementary, and others of which lead to some tension among goals.

The article then reviews some of these public announcements. From the governmental arena, we will look at the plans issued by the presidential campaign of Joe Biden and the output of the International Energy Agency (IEA). For decarbonization goals from the public policy arena, in honor of the Big Game we will learn first from some researchers at the University of California, Berkeley, and then from some researchers here at Stanford. Finally, for perspectives apart from new goals, we will review priorities outlined by investigators at Columbia University and the Massachusetts Institute of Technology (MIT).

The projects implicit in the goals are scrutinized. Particular attention is paid to where the pronouncements differ from one another, and whether and how those differences are addressed. To be clear, this article is not intended to critique any of them, in the sense of branding them as either realistic or unrealistic. In fact, judgments of that type are best formed on the basis of opinions of experts in the relevant fields — preferably experts who cross-examine one another in peer-reviewed settings and who communicate clearly. My purpose here is rather to examine whether the public literature gives readers, as participants in the energy dialogue, the information they need and deserve to have an opinion about what the proposal entails.

I finally come to candor. Should the advocates themselves be more explicit about the challenges of achieving their own visions? Or does discussion of such hurdles "chill the vibe" and make it less likely that we will

even strive for or come close to the goals? Is it necessary to be guarded about the probability of success, if those cautionary notes might deflate the project and inspire skepticism and recidivism?

I conclude that an absence of candor is corrosive to the public conversation on the energy transition. But that candor can be a virtue of the overall policy dialogue, rather than having to be part of every partisan's own voice.

Candor is not a one-way street to condemnation of anything bold. There is no need to be unduly pessimistic about radical economic transformations — I will benchmark this effort against prior "moon shot" programs, none of which were fully candid in this respect! The demands for decarbonization and for the rest of the transition demand outsized, indeed unprecedented action. It should not be surprising that the targeted changes will be unprecedented as well.

Being frank about the tasks that lie ahead will pay dividends in ensuring that the required focus is resilient and sustained. But we cannot assume that such a disclosure will be supplied by the enthusiasts for any one vision. It is therefore up to others who are engaged in the conversation to furnish the necessary candor.

I. THE ENERGY TRANSITION

What is the energy transition? Many works omit a definition, and the definitions that do exist widely differ. Daniel Yergin recently wrote:

> [W]hile energy transition has become a pervasive theme all around the world, disagreement rages, both within countries and among them, on the nature of the transition: how it unfolds, how long it takes, and who pays. "Energy transition" certainly means something very different to a developing country such as India, where hundreds of millions of impoverished people do not have access to commercial energy, than to Germany or the Netherlands.[5]

It may be best to plunge into some uses of this term. The World Economic Forum, the folks who bring you Davos, publish with the McKinsey consulting firm an Energy Transition Index ranking the progress of indi-

[5] DANIEL YERGIN, THE NEW MAP: ENERGY, CLIMATE, AND THE CLASH OF NATIONS xix (2020).

vidual countries.[6] The Forum begins with a description of the factors driving a global energy system in flux:

- Shifts in policies favoring or disfavoring specific sources, based on their environmental impacts;
- Changes in supply and demand of sources, such as decreases in both renewable generation and natural gas prices;
- Changes in consumption patterns, such as that toward greater electric usage;
- Geopolitical shifts and the emergence of popular nationalist movements;
- Revolutions in supply chains and technologies; and
- Emergent efficiencies and productivity gains.

Amid all this volatility, the core goals of what the Forum calls "System Performance" remain constant — (i) security of supply and access to affordable energy; (ii) inclusive economic development and growth; and (iii) environmental sustainability. That is to say, while decarbonization is happening, there is an energy equation that still demands to be solved, for the lives and livelihoods of all.

True, the energy transition has among its peak priorities the environmental considerations that drive decarbonization. But decarbonization is just one part of sustainability. The latter concept also embraces life-cycle impacts and the desired shift from a linear model of consumption and disposal to a circular economy founded on reuse and recycling. And beyond sustainability, the transition is to have many other virtues — it is also to be timely, inclusive, affordable, and secure. The Forum thus attempts to solve an equation in multiple variables.

Other studies more concretely define the transition with measurable criteria. One roster of metrics includes the following:

- Decarbonization, the movement from fossil to low-carbon primary sources, such as renewable, nuclear, fuels with carbon capture, and advanced geothermal technologies.
- Electrification, the degree of increase in the share of electricity in the mix of end uses.

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[6] WORLD ECONOMIC FORUM, FOSTERING EFFECTIVE ENERGY TRANSITION (2020 ed.)

- Reduction of energy intensity — in other words, achieving improvement in economic conditions (whether measured by gross domestic product (GDP) or a standard of happiness) using less energy per unit of wealth or income.

The Wood Mackenzie consultancy has visualized three "technology levers" (or gears) in the transition in addition to expanding renewable generation and storage — energy efficiency, use of carbon-free hydrogen, and carbon removal (for the production and use of natural gas during the period of transition).[7]

Note that these decarbonization measures are strongly focused on the sustainability objective for the transition. Less attention is given to the other objectives, but they are momentous in their own right. For one, there are approximately 7.8 billion people on our planet, and an increase of over a billion is estimated by the year 2050. Of the humans here today, an estimated 860 million lack electricity and 2.6 billion lack clean cooking fuels.[8] How do we assure secure and diversified sources of energy, expanding affordable energy access to those lacking it, facilitating economic development and growth — and retire the world's fossil fuels and fossil fuel infrastructure while we do so?[9]

The changes in attitudes toward energy sources in the last several years have been dramatic. Two examples stand out. First, natural gas, long thought of as a bridge, has become in some circles something of a pariah. It is still an extremely large source of electricity generation (far exceeding wind and solar in absolute terms). The displacement of coal-fired by natural gas-fired power has been a strong factor in decarbonization, stronger to date than the growth in renewable sources. Some nonetheless object that development of gas resources and end uses still results in unacceptable carbon emissions and diverts attention from cultivation of the renewables solution.

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[7] WOOD MACKENZIE, ENERGY TRANSITION OUTLOOK (2020).

[8] INTERNATIONAL ENERGY AGENCY, SUSTAINABLE DEVELOPMENT GUIDE 7 (SDG7) ENERGY PROGRESS REPORT (2019).

[9] More from YERGIN, *supra* note 5, at 407: "'We're told we have to move on beyond natural gas, to the next thing,' said Timipre Sylva, Nigeria's minister of petroleum. 'The reality is that Africa is not there yet on renewables. We have to overcome the issue of energy poverty in Africa. Many, many things are not being taken into account with all the talk about renewables and electric vehicles.'" The World Health Organization (WHO) estimates that three billion people suffer indoor air pollution from poor fuels, leading to extensive health risks and high mortality. *Household air pollution and health*, WORLD HEALTH ORGANIZATION (May 8, 2018).

Second, hydrogen has gone from a fringe part of the discussion a few years ago to being the major solution praised by governments, industry, and nongovernmental organizations alike. Hydrogen offers the dream of a green storage medium and a fuel and heat source — one capable of use in baseload generation as well as in energy-dense and high-heat industrial and mobile transport operations. Thus, for some observers and participants, the recipe looks very different in 2020 than it did in 2016 — even on the progressive wing of the body politic.

I believe we need to keep a more complete roster of drivers for the energy transition. A robust description includes most if not all the following initiatives:[10]

1. *Renewable Generation.* A great expansion of onshore and offshore wind, photovoltaic (PV) solar power and concentrated solar power (CSP), geothermal, hydroelectric, and other forms of renewable electricity generation — and of alternative liquid fuels generated from biological sources — by means of expedited siting, financing, development, and operation.
2. *Storage of Electricity and Heat.* A proliferation of distributed storage facilities not limited to pumped hydroelectric storage and batteries, including fuel cells and thermal sinks, with long-lasting discharge cycles suitable for baseload dependability and related valuable services, and for harnessing output from intermittent renewables.
3. *Carbon Consciousness for Fuels in Transition.* Improved management of fossil fuels during the period of transition, including reductions of emissions in production, processing, and transport; carbon capture and storage (CCS) and the production of "blue" hydrogen from natural gas coupled with CCS; and retirement and safe decommissioning of existing assets. Efficient ongoing uses for petroleum in petrochemical and a host of other non-fuel applications.
4. *Hydrogen from Renewables.* Development of the hydrogen value chain, both the production of "green" hydrogen from renewable or nuclear sources, and hydrogen infrastructure and end-use applications.

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[10] *See generally* VACLAV SMIL, ENERGY TRANSITIONS: HISTORY, REQUIREMENTS, PROSPECTS (2010); Benjamin K. Sovacool, *How long will it take? Conceptualizing the temporal dynamics of energy transitions*, 13 ENERGY RESEARCH & SOCIAL SCIENCE 202 (2016).

5. *Efficiency in Infrastructure.* Improvements in energy efficiency in the design, construction, operation, and life-cycle costs of our built infrastructure (whether residential, commercial, industrial, or public).

6. *Enhancements to the Grid and to Distributed Generation and Storage.* Accompanying expansion of storage, grid streamlining, transmission, distribution, and infrastructure for baseload generation, and for distributed and "behind the meter" storage as well as generation.

7. *Greening of Transportation, Industrial, and Public End Uses.* A revolutionary change in transportation, industrial and transmission infrastructure, and the ultimate uses in favor of electrical and hydrogen sources, including light-duty, medium-duty, and heavy-duty vehicles on land, vessels on the sea, and planes in the air.

8. *New and Enhanced Energy Technology.* Exploration of advanced generation, storage, and use techniques, potentially including advanced nuclear reactors (even nuclear fusion), bio-energy with carbon capture (BECC), direct-air capture (DAC), solar radiation management (SRM), and advanced geothermal systems.

9. *Affordability, Sustainability, Security, Environmental Justice, and Equity.* Delivering energy at a total cost, inclusive of consideration of externalities, that is affordable. Handling of life-cycle impacts in a sustainable manner, including safe and secure mining and manufacturing, circular-economy treatment of components, and resilience against wildfire, sea level rise, and drought risks. Diversification of sources and resilient supply and distribution chains across national borders. Making energy supply as well as investment and job opportunities available to wider populations, including vulnerable and underserved communities, with training, relocation, and employment benefits to those impacted by the transition.

The task of the energy transition is not merely to decarbonize on an urgent basis, as important as is our response to climate change. The transition is also to maintain and enhance security, access, economic development, and all measures of environmental health, including but not limited to reduced carbon emissions. Sometimes those other objectives are not heard amid the loud policy calls on one and only one goal — namely the achievement of 100 percent green electricity, or 100 percent green total

energy usage, by a given date.

Calls for an energy transition must address the cost, availability, and access of energy — for the present and future world populations. Some of this need will be accomplished by greater efficiencies, including the efficiencies inherent in electrification, and by increased productivity per unit of energy input. Other improvements come from increases in energy output, or reallocation of energy use from one subgroup to another.

II. THE END ZONES

The energy transition goals are expressed in different ways, but one consolation is that they must all begin with the actual circumstances today. Participants in the conversation should have a bundle of facts in the back of their minds as they hear the proposals. I covered others in my articles on numeracy and subsidization.[11]

Let us take United States electricity production as our primary example. The U.S. Energy Information Administration (EIA) reports 4,178 billion kilowatt-hours generated in the United States in 2018.[12] BP similarly reports 4,401 terawatt-hours (TWh) generated in the United States in 2019.[13] A billion kilowatt-hours in fact *is* one terawatt-hour. (This is an easier conversion than for prior editions, when BP measured outputs in British thermal units.) The IEA's figure is somewhere in between, 4,194 TWh for 2019.[14] So we are on comparatively firm ground to begin with.

BP reports that electricity production actually fell 56 TWh from 2018 to 2019. The COVID-19 pandemic and government and private responses caused a further drop in 2020. The electricity output rose significantly in 2021, either in a recovery or on an ongoing basis.

Of this output, again according to both EIA and BP, fossil fuels are 62 percent of the primary source, with natural gas at 38 percent and rising and coal at 24 percent and falling; nuclear at about 20 percent, where it has been for some years; and renewables at 17.5 percent. Within renewa-

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[11] Robert A. James, *Numeracy for Energy and Environmental Lawyers*, 8 JOURNAL OF LAW (5 J. LEGAL METRICS) 33 (2018); Robert A. James, *How Much Is Energy Subsidized?*, 10 JOURNAL OF LAW (7 J. LEGAL METRICS) 7 (2020).

[12] U.S. ENERGY INFORMATION ADMIN., ELECTRIC POWER ANNUAL 2019 at Table 1.1 (2019).

[13] BP STATISTICAL REVIEW OF WORLD ENERGY 2020 at 59 (2020).

[14] INTERNATIONAL ENERGY AGENCY, 2020 WORLD ENERGY OUTLOOK (2019).

bles, hydroelectricity is about 7 percent, wind (virtually all onshore in 2019) another 7 percent, and solar (both PV and CSP) about 1.8 percent. Wind and solar were the stars of the additions to the source in 2019, with natural gas close behind, but as can be seen renewables have some ground to make up.

Some renewable benchmarks are needed. The United States currently has about 64,000 wind turbines, adding about 3,000 a year according to government and industry sources.[15] We have perhaps 1.5 million roofs with solar panels.[16]

That basic bundle of facts gives us some idea of our "own end zone," the one from which we receive the kickoff in 2020, if you will. What does the other end zone, the "destination end zone," look like?

A year must be selected — the cases below mention 2035, 2050, and 2070, so let us start with 2050. There will likely be some downward forces on the electricity output — due to greater efficiencies and productivity. And there will likely be some upward forces — due to population growth and the increasing electrification of the transportation and industrial sectors. Whether explicitly or implicitly, the proposals must assume some number of terawatt-hours generated in the United States in the target year.

Within that destination end zone budget, these goals propose that all or almost all of the electricity is to be generated through low-carbon means. The "low-carbon" definition varies, with existing nuclear power plants and gas power plants with CCS often continuing. But coal assets and other gas assets, sources that currently provide 62 percent of output, are generally to be retired. A key task of the transition is thus to assure replacements and retirements that satisfy the new budget.

The same exercise can be applied to other concepts, such as United States total energy production, global electricity generation, and global total energy production. In each case, the proposal must start with the facts in 2020, assume or posit some end budget, and propose some means of getting from 2020 to that target. Remember the 8 billion souls here in 2020; the 9 billion or so who may be here in 2050; the 860 million now

[15] B.D. HOEN et al., UNITED STATES WIND TURBINE DATABASE (U.S. Geological Survey, American Wind Energy Association, & Lawrence Berkeley National Laboratory, July 2020).
[16] Charles W. Thurston, *Stanford Maps 1.47 Million Solar Roofs in America*, CLEANTECHNICA (Dec. 19, 2018).

without electricity; and the almost 3 billion now without clean cooking fuels. What will be the demands on the energy transition across the globe while any decarbonization project is undertaken?

III. GOVERNMENTAL GOALS

A. Biden Plans

The unity paper produced by advisers to the 2020 political campaigns of Vice President Joe Biden and Senator Bernie Sanders is instructive. The Biden-Sanders report, and a subsequent Biden paper (collectively here the "Biden plans"), call for bold initiatives on many fronts ranging from social justice to tax policy.[17] Chief among them is a $2 trillion energy and infrastructure plan with concrete decarbonization goals — 100 percent electric new buildings by 2030, 100 percent U.S. green electricity by 2035, and 100 percent green total energy by 2050.

The quantity of energy needed in these destination end zones is not reported in the paper — in each case, it may be the same or a bit more than in 2020. Some tactics are expressed numerically with respect to the transition. Let us examine those features at greater depth than I will supply for the other examples in this article.

Among all the adjectives and adverbs in the Biden plans, certain figures stand out in their simplicity and specificity. The 100 percent goals set forth above are followed by calls for 60,000 wind turbines onshore and offshore, all made in the United States, and 500 million solar panels on 8 million roofs and community solar facilities, to be in place between 2021 to 2025.

Some of the press coverage either did not report the specific figures at all or restated them with matter-of-fact exactitude.[18] It was important for

[17] See *Biden-Sanders Unity Task Force Recommendations* (July 8, 2020), followed by *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future* (late July or early August 2020). As a complete aside, I appreciate Senator Sanders' proposal to use federal highway rights of way as high-voltage transmission corridors. Whether that is feasible in many places is another question, but it is a relevant response to the evident land-use challenges at local and interstate levels.

[18] *Compare Joe Biden and Bernie Sanders Deepen Their Cooperation*, N.Y. TIMES, July 10, 2020 (reporting "a goal from the climate change task force to eliminate carbon emissions from power plants by 2035" with no reference to numbers of turbines or panels) *with Sanders-Biden climate task force calls for carbon-free power by 2035*, THE HILL, July 8, 2020 ("The plan also calls for a significant investment in renewable energy, including installing 500 million solar panels and manufacturing 60,000 wind turbines").

the candidates' materials to say the numbers, for the press to report the numbers, and for the targeted audience to applaud the numbers. An understanding of the numbers appears to have been optional.

Only in the comments of ordinary readers and credentialed academics to some of the press coverage did I see the questions that such numbers in isolation might deserve:

- Sixty thousand, eight million, five hundred million — for any of these, *is that a lot?* How does that compare to how many turbines and panels we install today?
- Are these figures inclusive of business as usual, installations already planned and permitted under the Obama and Trump Administrations, or are they incremental?
- How would the United States cause those projects to appear? We know how wind and solar projects are sited, developed, financed, and connected to customers in a locality, and the multitude of federal, state, and local laws, regulations, and causes of action that apply to them. How will government make this expansion happen?
- And if we were to install that many resources on this timetable, how far would that go, by 2026, in reaching the goal — that of 100 percent green power by 2035?

The readers supplied some calculations themselves.[19] Those of us who have considered the starting point — our own end zone — also have some feel for the figures. In a typical year, 3,000 turbines are being installed nationally. So 60,000 turbines would suggest a ramping up from 5,000 to 20,000 annual turbine installations in the five-year term. That does not appear out of the question from a scale and a financing perspective — similar growth in other renewable applications has recently been observed. That growth took place in the context of a global supply chain, however. More interesting are two bookends: how such an increase in U.S. manufacturing capacity would be accomplished, and how the site-permitting process could be so expanded, given that in some locales the best and easiest-to-permit installations may have already been launched.

[19] *See, e.g.*, Meredith Fowlie, *Biden's New Climate Plan*, ENERGY INSTITUTE BLOG (Aug. 3, 2020).

The solar calculation is trickier. A typical solar panel measures 1 by 1.65 meters.[20] A typical residential solar installation might use twenty panels — some fewer, some much more. A community solar installation could be of any size. Five hundred million solar panels might equate to some teens of millions of residential and commercial roofs and some thousands of community solar facilities installed in this period. In 2019, we had about 350,000 installations. To achieve the Biden plans, the installations might have to rise to 500,000 in 2021, and then well into the millions annually between 2022 and 2025. This rate of increase is not incomprehensible but it is somewhat daunting, recognizing again that the best and easiest sites may be taken.

Again, I derive all of this from reader and blog posts and my own online research, because neither the Biden plans nor the independent press coverage penetrated even to this level of detail. There is more groundwork supplied by a similar proposal from the Goldman researchers, considered below, but it was not cited in the campaign materials I saw. My point is that someone who is interested in participating in the energy dialogue finds it difficult to access the information needed to have an intelligent understanding of the goals, their contexts, and their implicit projects.

It is also interesting that President Biden has separately called for restricting the production of fossil fuels through new leases for hydraulic fracturing (or "fracking") on federal lands, but not for prohibiting fracking on private property. His campaign documents call for investment in research for advanced technologies including CCS (hence continuing natural gas usage), nuclear, and biofuels for applications that include aviation. His comprehensive plan thus includes fuel sources that are not on the menu for other proposals, in part because each has important political constituencies. Including these other fuel sources may also pay homage to our own end zone proportions — 62 percent fossil sources cannot be quickly replaced in their entirety by renewables and storage in any short time period.

The Biden campaign's plans were circumspect on where the $2 trillion price tag came from and what funds would pay for it. As of May 2021, the

[20] The panel width is specified in some U.S. materials as "39 inches." I thought that was a curious dimension, until it finally dawned on me that what they are reporting is "1 meter." For other examples of odd American figures that turn out to be exact metric retro-conversions, see BRIAN W. KERNIGHAN, MILLIONS, BILLIONS, ZILLIONS: DEFENDING YOURSELF IN A WORLD OF TOO MANY NUMBERS (2018).

Biden administration favors funding its proposed infrastructure and clean energy program through a combination of tax increases on corporations and individuals rather than adopting a carbon cap-and-trade or carbon tax.[21]

B. International Energy Agency

The IEA refers to the Paris Agreement and its call for net-zero carbon total energy by midcentury. The IEA's principal focus is development of new technology, stating that of the forty-odd new technologies needed for that goal, only six are currently on track to be available on a timely basis.[22]

The IEA discusses two cases: a 2050 "faster" scenario involving "unprecedented" speed of research, development, and deployment, and a 2070 "sustainable" scenario. In either case, the solutions to decarbonization lie in large improvements in energy efficiency (smart buildings, grid enhancements); renewable generation; storage not only in batteries but also in the form of hydrogen, fuel cells, and heat sinks; and addressing the hard-to-electrify parts of the economy with fossil fuel sources coupled with CCS, blue and green hydrogen, advanced nuclear, and bioenergy.

The IEA is to be commended for illustrating the scale of the task. For the steel industry, for example, it cites the pace of two hydrogen-fired steel plants being placed into service every month for thirty years, and ninety BECC facilities every year over those three decades. It also attaches price tags, such as $350 billion annually on research.

The IEA candidly recommends that existing hydroelectric facilities be modernized and that nuclear facilities be extended beyond their current retirement dates. It also says that permitting worldwide cannot follow "business as usual delays"; fast-tracking of vital grid improvements and other energy developments will be needed.

It is hard to get a picture of how practical the 2070 IEA goal is, let alone the 2050 IEA goal. But solid marks should be given for the agency's candor as to the present state of the technology and its illustration of the practical challenges to implementing new energy sources and applications.

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[21] Jim Tankersley & Emily Cochrane, *Biden Wants to Pay for Infrastructure Plan with 15 Years of Corporate Taxes,* N.Y. TIMES (Mar. 30, 2021).

[22] INTERNATIONAL ENERGY AGENCY, SPECIAL REPORT ON CLEAN ENERGY INNOVATION: ACCELERATING TECHNOLOGY PROGRESS FOR A SUSTAINABLE FUTURE (2020).

IV. ACADEMIC GOALS

A. Goldman School, UC Berkeley

The Goldman School of Public Policy in its *2035 Report* articulated a goal of 90 percent United States green electricity by 2035.[23] That ambition reflected a judgment that getting rid of the last 10 percent of fossil fuel sources would be uneconomic or impractical in certain sectors of our economy.

The Goldman report was accompanied by a series of Appendices, the first of which is a literature survey. The authors forthrightly cite the other papers on the subject, and briefly identify salient differences in approach or result. They acknowledge one older paper on its own terms, for example, and then observe that since its publication the cost and performance of renewables have significantly improved.

Another aspect to be admired is that quantities and proportions of sources for the destination end zone are explicitly called out — in this case, as being higher than our own end zone figures in 2020. The charts show 4,100 TWh in generation in 2020 rising to about 4,800 TWh in 2035. The logic is laid out well: the upward forces include population growth, greater electrification, and increased energy needs, while the downward forces include efficiencies and gains in productivity.

The task ahead is not minimized. The Goldman 2035 report, and later reports by the affiliated Energy Innovation group seeking to fill in the final 10 percent with green power,[24] cite the need to double the annual growth rates in the 2020s and to triple such rates in the 2030s — and the aspiration even to accelerate those rates. A budget of $1.7 trillion is forecast as the capital cost of the needed improvements.

One positive outcome of the Goldman 2035 report is that its authors project per-unit costs of electricity generated in the end state would be

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[23] See the awkwardly entitled 2035 THE REPORT (Goldman School of Public Policy, UC Berkeley, June 2020) (herein "Goldman 2035 report").

[24] *See* Amol Phadke et al., *Illustrative Pathways to 100 Percent Zero Carbon Power By 2035 Without Increasing Customer Costs*, Energy Innovation Policy & Technology LLC (Sept. 2020) (supplement to Goldman 2035 report). A goal of 90 percent may not have been sufficiently inspiring as a political clarion call. *Cf.* Fowlie, *supra* note 19 ("[T]here is something seductive about going all the way, so the Berkeley team has recently expanded their nationwide analysis to assess the costs of pushing past 90% to 100%").

only 4.6 cents per kilowatt-hour. Moreover, they report that the total societal costs of power will be greatly reduced when taking into account the environmental and health benefits of green sources. Since current San Francisco electricity rates average over 24 cents per kWh, this would be a large welfare gain if it proves out.

Finally, I admire the report's embrace of the political issues associated with transmission and permitting. There are specific recommendations for federal and state regulators regarding generation, transmission, and usage, and for streamlining the entitlements process. Regardless of what one may make of the decarbonization goals and the present state of the technology needed to achieve them, I credit the Goldman 2035 report for its candor.

B. Atmosphere/Energy Program, Stanford

A set of ongoing studies by researchers affiliated with the civil and environmental engineering department of the Stanford School of Engineering contemplates 80-85 percent green United States total energy production (not just electricity generation) by 2030, and 100 percent green United States total energy production by 2050.[25] Its goals are thus earlier and more comprehensive than those of the Biden plans, the IEA, and the Goldman 2035 report.

The first feature that strikes the reader of these studies is that the destination end zones have *lower* levels of output than the figures reported for our own end zone in 2020. IEA data are used for baseline levels of generation and demand. Thus, for the United States alone, the IEA's U.S. retail electricity figure (4,194 TWh for 2019) is brought down, by the greater efficiencies inherent in electric and hydrogen applications and government incentives, to 3,836 TWh in 2050. Global all-purpose end-use power demand in 2050 is forecast to be 57 percent less in an all-renewables system than in a "business as usual" scenario at that date.[26] This decrease over time

[25] *See, e.g.*, Mark Z. Jacobson et al., *Low-cost solution to the grid reliability problem with 100% penetration of intermittent wind, water, and solar for all purposes*, 112 PROCEEDINGS OF NAT'L ACAD. SCI. (PNAS) 15060 (2015) (herein "Jacobson 2015a"); Mark Z. Jacobson et al., *Impacts of Green New Deal Energy Plans on Grid Stability, Costs, Jobs, Health, and Climate in 143 Countries*, 1 ONE EARTH 449 (2019) (herein "Jacobson 2019").

[26] *See* Mark Z. Jacobson et al., *100% clean and renewable wind, water, and sunlight (WWS) all-sector energy roadmaps for the 50 United States*, 8 ENERGY ENVIRON. SCI. 2093 (2015) (herein "Jacobson 2015b"); Jacobson 2019 at 449-63, Table S2.

is different from the projections of some of the other approaches, a difference that calls out for a clear comparison and for an explanation of the variance.

One wonders if officials in Nigeria, India, and China would agree that 2050 global usage will decrease so substantially. Will disadvantaged residents of Lagos, Kolkata, and Wuhan have access to cooking fuel, air conditioning, or other goods and services under these assumptions? The Indian steel industry desires to increase output from 122 million metric tonnes in 2015 to 300 million tonnes in 2030.[27] Can that growth be accommodated? The reader will want either to confirm that the destination end zone levels are consistent with their development expectations, or instead to modify those expectations.

The papers have detailed descriptions of technologies that need to be deployed at great scale and accelerated pace. The authors estimate that 11.5 percent of electric generation would be dedicated to the production of green hydrogen. Efficient infrastructure and hydrogen- or electric-powered vessels, vehicles, and aircraft would all be implemented, on a timetable extending from the 2020s to the 2040s. The end state features 484,000 onshore and offshore wind turbines (compare to the 60,000 current turbines, and the 60,000 additional turbines called for by 2026 by the Biden plans); over a 48 percent contribution from PV and CSP (compare to 1.8 percent today from solar sources); and 75 million solar "residential systems" (compare to 1.5 million roofs today). The authors are quite candid that these figures would require significant scaling from the starting levels in 2020.[28]

Technologies are said to be available or close to deployment today. To take one example, an all-hydrogen or all-electric airplane fleet, with cryogenic hydrogen for flights over 1500 kilometers (km), is said to be capable of implementation by 2040. The papers cite the existence today of a 1500-km range, 4-seat hydrogen fuel cell plane. Research on hydrogen and electric airplanes has picked up the pace, and even further progress has been made with renewable jet biofuels. But entirely fossil-free aviation skies by 2040 remains an ambitious goal.[29]

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[27] *See National Steel Policy sets capacity target of 300 MT by 2030-31*, DOLLAR BUS. BUREAU (Jan. 12, 2017).

[28] *See* Jacobson 2015a, Jacobson 2015b, and Jacobson 2019.

[29] *See* Jacobson 2015a. For current reports of the state of zero-carbon aircraft, see Alex Dichter et al.,

A positive aspect of these studies is the great attention paid to different types of thermal storage as mass media for deployment of the energy of intermittent solar and wind sources. Technologies that are in use in Denmark are proposed for widespread application in the United States and elsewhere.

The materials expressly state that "The main barriers to getting to 100 percent clean energy are social and political, not technical or economic."[30] But a barrier is no less a barrier because it is political or social. The reader will need to supply his or her own judgments on how those final barriers might be overcome or brought down.

V. OTHER ACADEMIC PERSPECTIVES

A. Center for Global Energy Policy, Columbia

Like the IEA study, the Columbia University general research report takes from the IPCC the goal of deep decarbonization by "midcentury." The Center for Global Energy Policy calls for research, development, and deployment dollars to be allocated and spent on the applications that will move the decarbonization and energy transition needle the furthest. Among those are bringing large decreases to the cost of offshore wind — the steadiest and least intermittent form of wind/solar power — and pursuing CCS, BECC, and advanced nuclear technologies.[31]

A later report issued jointly by this center and the Global CCS Institute advocates for carbon capture from fossil fuels as necessary for reduction of emissions by 50 percent by 2030 and a further 25 percent by 2040, leading to the desired decarbonization by midcentury.[32] CCS is urged both for existing uses — heavy industry, blue hydrogen, and recently built coal-

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How airlines can chart a path to zero-carbon flying, McKinsey & Company (May 13, 2020) (use of renewable liquid biofuels); *Airbus looks to the future with hydrogen planes*, BBC NEWS (Sept. 21, 2020); *"Commercially available" hydrogen plane takes flight*, ENGINEERING & TECH. (Sept. 25, 2020) (20-minute test flight of six-seat Piper).

[30] *Mark Jacobson: Barriers to 100% Clean Energy are Social and Political, Not Technical or Economic*, ECOWATCH (November 20, 2015); Mark Z. Jacobson et al., *100% Clean and Renewable Wind, Water, and Sunlight All-Sector Energy Roadmaps for 139 Countries of the World*, 1 JOULE 108 (2017).

[31] VARUM SIVARAM ET AL., ENERGIZING AMERICA: A ROADMAP TO LAUNCH A NATIONAL ENERGY INNOVATION MISSION (2020).

[32] S. JULIO FRIEDMANN ET AL., NET-ZERO AND GEOSPHERIC RETURN: ACTIONS TODAY FOR 2030 AND BEYOND (Center on Global Energy Policy and Global CCS Institute, Sept. 2020).

and gas-fired power plants — and for new applications such as DAC, BECC, and carbon mineralization. This report calls for CCS hubs to facilitate efficient logistics for gas transportation, and streamlining and incentivizing CCS projects and research and development. It candidly notes that tax and other incentives are needed, as well as legal reforms for ownership of pore space in the United States; better definitions of the necessary monitoring requirements; and project company liability cutoffs and risk transfers. Project-on-project risks for capture, transport, and sequestration must be addressed, the report notes, because CCS proposals typically contemplate several developers playing complementary roles and any one part of the project can be thwarted if other parts fall behind in implementation.

B. MIT

The MIT study focuses on research needed for achieving any deep decarbonization goals. It gathers sources into three groups: *fuel-saving*, being solar, wind, and run-of-river hydroelectric generation; *fast-burst* batteries, thermal storage, and demand-management incentives and systems; and *firm resources,* being reservoir-based hydroelectricity, nuclear, gas with CCS, biogas, and biomass. The researchers ran hundreds of scenarios in hypothetical locations in the northern and southern United States and concluded that decarbonization using firm resources can be up to 62 percent less costly than if firm resources are discarded. They candidly admit that energy costs may be higher in the course of the transition to green fuels, but assert that they can be managed better with the firm sources of supply.[33]

It is difficult to fit the Columbia and MIT research agendas into my spectrum of decarbonization goals. In part that is because pursuit of research cannot guarantee the success or scale of any particular technology. Measuring interim progress along the way is more challenging for research than for actual deployments and retirements, so it is hard to know when one should redouble efforts on a promising approach and when one should cut losses on an unsuccessful one.[34]

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[33] Nestor A. Sepulveda et al., *The Role of Firm Low-Carbon Electricity Resources in Deep Decarbonization of Power Generation,* 2 JOULE 2403 (2018).

[34] After the election, a Princeton University study and *New York Times* article displayed considerable candor about the tasks that lie ahead. *See* ERIC LARSON ET AL., NET-ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS, ANDLINGER CENTER FOR ENERGY & THE ENVIRONMENT, PRINCETON UNIVERSITY (Dec. 15, 2020); Brad Plumer, *To Cut Emissions to Zero, U.S. Needs to Make*

VI. CANDOR IN THE ENERGY TRANSITION

Robert Socolow co-authored the paper that unveiled the famous wedge concept of multiple, incremental contributions to an overall reduction in carbon emissions over time.[35] That paper presented the wedges in a matter-of-fact way, and Socolow felt that little progress was made against the goals in the ensuing years. Later, he mused that the paper should have been more frank:

> I wish we had been more forthcoming with three messages: We should have conceded, prominently, that the news about climate change is unwelcome, that today's climate science is incomplete, and that every "solution" carries risk. I don't know for sure that such candor would have produced a less polarized public discourse. But I bet it would have.[36]

The Green New Deal resolutions introduced in the United States Congress[37] have also attracted a great deal of attention. They articulate broad social goals across many fronts, including jobs, health care, housing, food, high-speed rail, and clean energy. Since they are declarations of objectives, their proponents can take the position that their cost is zero — the costs will appear in the specific initiatives, which may be paid for by sources of funds available or currency issued under new monetary policies, by new taxes, or by both.

The reception of these resolutions illustrates some of the hazards of attempts to supply candor when the supply is coming from partisans. On one wing, co-sponsor Senator Edward Markey (D-Mass.) cited research to the effect that climate change could cause a 10 percent loss in GDP by 2090 if policies like those in the Green New Deal are *not* put into action. On the other wing, conservative think tanks waded in with hypotheticals

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Big Changes in Next 10 Years, N.Y. TIMES (Dec. 15, 2020). In a similar vein, a recent IEA report notes that wind and solar generation entails extraction of metals in processes that raise their own environmental risks. INTERNATIONAL ENERGY AGENCY, THE ROLE OF CRITICAL MINERALS IN CLEAN ENERGY TRANSITIONS (2020).

[35] *See* Stephen Pacala & Robert Socolow, *Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies*, 305 SCI. 968 (2004).

[36] Robert Socolow, *Wedges reaffirmed*, BULL. ATOMIC SCIENTISTS (Sept. 27, 2011).

[37] H.R. Res. 109 and S. Res. 59, 116th Cong. (2019).

of costs of implementing the Green New Deal up to $93 trillion, promptly rounded by politicians to $100 trillion.

It turns out much of that $100 trillion figure is attributed to the top-line costs of the healthcare policies, and even in that arena there may be insufficient accounting for reduced costs occasioned by the policies, such as reduced insurance premiums, greater worker productivity, and fewer major illnesses. Conversely, the think tank that produced the chart from which the 10 percent of GDP figure was drawn objected, saying their more-likely scenario was a 4 percent drop in GDP. They said their task was to describe scenarios, not to predict the future.[38]

Sources of candor thus need some candor themselves. Self-proclaimed fact-checkers should be prepared to have their own facts checked, or to be called on occasions where they are not checking facts of what was actually said, but expressing opinions or supplying other facts that could have been mentioned.

Some defenders of deep decarbonization have dismissed objections that the goals for decarbonization expressed in the policy pronouncements, or implicit in the Green New Deal, are too audacious. I believe they have a point.

Candor does not imply timidity. Time and again, we have accomplished audacious things for which we probably would not have received approvals before the fact:

- As World War II began, the United States was building 3,000 airplanes a year. President Franklin D. Roosevelt called for 185,000 planes to be built. By the end of the war in 1945, over 300,000 planes had been built.
- According to one estimate, the Manhattan Project to develop the atomic bomb cost $2.2 billion from 1942 to 1946 ($22 billion in 2008 dollars). That greatly exceeded the original cost and time estimate of approximately $148 million for 1942 to 1944. Of course, money would have been no object so long as the prospect of a German atomic bomb was live.

[38] Jessica McDonald, *How Much Will the 'Green New Deal' Cost?*, Factcheck.org (Mar. 14, 2019).

- The Interstate Highway System cost approximately $500 billion (in 2016 dollars) to build. The economic impacts of that system and its impact on United States land-use policies have been extensively studied. But President Dwight D. Eisenhower did not broach a multi-billion budget figure in his 1956 inaugural highway system address.
- The original budget for the San Francisco Bay Area Transit District system was $992 million. The original 71-mile system, including the engineering marvel of the Transbay Tube, was completed for approximately $1.7 billion (both figures in nominal dollars of the 1960s). Elsewhere, I have surmised that the $992 million figure is itself an engineering marvel, designed to secure bond approval from a public that would likely have never approved the project for an actual cost that *exceeded* a billion dollars.[39] Of course, now the cost of building a comparable system would be nearly prohibitive, even assuming one could secure the entitlements and pay for the land rights.
- According to NASA, the total cost of the Apollo program for 1960-1973 was $19.4 billion ($97.9 billion in 2008 dollars). When President John F. Kennedy made his speech to Congress in May 1961 setting a goal to land a man on the moon and return him safely "before this decade is out," he was not asked for a critical-path method timetable, or for a spreadsheet outlining the expenditures fiscal year by fiscal year.[40]
- And of course since 2020 we have been in the midst of a pandemic unprecedented in our lifetimes, during which the federal government is spending (or foregoing collection of) trillions of dollars in unemployment and business relief without a necessary expectation of a return on any "investment."

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[39] *See* Robert A. James, *Wally Kaapcke and the Birth of BART*, Pillsbury Winthrop Shaw Pittman Legal Education Program (Apr. 6, 2007). There are many other public-works projects whose actual costs greatly exceeded the estimates used to secure public approvals. The Sydney Opera House was budgeted at US$7 million and cost US$102 million; the Boston Big Dig was budgeted at $2.8 billion and cost upwards of $8 billion (not accounting strictly for constant dollars).

[40] *See* Deborah D. Stine, *The Manhattan Project, the Apollo Program, and Federal Energy Technology R&D Programs: A Comparative Analysis,* Congressional Research Service (June 30, 2009).

At the same time, I believe that some proponent, opponent, or observer should make good-faith inquiries into the pathways by which any audacious goal could be achieved. It is true that 300,000 planes far exceed 3,000 planes. But it is at least understandable how more assembly lines, under wartime conditions and with access to the raw materials and know-how, could produce more and better aircraft over the time allotted. It is a larger step to go from one hydrogen four-seat Cessna to visions of nothing but hydrogen passenger planes crisscrossing the skies.

CONCLUSION

I conclude as I began: *the way in which those in power express what they are doing is part and parcel of their power*. As with constitutional rights, so with climate and energy policy.

Greater candor in the overall process is conducive to intelligent public debate and lasting policy transformations. Aspirational goals need someone to vet the nature and quality of the aspirations. Some aspirations are just that — if we had landed a man on the moon in 1972 or in 1966, it is hard to see who at this date could object to that. But other aspirations have actual costs. British Columbia set a target of five percent of all cars, whenever purchased, to be electric vehicles by 2020. The province was criticized for spending scarce resources building out the charging station infrastructure for such a fleet, when actual sales were proving to be only a fraction of that figure. Acting in reliance on ambitious timetables may untimely divert funds from other vital needs.[41]

It is probably too much to ask of human nature to expect advocates, particularly those in the public sphere, to accompany their own broad goals with full downside disclosures of costs and risks — in the manner of an environmental impact statement or a securities prospectus. (I conducted an Internet search of *"should politicians be candid"* and received very few hits.) If their proposals depend on a think tank or academic study, though, it would be civil and courteous for them to cite that study, so anyone interested could see how that study fits with other studies in the marketplace of ideas.

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[41] For such a criticism, see Markham Hislop, *Beware the clean energy technology 'hype cyclers,'* ENERGIMEDIA (Feb. 1, 2017).

Politicians will continue to speak in aspirational terms. They may do so initially as a matter of bargaining, to get a better result than if they had set their asking level lower. They may do so as a means of moving the "Overton window" to modify public perceptions of the reasonable middle position on a given issue. Or they may simply assert an audacious goal with no intent or resolve to carry it out, or to see it through if it runs into trouble.[42]

Public policy is too important to be left entirely to proponents. Experts can speak to the prospects of a proposal in their respective fields, but the general public is at least entitled to understand what the proposal *is*. There is thus a role for opponents and observers to examine the goals, in the manner suggested in this article, so that all engaged in the discussion can understand the proposals, see the implicit projects behind them, and be prepared to evaluate appraisals of their likelihoods of success.

Candor can enrich debate in a democracy and harden our resolve to accomplish bold initiatives. That frankness may be supplied by opponents, akin to the Anglo-American system of legal advocacy, or by neutral parties, like the investigating judge in civil-law regimes. But it needs to be supplied by *someone*, so that all of us may come to informed opinions on our energy future.

# # #

[42] *See* Maggie Astor, *How the Politically Unthinkable Can Become Mainstream,* N.Y. TIMES (Feb. 26, 2019) (Overton window). *Cf.* ERIC ALTERMAN, LYING IN STATE: WHY PRESIDENTS LIE — AND WHY TRUMP IS WORSE (2020) (lies by U.S. presidents); SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978) (lies by everybody). Perhaps more germane than lying is being more concerned with appearance than reality, especially not really caring whether what one is saying is or is not true. *Compare* HARRY FRANKFURT, ON TRUTH (2006) *with* HARRY FRANKFURT, ON BULLSHIT (2005).

APPELLATE REVIEW VII

OCTOBER TERMS 2016 & 2017 — A DOUBLE HEADER

Joshua Cumby[†]

About ten years ago, the founding editors of the *Journal of Legal Metrics* devised what they called the "parallel review" affirmance rate, an alternative to the "primary review" affirmance rate so often used to quantify (judge?) the federal appellate courts' performance in the Supreme Court.[1] For example, in *Henson v. Santander Consumer USA Inc.*, Associate Justice Neil M. Gorsuch's first (unanimous) opinion, the Court "took the case" to resolve a conflict between the Fourth Circuit (the court below) and the Eleventh Circuit, on the one hand, and the Third and Seventh Circuits, on the other.[2] The primary review affirmance rate counts only the Fourth Circuit's win. But the parallel review affirmance rate counts wins for both the Fourth and Eleventh Circuits (and losses for the Third and Seventh Circuits).

We think this metric is better because it counts both winners and losers, expanding the sample size and mitigating the Supreme Court's "decided propensity" to review lower-court decisions it intends to reverse.[3] The parallel review affirmance rate also compares appellate courts' performance on the same legal questions with the same degree of difficulty — in each case, the players play the same game governed by the same rules — and acknowledges that not all affirmances and reversals are created equal.

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[1] *See* Tom Cummins & Adam Aft, *Appellate Review*, 2 JOURNAL OF LAW (1 J. LEGAL METRICS) 59 (2012) (Appellate Review I).

[2] 137 S. Ct. 1718, 1721 (2017).

[3] *See* Thomas Baker, T*he Eleventh Circuit's First Decade Contribution to the Law of the Nation, 1981-1991*, 19 NOVA. L. REV. 323, 327 (1994) ("The 'decided propensity' of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse.").

THE RULES

In the course of compiling statistics for previous installments in this series,[4] and with a little help from our friends,[5] we've refined our method:

1. Because we limit the term "circuit split" to conflicts between federal appellate courts or "inter-circuit" splits, "intra-circuit" splits and disagreements between lower federal and state courts don't count. For similar reasons, opinions reviewing state supreme or federal district court decisions aren't counted.[6]
2. Because its jurisdiction is statutorily distinct, opinions reviewing decisions by the U.S. Court of Appeals for the Federal Circuit also aren't counted.
3. To be counted, the circuit split must be identified within the four corners of an opinion (including majority opinions, concurrences, and dissents),[7] which must also resolve the circuit split so that we can confidently count winners and losers.[8]

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[4] *See* Appellate Review I; Tom Cummins & Adam Aft, *Appellate Review II: October Term 2011*, 3 JOURNAL OF LAW (2 J. LEGAL METRICS) 37 (2013) (Appellate Review II); Tom Cummins, Adam Aft & Joshua Cumby, *Appellate Review III: October Term 2012 and Counting*, 4 JOURNAL OF LAW (3 J. LEGAL METRICS) 385, 388-92 (2014) (Appellate Review III) (explaining the reasons for the current rules); Joshua Cumby, *Appellate Review IV: October Term 2013 — The Prodigal Sums Return*, 8 JOURNAL OF LAW (5 J. LEGAL METRICS) 65 (2018) (Appellate Review IV); Joshua Cumby, *Appellate Review V: October Term 2014*, 9 JOURNAL OF LAW (6 J. LEGAL METRICS) 54 (2019) (Appellate Review V); Joshua Cumby, *Appellate Review VI: October Term 2015*, 10 JOURNAL OF LAW (7 J. LEGAL METRICS) 31 (2020) (Appellate Review VI).

[5] *See* Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 JOURNAL OF LAW (3 J. LEGAL METRICS) 361 (2014).

[6] *See, e.g.*, Bravo-Fernandez v. United States, 137 S. Ct. 352, 362 (2016) (granting cert "to resolve a conflict among courts," including the First, Second, and Fifth Circuits, the D.C. Court of Appeals, and the Supreme Court of New Jersey on the one hand, and the Supreme Court of Michigan on the other).

[7] Cert petitions violate our four-corners rule in part because they are susceptible to advocacy bias. A circuit split is one of only a few "compelling" reasons for granting review. *See* SUP. CT. R. 10(A). But we can't assume that a split identified in a petition is the reason the Court grants cert, or that the Court's opinion necessarily resolves the split identified.

[8] This means that our sample size is underinclusive. The Court often decides cases that involve circuit splits, but we don't count them when we don't know who all the winners and losers are. *See, e.g.*, Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017) ("We granted certiorari to resolve widespread disagreement over the proper test for implementing [17 U.S.C.] § 101's separate-identification and independent-existence requirements."); Byrd v. United States, 138 S. Ct. 1518, 1526 (2018) ("This Court granted Byrd's petition for a writ of certiorari . . . to

THE RESULTS

A. October Term 2016

Applying our rules to the Supreme Court's work in the October 2016 term, we count 16 circuit splits:

October Term 2016 Circuit Splits		
Cite	**Winners**	**Losers**
State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby, 137 S. Ct. 436, 442 (2016)	2, 4, 5, 9	6
Salman v. United States, 137 S. Ct. 420, 425 (2016)	9	2
Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553, 558 (2017)	2, 3, 5, 7	1, 9, DC
Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 752 (2017)[9]	9	6
Beckles v. United States, 137 S. Ct. 886, 891-92 (2017)	11	3, 6, 7, 10, DC[10]
Manuel v. City of Joliet, Ill., 137 S. Ct. 911, 917 (2017)	1, 2, 3, 4, 5, 6, 9, 10, 11, DC	7
McLane Co. v. E.E.O.C., 137 S. Ct. 1159, 1166, 1167, (2017), *as revised* (Apr. 3, 2017)	3, 4, 6, 7, 8, 10, 11	9
Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1185-86 (2017)	4, 7, 8	9
Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1411 (2017)	4, 7, 8	11
Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1508 (2017)	2, 9	5, 8

address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car.").

[9] Likely more winners and losers here. *See* 137 S. Ct. at 752 n.3 (citing Payne v. Peninsula School Dist., 653 F.3d 863, 874 (9th Cir. 2011) (en banc) (cataloguing different Circuits' understandings of 20 U.S.C. § 1415(*l*), the exhaustion provision at issue in *Fry*)).

[10] See also 137 S. Ct. at 902 n.3 (Sotomayor, J., concurring).

October Term 2016 Circuit Splits		
Cite	**Winners**	**Losers**
Honeycutt v. United States, 137 S. Ct. 1626, 1631 (2017)	DC	2, 3, 4, 6, 8
Kokesh v. S.E.C., 137 S. Ct. 1635, 1641 (2017)	11	10, DC
Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017)	3[11]	2, 9
Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1721 (2017)	4, 11	3, 7
Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017)	2, 11	1, 6
Maslenjak v. United States, 137 S. Ct. 1918, 1924 (2017)	1, 4, 7, 9	6

This term's winner is the Fourth Circuit with seven wins, one loss, and an 88% parallel review affirmance rate. The Eleventh Circuit is a close second with an 86% affirmance rate, and the Fifth Circuit takes third with a 75% affirmance rate.

October Term 2016 Parallel Review Affirmance Rates				
Circuit	**Wins**	**Losses**	**AB**	**Rate**
4th	7	1	8	88%
11th	6	1	7	86%
5th	3	1	4	75%
2nd	5	3	8	63%
7th	5	3	8	63%
8th	3	2	5	60%

[11] This was almost a win for the Fourth Circuit, too. *See* 137 S. Ct. at 1712 (granting cert to decide whether "federal courts of appeals have jurisdiction under [28 U.S.C.] § 1291 and Article III of the Constitution to review an order denying class certification . . . after the named plaintiffs have voluntarily dismissed their claims with prejudice?"; holding "that § 1291 does not countenance jurisdiction by these means"; but declining to "reach the constitutional question"), n.8 (citing Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88, 100 (4th 2011), which (according to the Court) found that there is "no jurisdiction under Article III").

October Term 2016 Parallel Review Affirmance Rates				
Circuit	**Wins**	**Losses**	**AB**	**Rate**
9th	6	4	10	60%
3rd	4	3	7	57%
1st	2	2	4	50%
10th	2	2	4	50%
DC	2	3	5	40%
6th	2	6	8	25%

B. October Term 2017

We count 20 circuit splits during the Court's October 2017 Term:

October Term 2017 Circuit Splits		
Cite	**Winners**	**Losers**
Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 772, 776 (2018)	5	2, 9
Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 821 (2018)	7	2, 9, DC
Murphy v. Smith, 138 S. Ct. 784, 792 (2018) (Sotomayor, J., dissenting)	7	3, 8
Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883, 892 (2018)	7, 11	2, 3, 6, 8, 10
Marinello v. United States, 138 S. Ct. 1101, 1105 (2018)	6	2
Hall v. Hall, 138 S. Ct. 1118, 1127 (2018)	2, 4, 6, 8, 9	3
Wilson v. Sellers, 138 S. Ct. 1188, 1193-94 (2018)	1, 3, 4, 5, 6, 7, 8, 9	11
Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018)	6, 7, 9	5
Dahda v. United States, 138 S. Ct. 1491, 1496 (2018)	10, 11	DC
Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018)	5	6, 7, 9

October Term 2017 Circuit Splits		
Cite	**Winners**	**Losers**
Lagos v. United States, 138 S. Ct. 1684, 1687 (2018)	DC	2, 5, 6, 7, 8, 9
Hughes v. United States, 138 S. Ct. 1765, 1771-72 (2018)	9, DC	1, 3, 4, 5, 6, 7, 8, 10, 11
Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018)	4, 11	5, 10
China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1805-06 (2018)	1, 2, 5, 11	3, 6, 9
Sveen v. Melin, 138 S. Ct. 1815, 1821 (2018)	9, 10	8
Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1872 (2018)	7, 11, DC	2
Rosales-Mireles v. United States, 138 S. Ct. 1897, 1906 (2018)	1, 3, 7, 9, 10	5
Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018)	3	1, 2, 4, 6, 7, 9, 11
Lucia v. S.E.C., 138 S. Ct. 2044, 2050 (2018)	10	DC
Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)	8	7

This term's first-place winner is the Eleventh Circuit (October Term 2016's second-place winner) with five wins, three losses, and a 63% parallel review affirmance rate. The Fourth Circuit (October Term 2016's first-place winner) ties for second place with the First Circuit, and the Seventh Circuit takes third with a 58% affirmance rate.

October Term 2017 Parallel Review Affirmance Rates				
Circuit	**Wins**	**Losses**	**AB**	**Rate**
11th	5	3	8	63%
1st	3	2	5	60%
4th	3	2	5	60%
7th	7	5	12	58%

October Term 2017 Parallel Review Affirmance Rates				
Circuit	**Wins**	**Losses**	**AB**	**Rate**
10th	4	3	7	57%
9th	6	6	12	50%
DC	3	3	6	50%
5th	4	5	9	44%
6th	4	6	10	40%
3rd	3	5	8	38%
8th	3	5	8	38%
2nd	2	7	9	22%

C. Historical Parallel Review Affirmance Rates[12]

Historic Parallel Review Affirmance Rates by Place[13]							
OT2010		**OT2011**		**OT2012**		**OT2013**	
Cir.	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**
10th	100%	4th	78%	10th	88%	4th	86%
1st	86%	11th	56%	1st	80%	10th	83%
5th	79%	DC	50%	7th	67%	1st	83%
3rd	78%	6th	50%	2nd	64%	6th	80%
4th	67%	9th	44%	5th	60%	8th	75%
7th	62%	2nd	40%	4th	57%	7th	75%
2nd	60%	3rd	40%	8th	40%	2nd	67%
9th	60%	10th	38%	11th	40%	3rd	57%

[12] The presentation of historical data is a relatively new feature of the Appellate Review and one that we hope will prove more useful as we collect even more data. But it comes with a couple of caveats. First, we altered our method in Appellate Review III, so while we continue to compare apples to apples, the way we pick them has changed. *See* Appellate Review III at 388-92. Second, our sample size is still very small, as it (so far) includes only eight terms.

[13] *See* Appellate Review I at 69; Appellate Review II at 40; Appellate Review III at 394; Appellate Review IV at 68; Appellate Review V at 58-59; Appellate Review VI at 36.

Historic Parallel Review Affirmance Rates by Place[13]							
OT2010		**OT2011**		**OT2012**		**OT2013**	
Cir.	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**
6th	50%	7th	36%	DC	40%	DC	50%
8th	50%	1st	33%	3rd	36%	11th	50%
11th	45%	5th	33%	6th	33%	9th	27%
DC	33%	8th	25%	9th	18%	5th	0%
OT2014		**OT2015**		**OT2016**		**OT2017**	
Cir.	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**
2nd	100%	11th	100%	4th	88%	11th	63%
3rd	100%	DC	80%	11th	86%	1st	60%
4th	83%	9th	75%	5th	75%	4th	60%
7th	83%	5th	71%	2nd	63%	7th	58%
10th	75%	2nd	63%	7th	63%	10th	57%
11th	75%	8th	63%	8th	60%	9th	50%
1st	67%	4th	56%	9th	60%	DC	50%
9th	67%	1st	50%	3rd	57%	5th	44%
6th	50%	6th	50%	1st	50%	6th	40%
8th	50%	7th	50%	10th	50%	3rd	38%
5th	0%	10th	43%	DC	40%	8th	38%
DC	0%	3rd	0%	6th	25%	2nd	22%

Historic Parallel Review Affirmance Rates by Circuit[14]				
Cir.	**OT2010**	**OT2011**	**OT2012**	**OT2013**
1st	86%	33%	80%	83%
2nd	60%	40%	64%	67%
3rd	78%	40%	36%	57%
4th	67%	78%	57%	86%
5th	79%	33%	60%	0%
6th	50%	50%	33%	80%
7th	62%	36%	67%	75%
8th	50%	25%	40%	75%
9th	60%	44%	18%	27%
10th	100%	38%	88%	83%
11th	45%	56%	40%	50%
DC	33%	50%	40%	50%
Cir.	**OT2014**	**OT2015**	**OT2016**	**OT2017**
1st	67%	50%	50%	60%
2nd	100%	63%	63%	22%
3rd	100%	0%	57%	38%
4th	83%	56%	88%	60%
5th	0%	71%	75%	44%
6th	50%	50%	25%	40%
7th	83%	50%	63%	58%
8th	50%	63%	60%	38%
9th	67%	75%	60%	50%
10th	75%	43%	50%	57%
11th	75%	100%	86%	63%
DC	0%	80%	40%	50%

[14] *Id.*

CONCLUSION

We will continue our counting in the next issue, and we also hope to offer some thoughts as we look back on the first decade of the Appellate Review. Stay tuned.

# # #

A MERE RESEARCH PROJECT ABOUT THE NOT MERELY INCONSEQUENTIAL "MERE"

Nazo Demirdjian[†]

INTRODUCTION

There are a few cases I remember vividly from my Contracts course because they so clearly demonstrated significant concepts: *Lucy v. Zehmer*; *Hawkins v. McGee*; *Carlill v. Carbolic Smoke Ball Co.*[1] In the last case, the English Court of Appeals held that the Carbolic Smoke Ball's offer to pay £100 to anyone who used its device and still caught influenza was not "mere puff" and thus created a binding contract.[2] Importantly, the opinion put the word "mere" before the word "puff."[3] And although the case demonstrates the legal concept of puffery, it doesn't discuss the just as vital — if not more vital — word "mere." This research paper will shed light on the word "mere," demonstrating how significant and predictive it is for the field of contracts, perhaps even more so than the word "puff." Lord Justice Lindley's decision includes two significant terms, but only one has entered contract-law lore. Over a century later, *Carlill*'s use of the word "mere" takes a backseat. No longer.

"Mere" is a menacing word, dreaded by a party because its appearance spells disaster; it means that party has lost.[4] The Webster's Third English Dictionary, when legally defining "mere," contextualizes it under "mere

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[†] Juris Doctor 2023, William S. Boyd School of Law, University of Nevada-Las Vegas. This paper would not have been possible without the help, unwavering support, and invaluable direction of Professor Nancy Rapoport.

[1] *See generally* Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954); Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (N.H. 1929); Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (Court of Appeal, 1892).

[2] Carlill, 1 Q.B. at 261-62.

[3] *Id.*

[4] I first became aware of this link when Professor Nancy Rapoport highlighted it in my Contracts course.

motion" or "mere will."[5] There is no independent legal definition. Likewise, Black's Law Dictionary — one of the most famous legal dictionaries with over 2,000 pages and published since 1891 — does not even define the word.[6] So how does a word with no legal definition separate from the lay definition have so much power in the legal profession? Because "mere" signals a looming loss.

The ultimate goal of this project is to find out exactly how often a connection between "mere" and a loss exists. Although I anticipated that the use of the word "mere" would not always spell out a losing or winning argument, my project set out to find an exact measurement of when "mere" is indeed as menacing as it has seemed in many contracts cases. "Mere," when used in reference to a party's argument, means that a party has failed to provide the required threshold to get the relief sought. "Mere" can be the single most dangerous word in an opinion. I am not being merely dramatic. The data cannot be a mere aberration.

HYPOTHESIS

To make matters more interesting, however, I used the negative hypothesis. My hypothesis set out to find no connection and no importance associated with "mere."

> *Hypothesis: The use of the word "mere" to describe a side's main argument in a majority's base opinion in matters of contract law does not equate to that side losing the case; "mere" is inconsequential.*

For the purposes of this project and paper, "mere" included all derivatives, such as "merely."

METHODOLOGY

This paper presents a sample — it is meant to be illustrative, not exhaustive or comprehensive. I aimed to disprove the hypothesis not by sampling every single state, but rather by sampling every federal circuit. In my study, every federal circuit is represented by at least one state, and larger circuits are represented by two states. The First through Seventh,

[5] *Mere*, Merriam-Webster, 1413 (3rd ed. 2019).
[6] *See* BLACK'S LAW DICTIONARY 1183 (11th ed. 2019).

Eleventh, and the District of Columbia circuits fall into the smaller category and are represented by one state. The Eighth, Ninth, and Tenth circuits fall into the larger circuit category and are represented by two states. Within each Circuit Court, I chose a state considering both population and political ideology, though no single criteria was a deciding factor. For example, I did not choose California, which is both the most populous state in the Union and in the Ninth Circuit. Rather, I chose Nevada as part of the sample, a state whose politics align closely to that of California.[7] Additionally, Nevada as a smaller state, guarantees that findings are not skewed as a result of one state's cases. I chose Montana as a counter to Nevada in the Ninth Circuit because it is both a smaller and a more conservative state.[8] Of the ten most-populous states, five are represented (Texas, New York, Pennsylvania, Illinois, and Michigan).[9] And of the ten least-populous jurisdictions, five are represented (Wyoming, the District of Columbia, South Dakota, Rhode Island, and Montana).[10] I chose these states to be sure the correlation of "mere" with a specific result was not because of a sample size dominated by any one populous state.

Political Ideology

Political ideology of the states in the sample likewise falls within a wide range. Of the 14 chosen states and D.C., 5 states had voted for the Democratic presidential candidate in all elections in the 21st century; 6 states had voted for the Republican presidential candidate in all elections; and 5 states had voted for both parties.[11]

Of the 12 circuits, 4 circuits (the First, Fourth, Ninth, and D.C.) had a majority of active judges appointed by Democrat presidents.[12] In contrast,

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[7] Michael Schaus, *Free Market Watch: What's So Wrong With Turning Nevada into 'California East'?*, NEVADA BUSINESS (Apr. 1, 2019), https://www.nevadabusiness.com/2019/04/whats-wrong-with-turning-nevada-into-california-east/.

[8] *U.S. States — Ranked by Population 2021*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/states (last visited Oct. 27, 2021); *Political ideology by State*, PEW RESEARCH INSTITUTE, www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state/ (last visited Oct. 27, 2021).

[9] *Id.*

[10] *Id.*

[11] *Historical Presidential Election Information by State*, 270TOWIN, https://www.270towin.com/states/ (last visited Oct. 27, 2021).

[12] *Judges*, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, https://www.ca1.uscourts.

seven of the circuits (the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh) had a majority of active judges appointed by Republican presidents.[13] One circuit (Tenth) had an equal number of Democrat- and Republican-appointed judges.[14] By state, five states had a majority of Democrat-appointed judges and eight had a majority of Republican-appointed Judges. Two states — New Mexico and Wyoming — had an equally divided circuit. Only the political affiliations of active judges were the affiliations considered, because senior judges are not on the bench full-time. The 15 jurisdictions chosen and their corresponding circuits were as follows:

Circuits	**States**
First Circuit	Rhode Island
Second Circuit	New York
Third Circuit	Pennsylvania
Fourth Circuit	Virginia
Fifth Circuit	Texas
Sixth Circuit	Michigan
Seventh Circuit	Illinois

gov/judges (last visited Oct. 27, 2021); *Judges of the Court*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, https://www.ca4.uscourts.gov/judges (last visited Oct. 27, 2021); *The Judges of this Court in Order of Seniority*, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/judicial-council/judges-seniority-list/ (last visited Oct. 27, 2021); *Judges*, UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT, https://www.cadc.uscourts.gov/internet/home.nsf/content/judges (last visited Oct. 27, 2021).

[13] *Judges*, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, https://www.ca2.uscourts.gov/judges/judges.html (last visited Oct. 27, 2021); *Judges' Biographies*, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, https://www.ca3.uscourts.gov/judges-biographies (last visited Oct. 27, 2021); *5th Circuit Judges*, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, https://www.ca5.uscourts.gov/about-the-court/fifth-circuit-judges (last visited Oct. 27, 2021); *Judges*, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, https://www.ca6.uscourts.gov/judges (last visited Oct. 27, 2021); *Judges' Biographies*, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, https://www.ca7.uscourts.gov/judges-biographies/biographies7.htm (last visited Oct. 27, 2021); *Active and Senior Judges*, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, https://www.ca8.uscourts.gov/active-and-senior-judges (last visited Oct. 27, 2021); *Judges*, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, https://www.ca11.uscourts.gov/judges (last visited Oct. 27, 2021).

[14] *Judges of the Tenth Circuit Court of Appeals*, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, https://www.ca10.uscourts.gov/judges (last visited Oct. 27, 2021).

Circuits	**States**
Eight Circuit	South Dakota and Arkansas
Ninth Circuit	Nevada and Montana
Tenth Circuit	New Mexico and Wyoming
Eleventh Circuit	Alabama
D.C. Circuit	District of Columbia

I used Westlaw as my database of cases. After narrowing cases to those with the word "mere," "contract," and the name of the state, I further narrowed each case by (1) making sure all cases dealt with actual contracts — whether government, bankruptcy, employment, etc. and (2) eliminating cases in which "mere" was used in a quotation, as a footnote, in a standard of review, as an opposing claim or where "mere" was used only in a concurrence or dissent.[15] I put the remaining cases into three categories: (1) "mere" correlating with a losing argument; (2) "mere" appearing in a neutral way; and (3) "mere" correlating with a winning argument.[16] Finally, considering the breadth of the project, I considered only five years in creating this sample. More specifically, I considered cases from August 2016 to August 2021.

Population

I discovered that, for the purposes of my project, population turned out to be an important factor because I wanted to have a wide range of populations to really disprove the hypothesis. I did not want the higher population to be the reason that a circuit or state disproved the hypothesis. I also wanted states in different population ranges to be represented. I chose states that had varying populations and a diverse political make up.

[15] For example, Justice Wise's use of mere in his dissent is not considered. *See* Houston Pro. Fire Fighters Ass'n, IADD Loc. 341 v. Houston Police Officers' Union, 651 S.W.3d 41, 59 (Tex. App. 2021). Neither is the majority's use of mere when quoting another case (quoting City of Richardson v. Responsible Dog Owners of Tex., 794 S.W.2d 17, 19 (Tex. 1990).

[16] "Mere" correlating to a losing argument means that that the opinion's use of the word "mere" with a party's argument or assertion correlating to that party's loss. *See generally* Robert B. James, DDS, Inc. v. Elkins, 553 S.W.3d 596 (2018) for "mere" correlating with a losing argument ; Great Divide Insurance Company v. Fortenberry, 665 S.W.3d 627 (2021) for "mere" correlating with a neutral argument.

In this project, I did not think any one element was more important than having a diverse sample both in terms of population and political leaning.

Contract Type

Where Westlaw proved to be the most effective in categorizing cases was its "practice area" section. Because I had used the "advanced search" function to narrow down cases to those that included the word "contract" and "mere," I was able to more easily and readily verify that the cases involved contract law. I rejected cases not dealing primarily with contracts because the hypothesis aimed to find a connection between "mere" and contract arguments.

The "practice area" function had a list of areas: criminal, civil, employment & labor, commercial, corporate governance, real property, antitrust, health practitioner, taxation, securities, finance & banking, intellectual property, family law, insurance, construction, government contracts, estate planning, immigration, pension & retirement planning, admiralty & maritime, bankruptcy, environment, products liability. I made sure that all of the practice areas — with the exception of Criminal — were included in my first search. The "practice area" filter not only allowed me to be sure that I cast a wide net for my project, but also helped me to know exactly what type of areas were included in the study.

THE CIRCUIT FINDINGS

First Circuit — Rhode Island

I chose Rhode Island as the only state to represent the First Circuit. Rhode Island had 21 cases after the original search. An original search of the key words turned up over 200 cases. After filtering them with the criteria above, 21 cases remained. Of the 21 cases, 14 used the word "mere" in one of the ways that the project does not permit — especially in explaining the burden standards.[17] Of the remaining seven cases, five (71.4%) had a positive correlation of "mere" with a losing argument. Two cases (28.6%) had no correlation. Zero cases had a correlation of "mere"

[17] *E.g.*, Henry v. Media General Operations, Inc. 254 A.3d 822 (R.I. 2021) (using the word "mere" to indicate that accusations and certain animosity towards the Police Department by the media defendants was *not* enough evidence to find for the Police Captain).

with a winning argument. Rhode Island — and thus the First Circuit — disproved the hypothesis.

Second Circuit — New York

I chose New York as the only state to represent the Second Circuit. An original search of the key words turned up over 2,000 cases. After filtering them with the criteria above, 78 cases remained. Of the 78 cases, 28 used the word "mere" in one of the ways that the project does not permit. Of the remaining 50 cases, 36 (72%) had a positive correlation of "mere" with a losing argument. Fourteen cases (28%) had no correlation. Zero cases had a correlation of "mere" with a winning argument. New York — and thus the Second Circuit — disproved the hypothesis.

Third Circuit — Pennsylvania

I chose Pennsylvania as the only state to represent the Third Circuit. An original search of the key words turned up over 1,000 cases. After filtering them with the criteria above, 100 cases remained. Of the 100 cases, 49 — nearly half — used the word "mere" in one of the ways that the project does not permit. Of the remaining 51 cases, 38 (74.5%) had a positive correlation of "mere" with a losing argument. Thirteen cases (25.5%) had no correlation. Zero cases had a correlation of "mere" with a winning argument. Pennsylvania — and thus the Third Circuit — disproved the hypothesis.

Fourth Circuit — Virginia

I chose Virginia as the only state to represent the Fourth Circuit. An original search of the key words turned up over 1,000 cases. After filtering them with the criteria above, 53 cases remained. Of the 53 cases, 22 used the word "mere" in one of the ways that the project does not permit. Of the remaining 31 cases, 21 (67.7%) had a positive correlation of "mere" with a losing argument. Ten cases (32.3%) had no correlation. Zero cases had a correlation of "mere" with a winning argument. Virginia — and thus the Fourth Circuit — disproved the hypothesis.

Fifth Circuit — Texas

I chose Texas as the only state to represent the Fifth Circuit. An original search of the key words turned up over 3,000 cases. After filtering

them with the criteria above, 152 cases remained. Of the 152 cases, 47 used the word "mere" in one of the ways that the project does not permit. Of the remaining 105 cases, 75 (71.4%) had a positive correlation of "mere" with a losing argument. Thirty cases (28.6%) had no correlation. Zero cases had a correlation of "mere" with a winning argument. Texas — and thus the Fifth Circuit — disproved the hypothesis.

Sixth Circuit — Michigan

I chose Michigan as the only state to represent the Sixth Circuit. An original search of the key words turned up over 1,000 cases. After filtering them with the criteria above, 104 cases remained. Of the 104 cases, 55 used the word "mere" in one of the ways that the project does not permit. Of the remaining 46 cases, 38 (82.6%) had a positive correlation of "mere" with a losing argument. Eight cases (17.4%) had no correlation. Zero cases had a correlation of "mere" with a winning argument. Michigan — and thus the Sixth Circuit — disproved the hypothesis.

Seventh Circuit — Illinois

I chose Illinois as the only state to represent the Seventh Circuit. An original search of the key words turned up over 1,000 cases. After filtering them with the criteria above, 152 cases remained. Of the 152 cases, 66 used the word "mere" in one of the ways that the project does not permit. Of the remaining 86 cases, 61 (70.9%) had a positive correlation of "mere" with a losing argument. Twenty-five cases (29.1%) had no correlation. Zero cases had a correlation of "mere" with a winning argument. Illinois — and thus the Seventh Circuit — disproved the hypothesis.

Eighth Circuit — Arkansas and South Dakota

I chose Arkansas as the first states to represent the Eighth Circuit. An original search of the key words turned up over 200 cases. After filtering them with the criteria set up above, 78 cases remained. Of the 78 cases, 50 used the word "mere" in one of the ways that the project does not permit. Of the remaining 28 cases, 18 cases (64%) had a positive correlation "mere" with a losing argument. Ten cases (35.7%) had no correlation. Zero cases had a correlation of "mere" with a winning argument.

I chose South Dakota as the second states to represent the Eighth Circuit. An original search of the key words turned up over 100 cases. After filtering them with the criteria set up above, 15 cases remained. Of the 15 cases, seven used the word "mere" in one of the ways that the project does not permit. Of the remaining eight cases, six cases (75%) had a positive correlation of the word "mere" with a losing argument. Two cases (25%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument.

Thus, for the Eighth Circuit, out of 36 cases that passed the criteria to be included in the project, 24 cases (66.7%) had a positive correlation of the word "mere" with a losing argument. Twelve cases (33.3%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument. Both Arkansas and South Dakota — and thus the Eighth Circuit — disproved the hypothesis.

Ninth Circuit — Nevada and Montana

I chose Nevada as the first states to represent the Ninth Circuit. An original search of the key words turned up over 300 cases. After filtering them with the criteria set up above, 37 cases remained. Of the 37 cases, 21 used the word "mere" in one of the ways that the project does not permit. Of the remaining 16 cases, 12 cases (75%) had a positive correlation of the word "mere" with a losing argument. Four cases (25%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument.

I chose Montana as the second state to represent the Ninth Circuit. An original search of the key words turned up over 300 cases. After filtering them with the criteria set up above, 35 cases remained. Of the 35 cases, 17 used the word "mere" in one of the ways that the project does not permit. Of the 18 remaining cases, 14 cases (77.8%) had a positive correlation of the word "mere" with a losing argument. Four cases (22.2%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument.

Thus, for the Ninth Circuit, out of 34 cases that passed the criteria to be included in the project, 26 cases (76.5%) had a positive correlation of the word "mere" with a losing argument. Eight cases (23.5%) had no correlation between the word "mere" and the outcome of an argument. Zero

cases had a correlation of "mere" with a winning argument. Both Nevada and Montana — and thus the Ninth Circuit — disproved the hypothesis.

Tenth Circuit — New Mexico and Wyoming

I chose New Mexico as the first state to represent the Tenth Circuit. An original search of the key words turned up over 500 cases. After filtering them with the criteria set up above, 43 cases remained. Of the 43 cases, 18 used the word "mere" in one of the ways that the project does not permit. Of the remaining 25 cases, 16 cases (64%) had a positive correlation of the word "mere" with a losing argument. Nine cases (36%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument.

I chose Wyoming as the second state to represent the Tenth Circuit. An original search of the key words turned up over 200 cases. After filtering them with the criteria set up above, 15 cases remained. Of the 15 cases, 9 used the word "mere" in one of the ways that the project does not permit. Of the remaining five cases, three cases (60%) had a positive correlation of the word "mere" with a losing argument. two cases (40%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument.

Thus, for the Tenth Circuit, out of 30 cases that passed the criteria to be included in the project, 19 cases (63.3%) had a positive correlation of the word "mere" with a losing argument. Eleven cases (36.7%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument. Both New Mexico and Wyoming — and thus the Tenth Circuit — disproved the hypothesis.

Eleventh Circuit — Alabama

I chose Alabama as the only state to represent the Eleventh Circuit. An original search of the key words turned up over 1,000 cases. After filtering them with the criteria set up above, 45 cases remained. Of the 45 cases, 27 used the word "mere" in one of the ways that the project does not permit. Of the remaining 17 cases, 13 cases (76.5%) had a positive correlation of the word "mere" with a losing argument. Four cases (23.5%) had no correlation between the word "mere" and the outcome of an argument.

Zero cases had a correlation of "mere" with a winning argument. Alabama — and thus the Eleventh Circuit — disproved the hypothesis.

D.C. Circuit — D.C.

D.C. is the only jurisdiction covered in the D.C. Circuit. An original search of the key words turned up over 1,500 cases. After filtering them with the criteria set up above, 92 cases remained. Of the 92 cases, 40 used the word "mere" in one of ways the project does not permit. Of the remaining 51 cases, 37 cases (72.5%) had a positive correlation of the word "mere" with a losing argument. Fourteen cases (27.5%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument. Despite these idiosyncrasies, D.C. — and thus the D.C. Circuit — disproved the hypothesis.

CIRCUIT AND STATE CONCLUSION

After eliminating all cases that failed to meet the criteria set above, 559 cases remained. Four hundred seven cases (72.8%) had a positive correlation of the word "mere" with a losing argument. One hundred and fifty-two cases (27.2%) had no correlation between the word "mere" and the outcome of an argument. Zero cases had a correlation of "mere" with a winning argument. The Sixth Circuit most strongly disproved the hypothesis and the Tenth Circuit least strongly disproved the hypothesis. Thus, the hypothesis proved inaccurate overall and by each Circuit. In terms of each state, Michigan disproved the hypothesis the strongest and Wyoming the weakest.

My hypothesis was broadly tailored on purpose. I wanted to answer a simple yes-no dichotomy for the project: Did the word "mere" correlate to a losing argument? The answer to the question is "yes." The project revealed the answer to be "yes" 72.8 percent of the time. In fact, both the weakest and strongest correlations significantly disproved the negative hypothesis: from 63.3 percent at the lowest end to 82.6 at the highest end in terms of circuits and 60 percent at the lowest end and 82.6 percent at the highest end in terms of states.[18]

[18] The 60 percent state was Wyoming, a result that might have had to do with a very low number of cases left to categorize.

CIRCUIT COMPARISON

Political Leanings

Regardless of political leanings of either the state or the circuit, the word "mere" correlated with the losing argument. The hypothesis was false whether the circuit had more Democrat- or Republican-appointed judges. The Republican-appointed circuits outnumbered the Democrat-appointed circuits almost two-to-one by the end of the project, but that factor could not be changed unless I eliminated certain circuits to have an equal number, which would have eliminated the comprehensive goal of the project. Of course, during the five-year period that I reviewed, the composition of judges had shifted with appointments made by Presidents Obama, Trump, and Biden during the five-year period. From my review of the data, that shift did not seem to be a major issue because the political leaning of circuits did not seem to matter to the hypothesis: regardless of party majority, "mere" correlated to a losing argument.

The only circuit that had an equal split during the period of the project was the Tenth Circuit. Because I cut off my search in August 2021, President Biden's nomination, and the Senate confirmation, of Judge Veronica Rossman in late September was excluded, which would have added the Tenth Circuit as a majority Democrat-appointed circuit.[19] I might add that it was the Tenth Circuit that supported the hypothesis the least. Whether or not there was a connection in the low support and equal number of Democrat- and Republican-appointed judges was beyond the scope of the project.

On average, circuits with a majority-Democrat-appointed judges disproved the hypothesis 72 percent of the time and majority-Republican-appointed judges disproved the hypothesis 72.27 percent of the time. A mere 0.27 percent.

Future Studies

A future study could see how many times the word "mere" is being used vis-à-vis the state's population. Another study could consider every single state or choose only the most populous state in each circuit. Though

[19] Nate Raymond, *U.S. Senate Confirms Biden Judicial Pick Rossman to 10th Circuit,* REUTERS (Sept. 20, 2021, 7:40 AM), https://www.reuters.com/legal/litigation/us-senate-confirms-biden-judicial-pick-rossman-10th-circuit-2021-09-20/.

I chose to focus on all contract types, a future project could check the frequency of the word "mere" based on each type of contract.

A future project could likewise look at the specific judges based on the party of the President who appointed them, or on the shift of judges (and perhaps majorities) in the given time period — or a future study could look at state judges running in partisan elections. A future project could also see if a circuit's shift to a more Democrat-appointed/liberal composition or to a more Republican-appointed/conservative one could affect the hypothesis, even if by a minuscule difference. Finally, a future project could consider what part of the political party a president comes from. For example, although both Presidents Obama and Biden are Democrats, President Biden is more left-leaning in many regards because of the shift in the Democratic party during the 2016 and 2020 elections.

CONCLUSION

I was able to disprove my negative hypothesis: The use of the word "mere" in a majority's base opinion in matters of contract law equated to the side's argument being qualified by "mere" losing the case. The hypothesis was clearly disproved for all 15 states, across 12 circuits, and all types of contracts. In sum, it proved false 72.8 percent of the time regardless of states' or circuits' political leaning.

The reason that this project is important is to weed out confusing opinions, unclear language, and complex viewpoints to find out the clear opinion of the court. Where the word "mere" is present, the side's argument has lost. As I admitted before, the project could improve in multiple ways or by taking various paths. The project clearly showed that "mere" equals a loss. That all cannot be a mere coincidence.

My Contract course taught me the three components of a contract; it taught me what puffery meant; it taught me Article 2 of the UCC and many of its complicated rules; and my professor made sure to teach the importance of the word "mere."[20] "Mere," however, is not typically part of the Contracts course. This project clearly showed that law professors should emphasize "mere" more.

Just as I begun, I too will end. My title proved correct; there is nothing inconsequential about the word "mere."

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[20] *See* note 7, *supra*.

APPENDIX

First Circuit — Rhode Island

Mere = Loser

1. Henry v. Media General Operations, Inc. 254 A.3d 822 (R.I. 2021).
2. IDC Clambakes, Inc. v. Trustee of Goats Island Realty Trust, 246 A.3d 927 (R.I. 2021).
3. Cranston Police Retirees Action Committee v. City of Cranston by and through Storm, 208 A.3d 557 (R.I. 2019).
4. ABC Building Corporation v. Ropolo Family, LLC, 179 A.3d 701 (R.I. 2018).
5. Cote v. Aiello, 148 A.3d 537 (R.I. 2016).

Mere = Neutral

1. Hexagon Holdings, Inc. v. Carlisle Syntec Incorporated, 199 A.3d 1034 (R.I. 2019).
2. Hudson v. GEICO Insurance Agency, Inc. 161 A.3d 1150 (R.I. 2017).

Second Circuit — New York

Mere = Loser

1. County Waste and Recycling Service, Inc. v. Twin Bridges Waste and Recycling, Inc., 150 N.Y.S. 3d 893 (N.Y. Sup. Ct. 2021).
2. Winter v. Metropolitan Life Insurance Company, 146 N.Y.S.3d 770 (N.Y. Sup. Ct. 2021).
3. Reidman Acquisition, LLC v. Town Board of Town of Mendon, 194 A.D.3d 1444, 149 N.Y.S.3d 417 (2021).
4. MLB Construction Services, LLC v. Dormitory Authority, 176 N.E.3d 305 (2021).
5. Long Island Medical & Gastroenterology Associates, P.C. v. Mocha Realty Associates, LLC., 143 N.Y.S.3d 56 (2021).
6. Universal Engineering Services, P.C. v. Industrial Development Agency of Mount Vernon, 130 N.Y.S.3d 647 (N.Y. Sup.Ct. 2020).
7. Pirs Capital, LLC v. D & M Truck, Tire & Trailer Repair, Inc., 129 N.Y.S.3d 734 (N.Y. Sup. Ct. 2020).
8. CREF 546 West 44th Street, LLC v. Hudson Meridian Construction Group, LLC., 128 N.Y.S.3d 829 (N.Y. Sup. Ct. 2020).
9. Wind POint Partners, VII-A, L.P. v. Hoya Corporation, 128 N.Y.S.3d 186 (2020).
10. Westchester Fire Insurance Co. v. Schorsch, 129 N.Y.S. 3d 67 (2020).
11. Framan Mechanical, Inc. v. State University Construction Fund, 123 N.Y.S.3d 256 (2020).
12. Digesare Mechanical, Inc. v. U.W. Marx, 176 A.D.3d 1449 (2019).

13. People Care Incorporated v. City of New York Human Resources Administration, 112 N.Y.S.3d 306 (2019).
14. Thomas v. Karen's Body Beautiful, LLC., 91 N.Y.S.3d 86 (2019).
15. Bratge v. Simons, 102 N.Y.S.3d 818 (2019).
16. Sandals v. Magna Legal Services, LLC., 90 N.Y.S.3d 843 (N.Y. Civ. Ct. 2018).
17. LeadingAge New York, Inc. Shah, 114 N.E.3d 1032 (2018).
18. New York Cardiothoracic Surgeons, P.C. Brevetti, 113 N.Y.S.3d 825 (N.Y. Sup. Ct. 2019).
19. HSBC Bank, USA, NA v. Margineanu, 86 N.Y.S.3d 694 (N.Y. Sup. Ct. 2018).
20. Town of Huntington v. Long Island Power Authority, 110 N.Y.S.3d 497 (N.Y. Sup. Ct. 2018).
21. Board of Education of Northport-East Northport Union Free School District v. Long Island Power Authority, 110 N.Y.S.3d 497 (N.Y. Sup. Ct. 2018).
22. 2138747 Ontario, Inc. v. Samsung C & T Corporation, 103 N.E.3d 774 (2018).
23. Wolberg v. IAI North America, Inc., 77 N.Y.S.3d 348 (2018).
24. City of Buffalo City School District v. LPCiminelli, Inc., 73 N.Y.S.3d 836 (2018).
25. Prevost v. One City Block LLC, 65 N.Y.S.3d 172 (2017).
26. Haidhaqi v. Metropolitan Transp. Authority, 62 N.Y.S.3d 408 (2017).
27. Castillo v. 281 Broadway Associates, 65 N.Y.S.3d 490 (N.Y. App.. Term 2017).
28. Erie Ins. Exchange v. J.M. Pereira & Sons, Inc., 57 N.Y.S.3d 823 (2017).
29. Wells v. Hodgkins, 36 N.Y.S.3d 50 (N.Y. Sup. Ct. 2016).
30. Sardis v. Sardis, 53 N.Y.S.3d 904 (N.Y. Sup. Ct. 2017).
31. Finkelstein v. Board of Educ. of City School Dist. of City New York, 56 N.Y.S.3d 8 (2017).
32. Douglas Elliman, LLC v. East Coast Realtors, Inc., 52 N.Y.S.3d 351 (2017).
33. Little v. County of Nassau, 48 N.Y.S.3d 723 (2017).
34. Friedman v. Markowitz, 144 A.D.3d 993 (2016).
35. Shirazi v. New York University, 40 N.Y.S.3d 65 (2016).
36. Michael R. Gianatasio, PE, P.C. v. City of New York, 37 N.Y.S.3d 828 (N.Y. Sup. 2016).

Mere = Neutral

1. Mangia Restaurant Corp. v. Utica First Insurance Company, 148 N.Y.S.3d 606 (N.Y. Sup. Ct. 2021).
2. Westchester Fire Insurance Co. v. Schorsch, 174 N.E.3d 367 (2021).
3. New Brunswick Theological Seminary v. Van Dyke, 168 N.E.3d 857 (2021).
4. 159 MP Corp. v. Redbridge Bedford, LLC., 128 N.E.3d 128 (2019).
5. Connecticut New York Lighting Company v. Manos Business Management Company, Inc., 8 N.Y.S.3d 101 (2019).
6. Maple-Gate Anesthesiologists, P.C. v. Nasrin, 122 N.Y.S.3d 840 (2020).
7. Gillen v. Town of Hempstead Town Board, 96 N.Y.S.3d 492 (N.Y. Sup. Ct. 2019).

8. Vincent Crisafulli Testamentary Trust v. AAI Acquisition, LLC., 110 N.Y.S.3d 494 (N.Y. Sup. Ct. 2018).
9. Santana v. Jablonski, 108 N.Y.S.3d 692 (N.Y. City Ct. 2018).
10. De Vera v. 243 Suydam, LLC.
11. Wilson v. Dantas, 103 N.Y.S.3d 381 (2019).
12. American Economy Ins. Co. v. State, 87 N.E.3d 126 (2017).
13. Island Intellectual Property LLC v. Reich & Tang Deposit Solutions, LLC., 65 N.Y.S.3d 188 (2017).
14. Stonehill Capital Management, LLC v. Bank of the West, 68 N.E.3d 683 (2016).

Third Circuit — Pennsylvania

Mere = Loser

1. Coppola v. Department of Labor and Industry, State Workers' Insurance Fund, No. 693 C.D. 2020, 2021 WL 3439580 (Pa. Commw. Ct. Aug. 6, 2021).
2. Bert Company v. Turk, 2021 PA Super 87, 257 A.3d 93 (2021).
3. Romutis v. Borough of Ellwood City, 246 A.3d 361 (Pa. Commw. Ct. 2021).
4. Acme Markets, Inc. v. Seltzer, 244 A.3d 469 (2020).
5. Vega v. Department of Labor and Industry, 2020 PA Super 285, 244 A.3d 469 (2020).
6. SEDA-COG Joint Rail Authority v. Carload Express, Inc., 238 A.3d 1225 (Pa. 2020).
7. Cummins v. Bradford Sanitary Authority, 237 A.3d 584 (Pa. Commw. Ct. 2020).
8. Abbonizio v. City of Philadelphia, No. 974 C.D. 2019, 2020 WL 3027255 (Pa. Commw. Ct. June 5, 2020).
9. Ladd v. Real Estate Commission, 659 Pa. 165 (2020).
10. A Special Touch v. Department of Labor and Industry, 658 Pa. 288 (2020).
11. Silbaugh v. Workers' Compensation Appeal Board, No. 57 C.D. 2019, 2019 WL 6288537 (Pa. Commw. Ct. Nov. 25, 2019).
12. U.S. Coal Corporation v. Dinning, 2019 PA Super 326, 222 A.3d 431 (2019).
13. Williams by Williams v. OAO Severstal, No. 938 WDA 2017, 2019 WL 4888570 (Pa. Super. Ct. Oct. 3, 2019).
14. Carulli v. North Versailles Sanitary Authority, 216 A.3d 564 (Pa. Commw. Ct. 2019).
15. Dodd v. County of Allegheny, Office of Treasurer, No. 1470 C.D. 2017, 2019 WL 3477014 (Pa. Commw. Ct. Aug. 1, 2019).
16. S & H Transport, Inc v. City of York, 636 Pa. 1, 140 A.3d 1 (2016).
17. Millcreek Township School District v. Millcreek Township Educational Support Personnel Association, 210 A.3d 993 (2019).
18. Sabia Landscape, Inc. v. Long, 216 A.3d 435 (2019).
19. Maisano v. Avery, 204 A.3d 515 (2019).

20. American Southern Insurance Co., v. Halbert, 203 A.3d 223 (2019).
21. Dittman v. UPMC, 196 A.3d 1036 (2018).
22. Northern Berks Regional Police Commission v. Berks County Fraternal Order of Police, Lodge # 71, 230 A.3d 1022 (2020).
23. Commonwealth v. Yim, 195 A.3d 922 (2018).
24. Jarrett v. Consolidated Corporation, 185 A.3d 374 (2018).
25. HPM Consulting v. Unemployment Compensation Board of Review, 185 A.3d 1190 (Pa. Commw. Ct. 2018).
26. Reginelli v. Boggs, 181 A.3d 293 (2018).
27. Custom Building Systems, LLC v. Nipple, No. 127 MDA 2017, 2017 WL 4949001 (Pa. Super. Ct. Oct. 31, 2017).
28. Bitter Sweet Properties, LP v. City of Farrell, 189 A.3d 984 (2018).
29. UnitedHealthCare of Pennsylvania, Inc v. Baron, 171 A.3d 943 (Pa. Commw. Ct. 2017).
30. William Penn School District v. Pennsylvania Department of Education, 170 A.3d 414 (2017).
31. Cornell Narberth, LLC v. Borough of Narberth, 167 A.3d 228 (Pa. Commw. Ct. 2017).
32. Cristea v. Unemployment Compensation Board of Review, No. 1560 C.D. 2016, 2017 WL 2569860 (Pa. Commw. Ct. June 14, 2017).
33. School District of Philadelphia v. Commonwealth Association of School Administrators, Teamsters Local 502, 160 A.3d 928 (Pa. Commw. Ct. 2017).
34. Toro v. Fitness International LLC, 150 A.3d 968 (2016).
35. City of Lebanon v. Lebanon County Earned Income Tax Bureau, No. 2419 C.D. 2015, 2016 WL 5833766 (Pa. Commw. Ct. Oct. 6, 2016).
36. B.G. Balmer & Co., Inc. v. Frank Crystal & Company, Inc., 148 A.3d 454 (2016).
37. Philadelphia Federation of Teachers, AFT, Local 3, AFL-CIO v. School Dist. of Philadelphia, 144 A.3d 1281 (2016).
38. Barnes v. Alcoa, Inc., 145 A.3d 730 (2016).

Mere = Neutral

1. In re Amazon.com, Inc., 255 A.3d 191 (Pa. 2021).
2. Penn Psychiatric Center, Inc. v. United States Insurance Company, 269 A.3d 1224 (Pa. 2021).
3. Troiano v. Farley, 256 A.3d 512 (Pa. Commw. Ct. 2021).
4. Lancaster County Agricultural Preserve Board v. Fryberger, 257 A.3d 192 (Pa. Commw. Ct. 2021).
5. Lebron v. Public School Employees Retirement Board, 245 A.3d 300 (Pa. Commw. Ct. 2020.
6. Reading Blue Mountain and Northern Railroad v. SEDA-COG Joint Rail Authority, 235 A.3d 438 (Pa. Commw. Ct. 2020).

7. Bloom v. Pennsylvania State Ethics Commision, No. 1539 C.D. 2017, 2019 WL 6698106 (Pa. Commw. Ct. Dec. 9, 2019).
8. Moore v. Mulligan Mining, Inc., No. 1497 WDA 2018, 2019 WL 5212398 (Pa. Super. Ct. Oct. 16, 2019).
9. Kuwait & Gulf Link Transport Company v. Doe, 2019 PA Super 234, 216 A.3d 1074 (2019).
10. Davis v. Borough of Montrose, 2018 PA Super 228, 194 A.3d 597 (2018).
11. Erie County Technical School v. Pennsylvania Labor Relations Board, 169 A.3d 151 (Pa. Commw. Ct. 2017).
12. Chester Upland School District v. Pennsylvania Labor Relations Board, 150 A.3d 143 (Pa. Commw. Ct. 2016).
13. Vladimirsky v. School Dist. of Philadelphia, 144 A.3d 986 (Pa. Commw. Ct. 2016).

Fourth Circuit — Virginia

Mere = Loser

1. AlBritton v. Commonwealth, 853 S.E.2d 512 (Va. 2021).
2. Jones v. Phillips, 850 S.E.2d 646 (Va. 2020).
3. Newman Knight Frank v. Estate of Williams, No. 0600-20-2, 2020 WL 6478378 (Va. Ct. App. Nov. 4, 2020).
4. Mireskandari v. Daily Mail & General Trust, PLC, 105 Va. Cir. 370 (2020).
5. Cromartie v. Billings, 837 S.E.2d 247 (Va. 2020).
6. Tingler v. Graystone Homes, Inc., 834 S.E.2d 244 (Va. 2019).
7. Knowesis, Inc. v. Herrera, 103 Va. Cir. 175 (2019).
8. Ononuju v. Virginia Housing Development Authority, 103 Va. Cir. 57 (2019).
9. A.H. by Next Friends C.H. v. Church of God in Christ, Inc.,831 S.E.2d 460 (2019).
10. HCP Properties-Fair Oaks of Fairfax, VA, LLC v. County of Fairfax, 102 Va. Cir. 160 (2019).
11. Jeffreys v. Uninsured Employer's Fund, 823 S.E.2d 476, 479 (Va. 2019).
12. King v. DTH Contract Services, 823 S.E.2d 6, 13 (Va. Ct. App. 2019).
13. Erie Insurance Exch. v. EPC MD 15, LLC, 822 S.E.2d 351 (Va. 2019).
14. Crosby v. ALG Trustees, LLC, 822 S.E.2d 185 (Va. 2018).
15. Parker v. Carilion Clinic, 819 S.E.2d 809 (Va. 2018).
16. Coward v. Wellmont Health System, 812 S.E.2d 766 (Va. 2018).
17. Van Buren v. Poston, 97 Va. Cir. 229 (2017).
18. Walgreens Co. v. County of Spotsylvania, 99 Va. Cir. 20 (2017).
19. Advanced Systems Engineering Corp. v. Intuitive IT LLC, 96 Va. Cir. 245 (2017).
20. AGCS Marine Insurance Company v. Arlington County, 800 S.E.2d 159 (Va. 2017).
21. Newport News Shipbuilding & Dry Dock Co. v. Wardwell Orthopedics, P.C., 796 S.E.2d 461 (Va. Ct. App. 2017).

Mere = Neutral

1. Jones v. A Town Smoke House & Catering Inc. 106 Va. Cir. 168 (2020).
2. Divino v. Uninsured Employer's Fund, No. 1990-19-1, 2020 WL 3966748 (Va. Ct. App. July 14, 2020).
3. Brown v. Tashman, 105 Va. Cir. 152 (2020).
4. Cully v. Smith, 102 Va. Cir. 293 (2019).
5. Kerlavage v. America's Home Place, Inc., 104 Va. Cir. 80 (2019).
6. Sweely Holdings, LLC v. SunTrust Bank, 820 S.E.2d 596 (Va. 2018).
7. SAF Funding, LLC v. Taylor, 98 Va. Cir. 10 (2017).
8. Virginia Board of Medicine v. Hagmann, 797 S.E.2d 422 (Va. Ct. App. 2017).
9. King William County v. Jones, 789 S.E.2d 133 (Va. Ct. App. 2016).
10. Reading and Language Learning Center v. Sturgill, 94 Va. Cir. 94 (2016).

Fifth Circuit — Texas

Mere = Loser

1. Clintas-R.U.S., L.P. v. Dave's Tubing Testing and Hot Oil Service, Inc., No. 11-19-00145-CV, 2021 WL 2371640 (Tex. App. June 10, 2021).
2. Tejas Specialty Group, Inc. v. United Specialty Insurance Company, No. 02-20-00085-CV, 2021 WL 2252742 (Tex. App. June 3, 2021).
3. Aerotek, Inc. v. Boyd, 624 S.W.3d 199 (2021).
4. JLB Builders, LLC v. Hernandez, 64 ex. Sup. Ct. J. 964 (2021).
5. Waste Management of Texas, Inc. v. Stevenson, 64 Tex. Sup. Ct. J. 819 (2021).
6. MRC Permian Company v. Point Energy Partners Permian, LLC, 624 S.W.3d 643 (2021).
7. Martinez v. Boone, 624 S.W.3d 241 (2021).
8. Headington Royalty, Inc. v. Finley Resources, Inc, 623 S.W.3d 480 (2021).
9. SignAd, Ltd. v. DW.Marketing, Media & Public Relations, LLC, No. 14-20-00042-CV, 2021 WL 865082 (Tex. App. Mar. 9, 2021).
10. RGv Concepts, Ltd. v. Texas Workforce Commission, No. 13-20-00087-CV, 2021 WL 727012 (Tex. App. Feb. 25, 2021).
11. Hernandez v. Combined Insurance Company of America, No. 02-20-00225-CV, 2021 WL 520456 (Tex. App. Feb. 11, 2021), review denied (July 2, 2021).
12. Latray v. Colony Insurance Company, No. 07-19-00350-CV, 2021 WL 97204 (Tex. App. Jan. 11, 2021), opinion withdrawn and superseded on denial of reh'g, No. 07-19-00350-CV, 2021 WL 5127520 (Tex. App. Nov. 4, 2021).
13. Southcross Energy Partners GP, LLC, v. Gonzales on Behalf of Gonzales, 625 S.W.3d 869 (Tex. App. 2021).
14. Texas Medicine Resources, LLP v. Molina Healthcare of Texas, Inc., 620 S.W.3d 458 (2021).

15. BBVA Compass v. Bagwell, No. 05-18-00860-CV, 2020 WL 7332845 (Tex. App. Dec. 14, 2020).
16. Marrujo v. Wisenbaker Builder Services, Inc. No. 01-19-00056-CV, 2020 WL 7062318 (Tex. App. Dec. 3, 2020).
17. Cantu v. Commission for Lawyer Discipline, No. 13-16-00332-CV, 2020 WL 7064806 (Tex. App. Dec. 3, 2020).
18. Pearl Resources LLC v. Charger Services, 622 S.W.3d 106 (2020).
19. T.L. v. Cook Children's Medical Center, 607 S.W.3d 9 (2020).
20. W & T Offshore, Inc. v. Fredieu, 610 S.W.3d 884 (2020).
21. Sandberg v. STMicroelectronics, Inc. 600 S.W.3d 511 (2020).
22. Balentine v. Federal Insurance Company, No. 14-18-00438-CV, 2020 WL 1467352 (Tex. App. 2020).
23. Hernandez v. Sun Crane and Hoist, Inc., 600 S.W.3d 485 (2020).
24. Edinburg Consolidated Independent School District v. Esparza, 603 S.W.3d 468 (2020).
25. Atmos Energy Corporation v. Paul, 589 S.W.3d 431 (2020).
26. Chalker Energy Partners III, LLC v. Le Norman Operating LLC, 595 S.W.3d 668 (2020).
27. Bauer v. Gulshan Enterprises, Inc. 617 S.W.3d 1 (2020).
28. Continental Alloys & Services (Delaware) LLC v. YangZhou Chengde Steel Pipe Co., Ltd., 597 S.W.3d 884 (2020).
29. Erikson v. Renda, 590 S.W.3d 557 (2020).
30. Brazos Contractors Development, Inc. v. Jefferson, 596 S.W.3d 291 (2019).
31. James Construction Group, LLC. v. Westlake Chemical Corporation, 594 S.W.3d 722 (2019).
32. Roddy v. Holly Lake Ranch Association, LLC, 586 S.W.3d 336 (2019).
33. Rodriguez v. Ginsburg, No. 05-17-01266-CV, 2019 WL 4010770 (Tex. App. Aug. 26, 2019).
34. Houston Community College System v. HV BTW, LP, 589 S.W.3d 204 (2019).
35. Diaz v. R & A Consultants, 579 S.W.3d 460 (2019).
36. Jang Won Cho v. Kun Suk Kim, 572 S.W.3d 783 (2019).
37. Cimarex Energy Co. v. Anadarko Petroleum Corp. 574 S.W.3d 73 (2019).
38. Exxon Mobile Corporation v. Insurance Company of State, 62 Tex.Sup.Ct.J. 473 (2019).
39. Universal Plant Services, Inc. v. Dresser-Rand Group, Inc. 571 S.W.3d 346 (2018).
40. M.E.N. Water Supply Corporation v. City of Corsicana, 564 S.W.3d 474 (2018).
41. Frediu v. W&T Offshore, Inc. 584 S.W.3d 200 (2018).
42. Wasson Interests, Ltd. v. City of Jacksonville, 559 S.W.3d 142 (2018).
43. Cities of Conroe, Magnolia, and Splendora v. Paxton, 559 S.W.3d 656 (2018).
44. Fortitude Energy, LLC v. Sooner Pipe LLC, 564 S.W.3d 167 (2018).
45. Porter-Garcia v. TRavis Law Firm, PC, 564 S.W.3d 75 (2018).
46. Alief Independent School District v. Barnsley, 558 S.W.3d 747 (2018).

47. Arana v. Figueroa, 559 S.W.3d 623 (2018).
48. Dalton v. Dalton, 551 S.W.3d 126 (2018).
49. Anderson v. Durant, 550 S.W.3d 605 (2018).
50. Orbison v. Ma-Tex Rope Company, Inc., 553 S.W.3d 17 (2018).
51. Nelson v. Vernco Construction, Inc., 566 S.W.3d 716 (2018).
52. Robert B. James, DDS, Inc. v. Elkins, 553 S.W.3d 596 (2018).
53. Tarr v. Timberwood Park Owners Association, Inc., 556 S.W.3d 274 (2018).
54. Austin Bridge & Road, LP v. Suarez, 556 S.W.3d 363 (2018).
55. Perryman v. Spartan Texas Six Capital Partners, Ltd. 546 S.W.3d 110 (2018).
56. Taylor Housing Authority v. Shorts, 549 S.W.3d 865 (2018).
57. ReadyOne Industries, Inc. v. Lopez, 551 S.W.3d 305 (2018).
58. Hill v. Shamoun & Norman, LLP, 544 S.W.3d 724 (2018).
59. Painter v. Amerimex Drilling, I, Ltd., 561 S.W.3d 125 (2018).
60. The Episcipal Church v. Salazar, 547 S.W.3d 353 (2018).
61. R. Hassell Builders, Inc. v. Texan Floor Service, Ltd. 546 S.W.3d 816 (2018).
62. City of Richardson v. Oncor Electric Delivery Company LLC, 539 S.W.3d 252 (2018).
63. GTECH Corporation v. Steele, 549 S.W.3d 768 (2018).
64. Border Demolition & Environmental, Inc. v. Pineda, 535 S.W.3d 140 (2017).
65. Remedy Intelligent Staff, Inc. v. Drake Alliance Corporation, No. 14-16-00241-CV, 2017 WL 4440484 (Tex. App. Oct. 5, 2017).
66. West Travis County Public Utility Agency v. Travis County Municipal Utility District No. 12, 537 S.W.3d 549 (2017).
67. Knight Renovations, LLC v. Thomas, 525 S.W.3d 446 (2017).
68. Shield Limited Partnership v. Bradburry, 526 S.W.3d 471 (2017).
69. Efremov b. GeoSteering, LLC, 2017 WL 976072 (Mar. 14, 2017).
70. E-Learning LLC v. AT&T Corp., 517 S.W.3d 849 (2017).
71. City of San Antonio v. Hays Street Bridge Restoration Group, 551 S.W.3d 755 (2017).
72. Walters v. Livingston, 519 S.W.3d 658 (2017).
73. Tarr v. Lantana Southwest Homeowners' Association, Inc. 2016 WL 7335861 (Dec. 16, 2016).
74. Petroleum Workers Union of the Republic of Mexico v. Gomez, 503 S.W.3d 9 (2016).
75. MJS and Associates, LLC v. Master, 501 S.W.3d 751 (2016).

Mere = Neutral

1. Great Divide Insurance Company v. Fortenberry, 665 S.W.3d 627 (Tex. App. 2021).
2. Comcast Corporation v. Houston Baseball Partners, LLC, 627 S.W.3d 398 (Tex. App. 2021).
3. Genesetix, Inc. v. Baylor College of Medicine, 616 S.W.3d 630 (2021).
4. Infinity County Mutual Insurance Company v. Tatsch, 617 S.W.3d 614 (2020).
5. Spicer, Trustees for Estate of Brady v. Maxus Healthcare Partners, LLC, 616 S.W.3d 59 (2020).
6. Mendez v. Houston Harris Area Safety Council, Inc., 634 S.W.3d 154 (Tex. App. 2021).

7. Armendariz v. Hudgens, 618 S.W.3d 750 (Tex. App. 2020).
8. Pisharodi v. Columbia Valley Healthcare System, LP, 622 S.W.3d 74 (2020).
9. Lockheed Martin Corporation v. Hegar, 63 Tex. Sup. Ct. J. 999 (2020).
10. Fuller v. Wholesale Electric Supply Company of Houston, Inc. 631 S.W.3d 177 (Tex. App. 2020).
11. Altech Controls Corporation v. Malone, No. 14-17-00737-CV, 2019 WL 3562633 (Aug. 6, 2019).
12. McDonald Oilfield Operations, v. 3B Inspection, LLC 582 S.W.3d 732 (2019).
13. Bustamante v. Miranda & Maldonado, PC, 569 S.W.3d 852 (2019).
14. Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, No. 05-17-01051-CV, 2018 WL 6187590 (Nov. 27, 2018).
15. North East Independent School District v. Riou, 581 S.W.3d 333 (2018).
16. American K-9 Detection Services, LLC v. Freeman, 556 S.W.3d 246 (2018).
17. Renda v. Erikson, 547 S.W.3d 901 (2018).
18. Jefferson County v. Jefferson County Constable Association, 546 S.W.3d 661 (2018).
19. Lemon v. Hagood, 545 S.W.3d 105 (2017).
20. Whataburger Restaurant LLC v. Cardwell, 545 S.W.3d 73 (2017).
21. Fairfield Industries, Inc. EP Energy E&P Company, LP, 531 S.W.3d 234 (2017).
22. Jefferson County v. Stines, 523 S.W.3d 691 (2017).
23. Horizon Health Corporation v. Acadia Healthcare Company, Inc. 520 S.W.3d 848 (2017).
24. Harris County Appraisal District v. Texas Workforce Commission, 519 S.W.3d 113 (2017).
25. Martin Operating Partnership LP v. QEP Marine Fuel Investment, LLC, 525 S.W.3d 712 (2017).
26. Bates v. Pecos County, 546 S.W.3d 277 (2017).
27. City of Austin v. Utility Associates, Inc. 517 S.W.3d 300 (2017).
28. Viajes Gerpa, S.A. v. Fazeli, 522 S.W.3d 524 (2016).
29. Port of Houston Authority of Harris County v. Zachry Construction Corporation, 513 S.W.3d 543 (2016).
30. Daugherty v. Highland Capital Management, LP, No. 05-14-01215-CV, 2016 WL 4446158 (Aug. 22, 2016).

Sixth Circuit — Michigan

Mere = Loser

1. Sova v. Advisacare Healthcare Solutions, Inc., No. 353912, 2021 WL 3700451 (Mich. Ct. App. Aug. 19, 2021).
2. Sbr Associates II, LLC v. AFJ Development Company, LLC, No. 354992, 2021 WL 3233566 (Mich. Ct. App. July 29, 2021).

3. Webb v. Fidelity Brokerage Services, No. 354691, 2021 WL 3234362 (Mich. Ct. App. July 29, 2021).
4. Can IV Packard Square, LLC v. Schubiner, No. 352510, 2021 WL 1711593 (Mich. Ct. App. Apr. 29, 2021).
5. Traverse City Record-Eagle v. Traverse City Area Public Schools Board of Education, 337 Mich. App. 281 (Mich. Ct. App. 2021).
6. Elia Companies, LLC v. University of Michigan Reagents, 335 Mich. App. 439 (Mich. Ct. App. 2021).
7. Farrow Group, Inc. v. Detroit Land Bank Authority, No. 341822, 2019 WL 2194972 (Mich. Ct. App. May 21, 2019).
8. Technical, Professional and Officeworkers Association of Michigan v. Renner, 335 Mich. App. 293 (Mich. Ct. App. 2021).
9. Lewandowski v. Arenac County, No. 350272, 2020 WL 7635446 (Mich. Ct. App. Dec. 22, 2020).
10. New Covert Generating Company, LLC v. Township of Covert, 507 Mich. 932 (2021).
11. Haygood v. General Motors, LLC, No. 346470, 2020 WL 1043613 (Mich. Ct. App. Mar. 3, 2020).
12. Smith v. Chrysler Group, LLC, 331 Mich. App. 492 (Mich. Ct. App. 2020).
13. Dean v. St. Mary's of Michigan, No. 345213, 2020 WL 402054 (Mich. Ct. App. Jan. 23, 2020).
14. Cove Creek Condominium Association v. Vistal Land & Home Development, LLC, 330 Mich. App. 679 (Mich. Ct. App. 2019).
15. Shaw v. City of Dearborn, 329 Mich. App. 640 (Mich. Ct. App. 2019).
16. Zyber v. Patsy Lou Buick GMC, Inc., No. 344628, 2019 WL 3849443 (Mich. Ct. App. Aug. 15, 2019).
17. Cesarini v. FCA US, LLC, No. 342674, 2019 WL 2711584 (Mich. Ct. App. June 27, 2019).
18. Client Financial Services, Inc. v. Beaumont Health, No. 342875, 2019 WL 2552859 (Mich. Ct. App. June 20, 2019).
19. Bodnar v. St. John Providence, Inc., 327 Mich. App. 203 (Mich. Ct. App. 2019).
20. Marinucci v. Charter Township of Northville, No. 340579, 2019 WL 938866 (Mich. Ct. App. Feb. 26, 2019).
21. Aytch v. Southfield Board of Education, No. 336790, 2018 WL 5275520 (Mich. Ct. App. Oct. 16, 2018).
22. Shefa, LLC v. Xiao Hua Gong, No. 337629, 2018 WL 4927139 (Mich. Ct. App. Oct. 4, 2018).
23. Interurban Transit Partnership v. Amalgamated Transit Union Local 836, No. 339518, 2018 WL 4658792 (Mich. Ct. App. Sept. 27, 2018).
24. Dowker v. Richmond Community Schools, No. 336964, 2018 WL 4339509 (Mich. Ct. App. Sept. 11, 2018).
25. Aguilar v. City of Saginaw, No. 339016, 2018 WL 4164685 (Mich. Ct. App. Aug. 30, 2018).

26. Steele v. McCauley, No. 332305, 2018 WL 1403789 (Mich. Ct. App. Mar. 20, 2018).
27. City of Highland Park v. County of Wayne, No. 334203, 2018 WL 1020188 (Mich. Ct. App. Feb. 22, 2018).
28. Mays v. Snyder, 506 Mich. 157 (2020).
29. Bowen v. Alpena Regional Medical Center, No. 334620, 2018 WL 442218 (Mich. Ct. App. Jan. 16, 2018).
30. Zastrow v. City of Wyoming, No. 331791, 2017 WL 3878983 (Mich. Ct. App. Sept. 5, 2017).
31. Hannah v. Blue Cross Blue Shield of Michigan, No. 331940, 2017 WL 3642656 (Mich. Ct. App. Aug. 24, 2017).
32. Walrath v. Witzenmann USA LLC, 320 Mich. App. 125 (Mich. Ct. App. 2017).
33. Saginaw Education Association v. Eady-Miskiewicz, 319 Mich. App. 422 (2017).
34. Satgunam v. Hackney Grover Hoover & Bean, No. 330454, 2017 WL 1399982 (Mich. Ct. App. Apr. 18, 2017).
35. Talley v. Detroit Public Schools, No. 329005, 2017 WL 358798 (Mich. Ct. App. Jan. 24, 2017).
36. Schaefer v. Plymouth Tp., No. 328054, 2016 WL 6668088 (Mich. Ct. App. Nov. 10, 2016).
37. Laster v. Henry Ford HEalth System, 316 Mich. App. 726 (Mich. Ct. App. 2016).
38. Major v. Village of Newberry, 316 Mich. App. 527 (Mich. Ct. App. 2016).

Mere = Neutral

1. Pandemonium, Inc. v. Northcrest Development, LLC, No. 350526, 2021 WL 3117210 (Mich. Ct. App. July 22, 2021).
2. Shepherd v. Benevis, LLC, No. 350164 (Mich. Ct. App. Jan. 7, 2021).
3. Jamil v. TBI Properties, LLC, No. 351024, 2020 WL 7413756 (Mich. Ct. App. Dec. 17, 2020).
4. Department of Transportation v. Riverview-Trenton Railroad Company, 332 Mich. App. 574 (Mich. Ct. App. 2020).
5. AES Management, Inc. v. Keckes Silver & Gadd, P.C., 507 Mich. 881 (2020).
6. Schultz v. DTE Energy Corporate Services, LLC, No. 338196, 2018 WL 4577234 (Mich. Ct. App. Sept. 20, 2018).
7. People v. Smith, 336 Mich. App. 297 (Mich. Ct. App. 2021).
8. Esslin v. Michigan Horse Pulling Association, Inc., No. 330406, 2017 WL 1103532 (Mich. Ct. App. Mar. 21, 2017).

Seventh Circuit — Illinois

Mere = Loser

1. Amalgamated Transit Union v. Barron, 2021 IL App (1st) 200380-U (Ill. App. Ct. 2021).
2. Williams v. Duratel, LLC, LLC, 2021 IL App (1st) 200652-U (Ill. App. Ct. 2021).

3. Doyle v. Executive Ethics Commission, 2021 IL App (2d) 200157 (Ill. App. Ct. 2021).
4. Keystone Montessori School v. Village of River Forest, 2021 IL App (1st) 191992 (Ill. App. Ct. 2021).
5. Purdy Brothers Trucking, LLC. v. Illinois Workers' Compensation Commission, 2021 IL App (3d) 200463WC-U (Ill. App. Ct. 2021).
6. Torrijos v. International Paper Company, 191 N.E.3d 182 (2021).
7. Same Condition, LLC v. Codal, Inc., 187 N.E.3d 1147 (Ill. 2021).
8. People v. Nordike, 2021 IL App (5th) 190359-U (Ill. App. Ct. 2021).
9. McCaffrey v. Village of Hoffman Estates, 2021 IL App (1st) 200395 (Ill. App. Ct. 2021).
10. Williams v. Human Rights Commission, 2021 IL App (1st) 200785-U (Ill. App. Ct. 2021).
11. Souza v. City of West Chicago, 2021 IL App (2d) 200047 (Ill. App. Ct. 2021).
12. Power COnstruction Company, LLC v. Michels Corporation, 2020 IL App (1st) 200084-U (Ill. App. Ct. 2020).
13. Prakash v. Parulekar, 2020 IL App (1st) 191819 (Ill. App. Ct. 2020).
14. People ex rel. Department of Human Rights v. Oakridge Healthcare Center, LLC.,2020 IL 124753 (Ill. 2021).
15. Vitiritti v. KHB Group, LLC., 2020 IL App (1st) 190931-U (Ill. App. Ct. 2020).
16. Best Buy Stores, L.P. v. Department of Revenue, 2020 IL App (1st) 191680 (Ill. App. Ct. 2020).
17. Benton v. Little League Baseball, Incorporated, 2020 IL App (1st) 190549 (Ill. App. Ct. 2020).
18. Enbridge Energy, Limited Partners v. Village of Romeoville, 2020 IL App (3d) 180060 (Ill. App. Ct. 2020).
19. Rushton v. Department of Corrections, 160 N.E.3d 929 (2020).
20. Zander v. Carlson, 2020 IL 125691 (Ill. App. Ct.. 2020).
21. Pro Sapiens, LLC v. Indeck Power Equipment Company, 156 N.E.3d 1046 (Ill. 2020).
22. Anderson Law LLC v. 3 Build Constructions, LLC, 2019 IL App (1st) 181575-U (Ill. App. Ct. 2019).
23. Sweeney v. Algonquin Township Road District, 2019 IL App (2d) 19-0026-U (Ill. App. Ct. 2019).
24. Cardenas v. Grozdic, 2019 IL App (1st) 182029-U (Ill. App. Ct. 2019).
25. Zoepfel-Thuline v. Black Hawk College, 145 N.E.3d 48 (2020).
26. Reid by Marion Community Unit School District No. 2 v. Board of Education of Marion Community Unit School No. 2, 2019 IL App (5th) 180519-U (Ill. App. Ct. 2019).
27. Restore Construction Company, Inc. v. Board of Education Of Proviso Township High School District 209, 64 N.E.3d 1238 (Ill. 2020).
28. Caulfield b. Packer Engineering, Inc., 56 N.E.3d 509 (Ill. 2020).

29. Yako v. Fejes Freight Express, Inc., 2019 IL App (1st) 182562-U (Ill. App. Ct. 2020).
30. Learned v. Illinois Workers' Compensation Commission, 2019 IL App (5th) 180368WC-U (Ill. App. Ct. 2019).
31. People ex. Rel. Illinois Department of Children and Family Services v. DBOC Organization, 2019 IL App (1st) 170451-U (Ill. App. Ct. 2020).
32. American Utility Auditors, Inc. v. Village of University Park, 2019 IL App (2d) 180452-U (Ill. App. Ct. 2020).
33. White v. Wal-mart Stores, Inc, 2019 IL App (1st) 163238-U (Ill. App. Ct. 2019).
34. Gedville v. Village of Justice, 2019 IL App (1st) 181598-U (Ill. App. Ct. 2019).
35. People ex. Rel. Department of Human Rights v. Oakridge Nursing & Rehab Center, 181 N.E.3d 184 (Ill. 2020).
36. Brettman v. M & G Truck Brokerage, Inc., 127 N.E.3d 880 (Ill. 2019).
37. City of Countryside v. City of Countryside Police Pension Board of Trustees, 122 N.E.3d 297 (Ill. 2018).
38. In re N.G., 115 N.E.3d 102 (Ill. 2018).
39. Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc., 158 N.E.3d 219 (Ill. 2019).
40. Brummel v. Grosssman, 103 N.E.3d 398 (Ill. 2018).
41. Robertson v. Misetic, 116 N.E.3d 205 (Ill. 2020).
42. U.S. Bank National Association v. Randhurst Crossing LLC, 105 N.E.3d 132 (Ill. 2018).
43. Schroeder v. Sullivan, 2018 IL App (1st) 163210 (Ill. App. Ct. 2018).
44. 1550 MP Road LLC v. Teamster Local Union No. 700, 131 N.E.3d 99 (2019).
45. Wilson v. Illinois Workers' Compensation Commission, 2017 IL App (5th) 160408WC-U (Ill. App. Ct. 2017).
46. Bremen Educational Support Team v. Illinois Education Labor Relations Board, 2017 IL App (1st) 162628-U (Ill. App. Ct. 2017).
47. My Baps Construction Corporation v. City of Chicago, 87 N.E.3d 987 (Ill. 2017).
48. Board of Trustees of City of Harvey Firefighters's Pension Fund v. City of Harvey, 96 N.E.3d 1 (Ill. 2017).
49. St. Paul Fire and Marine Insurance Company v. City of Waukegan, 82 N.E.3d 823 (Ill. 2017).
50. Better Government Association v. Illinois High School Association, 89 N.E.3d 376 (Ill. 2017).
51. Krozel v. Court of Claims, 77 N.E.3d 1165 (Ill. 2017).
52. Evans v. Newcastle Home Loans, LLC, 2017 IL App (1st) 160080-U (Ill. App. Ct. 2017).
53. McKenna v. Illinois Educational Labor Relations Board, 2017 IL App (1st) 150531-U (Ill. App. Ct. 2017).
54. International Brotherhood of Teamsters, Local 700 v. Illinois Labor Relations Board, Local Panel, 2021 IL App (1st) 191992 (Ill. App. Ct. 2021).

55. Schmidt v. Metcalf, 2017 Ill. App. 2d 151040 (Ill. App. Ct. 2017).
56. Board of Education of Springfield School District No. 186 v. Attorney General of Illinois, 77 N.E.3d 625 (Ill. 2017).
57. Piolla v. Merit Electric, LLC, 2016 IL App (1st) 153389-U (Ill. App. Ct. 2016).
58. Chicago Transit Authority v. Amalgamated Transit Union, Local 241, 2016 IL App (1st) 152050-U (Ill. App. Ct. 2016).
59. Carney v. Union Pacific R. Co., 77 N.E.3d 1 (Ill. 2016).
60. Charnot v. Bellwood School Dist. 88, 2016 IL App (1st) 152053-U (Ill. App. Ct. 2016).
61. Murillo v. City of Chicago, 61 N.E.3d 152 (ll. App. Ct. 2016).

Mere = Neutral

1. Glasper v. Scrub Inc. 2021 IL App (1st) 200764-U (Ill. App. Ct. 2021).
2. Parente & Norem, P.C. v. Chicago Regional Council of Carpenters Welfare Fund, 186 N.E.3d 405 (Ill. App. Ct. 2021).
3. Neely v. Human Rights Commision 2020 IL App (1st) 192263-U (Ill. App. Ct. 2020).
4. REEF-PCG, LLC v. 747 Properties, LLC, 157 N.E.3d 1122 (Ill. App. Ct. 2020).
5. Rocha v. FedEx Corporation, 164 N.E.3d 640 (Ill. App. Ct. 2020).
6. Kampmann v. Hillsboro Community School District No. 3 Board of Education, 139 N.E.3d 1020 (Ill. App. Ct. 2019).
7. Pam's Academy of Dance/Forte Arts Center v. Marik, 128 N.E.3d 321 (Ill. App. Ct. 2018).
8. Berrios v. Cook County Board of Commissioners, 138 N.E.3d 695 (Ill. App. Ct. 2018).
9. Nuzzo v. J & J Exhibitors Service, Inc., 2018 IL App (1st) 170734-U (Ill. App. Ct. 2018).
10. Davis v. Leclair Ryan P.C., 2018 IL App (1st) 162136-U (Ill. App. Ct. 2018).
11. Hastings v. Board of Education of Napeville Community Unit School District 203, 2017 IL App (2d) 170141-U (Ill. App. Ct. 2017).
12. Performance Food Group Company, LLC v. ARBA Care Center of Bloomington, LLC, 86 N.E.3d 1042 (Ill. App. Ct. 2017).
13. Baumrucker v. Express Cab Dispatch, Inc., 84 N.E.3d 482 (Ill. App. Ct. 2017).
14. Le Pretre v. Lend Lease (US) Construction, Inc, 82 N.E.3d 174 (Ill. App. Ct. 2017).
15. Illinois Collaboration on Youth v. Dimas, 81 N.E.3d 63 (Ill. App. Ct. 2017).
16. Perik v. JP Morgan Chase Bank, N.A., 34 N.E.3d 641 (Ill. App. Ct. 2016).
17. Klees v. Village of Mount Prospect, 2017 IL App (1st) 152049-U (Ill. App. Ct. 2017).
18. Andrews v. Norfolk Southern Railroad Corp. 77 N.E.3d 1028 (Ill. App. Ct. 2017).
19. O'Dwyer v. James Consolidated Enterprises, Inc. 2017 IL App (1st) 152358-U (Ill. App. Ct. 2017).

20. Pisani v. City of Springfield, 73 N.E.3d 129 (Ill. App. Ct. 2017).
21. Galaxy Environmental, Inc. v. Antoniou, 2017 IL App (1st) 160321-U (Ill. App. Ct. 2016).
22. Swift v. Medicate Pharmacy Delivered Mail Order, 2016 IL App (1st) 152786-U (Ill. App. Ct. 2016).
23. Miranda v. MB Real Estate Services, LLC, 2016 IL App (1st) 152971-U (Ill. App. Ct. 2016).
24. Vulpitta v. Walsh Const. Co., 61 N.E.3d 1069 (Ill. App. Ct. 2016).
25. State ex rel. Schad v. National Business Furniture, LLC, 62 N.E.3d 1061 (Ill. App. Ct. 2016).

Eight Circuit — Arkansas

Mere = Loser

1. Hogan v. Bank of Little Rock, 618 S.W.3d 194 (Ark. App. 2021).
2. Cherry v. Cherry, 2020 Ark. App. 294 (Ark. Ct. App. 2020).
3. Quinn v. O'Brien, 596 S.W.3d 20 (Ark. App. 2020).
4. Industrial Welding Supplies of Hattiesburg, LLC v. Pinson, 587 S.W.3d 540 (Ark. 2019).
5. Konecny v. Federated Rural Electric Insurance Exchange, 588 S.W.3d 349 (Ark. App. 2019).
6. Lakeside Nursing and Rehabilitation Center, Inc. v. Rufkahr, 572 S.W.3d 461 (Ark. App. 2019).
7. Karolchyk v. Karolchyk, 565 S.W.3d 531 (Ark. App. 2018).
8. Elder v. Elder, 549 S.W.3d 919 (Ark. App. 2018).
9. Farm Credit Midsouth, PCA v. Bollinger, 548 S.W.3d 164 (Ark. App. 2018).
10. Darr v. Billeaudeau, 541 S.W.3d 460 (Ark. App. 2018).
11. Thompson v. Broussard, 526 S.W.3d 899 (Ark. App. 2017).
12. Chambers v. Chambers, 527 S.W.3d 1 (Ark. App. 2017).
13. Warren v. Frizell, 516 S.W.3d 756 (Ark. App. 2017).
14. Jones v. John B. Dozier Land Trust, 511 S.W.3d 869 (Ark. App. 2017).
15. Young v. Welch, 2016 Ark. App. 614 (Ark. App. 2016).
16. SEECO, Inc. v. Stewmon, 506 S.W.3d 828 (Ark. 2016).
17. Union Pacific Railroad Company v. SEECO, Inc., 504 S.W.3d 614 (Ark. App. 2016).
18. Ford Motor Credit Company, LLC v. First National Bank of Crossett, 500 S.W.3d 188 (Ark. App. 2016).

Mere = Neutral

1. C. J. Mahan Construction Co. v. Betzner, 2021 Ark. 42 (Ark. 2021).
2. Wilson v. Gillentine, 618 S.W.3d 145 (Ark. App. 2021).

3. Municipal Health Benefit Fund v. Hendrix, 602 S.W.3d 101 (Ark. 2020).
4. Ashbyv. Ragon, 601 S.W.3d 124 (Ark. App. 2020).
5. JMD COnstruction Services, LLC v. General Construction Solutions, LLC, 577 S.W.3d 50 (Ark. App. 2019).
6. Anita G., LLC v. Centennial Bank, 575 S.W.3d 561 (Ark. App. 2019).
7. Brennan v. White County, 573 S.W.3d 577 (Ark. App. 2019).
8. Johnson v. Blytheville School District by its Board of Directors, 516 S.W.3d 785 (Ark. App. 2017).
9. City of Conway v. Shumate, 511 S.W.3d 319 (Ark. 2017).
10. CMS Investment Holdings, LLC v. Estate of Wilson, 506 S.W.3d 292 (Ark. App. 2016).

Eight Circuit — South Dakota

Mere = Loser

1. Wright v. Temple, 956 N.W.2d 436 (S.D. 2021).
2. Knecht v. Evridge, 940 N.W.2d 318 (S.D. 2020).
3. James v. State Farm Mutual Automobile Insurance Company, 929 N.W.2d 541 (S.D. 2019).
4. Institute of Range and the American Mustang v. Nature Conservancy, 922 N.W.2d 1 (S.D. 2018).
5. Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 918 N.W.2d 396 (S.D. 2018).
6. In re Estate of Colombe, 885 N.W.2d 350 (S.D. 2016).

Mere = Neutral

1. Slota v. Imhoff and Associates, P.C., 949 N.W.2d 869 (S.D. 2020).
2. Black Bear v. Mid-Central Educational Cooperative, 941 N.W.2d 207 (S.D. 2020).

Ninth Circuit — Nevada

Mere = Loser

1. Guzman v. Johnson, 483 P.3d 531 (Nev. 2021).
2. Nevada State Education Association v. Clark County Education Association, 482 P.3d 665 (Nev. 2021).
3. William v. Lazer, 476 P.3d 928 (Nev. App. 2020).
4. Petra Drilling and Blasting, Inc. v. U.S. Mine Corp., 468 P.3d 885 (Nev. App. 2020).
5. Droge v. AAAA Two Star Towing, Inc., 468 P.3d 862 (Nev. App. 2020).
6. City of Henderson v. Spangler, 464 P.3d 1039 (Nev. App. 2020).
7. Sierra Pacific Industries v. Wilson, 440 P.3d 37 (Nev. 2019).

8. Agwara v. State Bar of Nevada, 406 P.3d 488 (Nev. 2017).
9. Szymborski v. Spring Mountain Treatment Center, 403 P.3d 1280 (Nev. 2017).
10. Wynn Resorts, Limited v. Eight Judicial District Court in and for County of Clerk, 386 P.3d 996 (Nev. 2016).
11. Brinkerhoff v. Foote, 387 P.3d 880 (Nev. 2016).
12. Cashman Equipment Company v. West Edna Associates, Ltd., 380 P.3d 844 (Nev. 2016).

Mere = Neutral

1. Trice v. Liberty Mutual Insurance Company, 479 P.3d 228 (Nev. App. 2021).
2. Matter of Estate of Poirier, 466 P.3d 948 (Nev. App. 2020).
3. Oceania Insurance Corporation v. Cogan, 457 P.3d 276 (Nev. App. 2020).
4. Poole v. Nevada Auto Dealership Investments, LLC, 449 P.3d 479 (Nev. App. 2019).

Ninth Circuit — Montana

Mere = Loser

1. Young v. Hammer, Hewitt, Jacobs & Floc, PLC, 491 P.3d 725 (Mont. 2021).
2. House v. U.S. Bank National Association, 481 P.3d 820 (Mont. 2021).
3. Zabrocki v. Teachers Retirement System, 480 P.3d 833 (Mont. 2021).
4. Meine v. Hren Ranchers, Inc., 475 P.3d 748 (Mont. 2020).
5. Gateway Hospitality Group, Inc. v. Philadelphia Indemnity Insurance Company, 464 P.3d 44 (Mont. 2020).
6. Maryland Casualty Company v. Asbestos Claims Court, 460 P.3d 882 (Mont. 2020).
7. Payne v. Hall, 458 P.3d 1001 (Mont. 2021).
8. Abbey/Land, LLC v. Glacier Construction partners, LLC, 433 P.3d 1230 (Mont. 2019).
9. DeTienne v. Sandrock, 431 P.3d 12 (Mont. 2018).
10. Big Sky Civil and Environmental, Inc. v. Dunlavy, 429 P.3d 258 (Mont. 2018).
11. Associated Management Services, Inc. v. Ruff, 424 P.3d 571 (Mont. 2018).
12. Folsom v. Montana Public Employees' Association, Inc., 400 P.3d 706 (Mont. 2017).
13. Byorth v. USAA Casualty Insurance Company, 384 P.3d 455 (Mont. 2016).
14. Junkermier, Clark, Campanella, Stevens P.C. v. Alborn, Uithoven, Riekenberg, P.C., 380 P.3d 747 (Mont. 2016).

Mere = Neutral

1. Reisbeck v. Farmers Insurance Exchange, 467 P.3d 557 (Mont. 2020).
2. Speer v. Department of Corrections, 458 P.3d 1016 (Mont. 2020).

3. Raap v. Board of Trustees, Wolf Point School District, 414 P.3d 788 (Mont. 2018).
4. Anderson v. ReconTrust Company, N.A., 407 P.3d 692 (Mont. 2017).

Tenth Circuit — New Mexico

Mere = Loser

1. Reeves-Ervins v. Daniel, No. A-1-CA-38205 (N.M. Ct. App. Apr. 30, 2021).
2. McGregor v. Platinum Bank, No. A-1-CA-33109, 2021 WL 475277 (N.M. Ct. App. Feb. 9, 2021).
3. Lea Power Partners, LLC v. New Mexico Taxation & Revenue Department, No. A-1-CA-37707, 2021 WL 72203 (N.M. Ct. App. Jan. 6, 2021).
4. Benavidez v. Bernalillo County Board of County Commissioners, 2021-NMCA-029, 493 P.3d 1024 (Apr. 16, 2021).
5. Last Will and Testament of Welch v. Welch, 2021-NMCA-028, 493 P.3d 400 (N.M. 2021).
6. Velasquez v. Regents of Northern New Mexico College, 2021-NMCA-007, 484 P.3d 970 (Feb. 12, 2021).
7. Peavy by Peavy v. Skilled Healthcare Group, Inc., 2020-NMSC-010, 470 P.3d 218 (N.M. 2018).
8. O'Brien v. Behles, 464 P.3d 1097 (N.M. Ct. App. 2020).
9. Public Service Company of New Mexico v. New Mexico Public Regulations Commission, NO. S-1-SC-36115 (N.M. 2019).
10. Herbison v. Schwaner, No. A-1-CA-34997, 2019 WL 1228072 (N.M. Ct. App. Feb. 4, 2019).
11. Albuquerque Journal v. Board of Education of Albuquerque Public Schools, 2019-NMCA-012, 436 P.3d 1 (N.M. Ct. App. 2018).
12. Bank of New York Mellon for Certificate Holder of CWALT, Inc. Alternative Loan Trust 200-525T1 v. Eaton, No. A-1-CA-35010 (N.M. Ct. App. Jun. 12, 2018).
13. Wilmington Savings Fund Society, FSB v. Sauceda, No. A-1-CA-36787, 2018 WL 3000153 (N.M. Ct. App. May 23, 2018).
14. State v. Yancey,021-NMCA-009, 484 P.3d 1008 (Mar. 17, 2021).
15. Fogelson v. Wallace, 2017-NMCA-089, 406 P.3d 1012, (N.M. Ct. App. 2017).
16. Ciolli v. McFarland Land & Cattle Company, Inc., 2017-NMCA-037, 392 P.3d 635 (N.M. Ct. App. 2016).

Mere = Neutral

1. Wilson v. Berger Briggs Real Estate & Insurance, Inc., 2021-NMCA-054, 497 P.3d 654 (N.M. Ct. App. 2021).
2. City of Albuquerque v. SMP Properties, LLC, 2019-NMCA-004, 433 P.3d 336 (N.M. Ct. App. 2020).

3. State ex. Rel Foy. v. Vanderbilt Capital Advisors, LLC, 2022-NMCA-026,, 511 P.3d 329, 340 (N.M. Ct. App. 2020).
4. New Mexico Construction Industries Division and Manufactured Housing Division v. Cohen, 2019-NMCA-071, 453 P.3d 456 (N.M. Ct. App. 2019).
5. Caballero v. Haines, No. A-1-CA-37284, 2018 WL 7022169 (N.M. Ct. App. Dec. 13, 2018).
6. Valerio v. San Mateo Enterprises, Inc., 2017-NMCA-059, 400 P.3d 275 (N.M. Ct. App. 2017).
7. Hegerty v. Skilled Healthcare, LLC, No. 34,846, 2017 WL 1019632 (N.M. Ct. App. Feb. 15, 2017).
8. Allred v. New Mexico Department of Transportation, 2017-NMCA-019, 388 P.3d 998, 1008 (N.M. Ct. App. 2016).
9. Beaudry v. Farmers Insurance Exchange Farmers Group, Inc., 2017-NMCA-016, 388 P.3d 662 (N.M. Ct. App. 2016).

Tenth Circuit — Wyoming

Mere = Loser

1. Norris v. Besel, 442 P.3d 60 (Wyo. 2019).
2. Mantle v. North Star Energy & Construction LLC, 473 P.3d 279 (Wyo. 2020).
3. Montierth v. Deutsche Bank National Trust Company for Ameriquest Mortgage Securities Trust 2005-R7, 415 P.3d 654 (Wyo. 2018).

Mere = Neutral

1. Wyoming State Hospital v. Romine, 483 P.3d 840 (Wyo. 2021).
2. Warwick v. Accessible Space, Inc., 448 P.3d 206 (Wyo. 2019).

Eleventh Circuit — Alabama

Mere = Loser

1. Nucor Steel Tuscaloosa, Inc. v. Zurich American Insurance Company, 343 So. 3d 458 (Ala. 2021).
2. Autauga Creek Craft House, LLP v. Eddie Brust, 2019 WL 4570169 (Ala. Civ. App. 2019).
3. Ex Parte Hubbard, 321 So. 3d 70 (Ala. 2020).
4. Startley General Contractors, Inc. v. Water Work Board of City of Birmingham, 294 So. 3d 742 (Ala. 2019).
5. Graham v. State, 299 So. 3d 273 (Ala. Crim. App. 2019).
6. Lindsay v. State, 326 So. 3d 1 (Ala. Crim. App. 2019).
7. Ex Parte International Paper Company, 285 So. 3d 753 (Ala. 2019).
8. GEICO General Insurance Company v. Curtis, 279 So. 3d 1171 (Ala. Civ. App. 2018).

9. Curry v. Miller, CV-16-900224 (Ala. 2018).
10. Tidmore v. Citizens Bank & Trust, 250 So. 3d 577 (Ala. Civ. App. 2017).
11. Ex Parte Hugine, 256 So. 3d 30 (Ala. 2017).
12. Bain v. Colbert County Northwest Alabama Health Care Authority, 233 So. 3d 945 (Ala. 2017).
13. Board of Zoning Adjustment of Huntsville v. Watson, 220 So. 3d 1074 (Ala. Civ. App. 2016).

Mere = Neutral

1. Fuston, Petway, & French, LLP v. Water Works Board of City of Birmingham, 343 So. 3d 1118 (Ala. 2021).
2. McDonald v. Keahey, 301 So. 3d 823 (Ala. Civ. App. 2019).
3. Hall v Environmental Litigation Group, P.C., 248 So. 3d 949 (Ala. 2017).
4. Thomas v. Safeway Insurance Company of Alabama, Inc., 244 So. 3d 965 (Ala. Civ. App. 2017).

D.C. Circuit — D.C.

Mere = Loser

1. Environmental Defense Fund v. Federal Energy Regulatory Commission, 2 F.4th 953 (D.C. Cir. 2021).
2. M3 USA Corporation v. Qamoum, 1:20CV02903 (2020).
3. CapitalKeys, LLC v. Democratic Republic of Congo, 278 F. Supp. 3d 265 (D.D.C. 2017).
4. Exxon Mobil Corporation v. Corporacion CIMEX S.A., 534 F. Supp. 3d 1 (D.D.C. 2021).
5. Butler v. Enterprise Integration Corporation, 459 F. Supp. 3d 78 (D.D.C. 2020).
6. United States ex. Rel. PCA Integrity Association, LLP v. NCO Financial Systems, Inc., No. CV 15-750 (RC), 2020 WL 686009 (D.D.C. Feb. 11, 2020).
7. Ciox Health, LLC v. Azar, 435 F. Supp. 3d 30 (D.D.C. 2020).
8. Thomas v. Securiguard Inc., No. CV 18-0125 (ABJ), 2019 WL 13160062 (D.D.C. Nov. 20, 2019).
9. UMC Development, LLC v. District of Columbia, 401 F. Supp. 3d 140 (D.D.C. 2019).
10. De La Fuente v. DNC Services Corporation, No. CV 18-336 (RC), 2019 WL 1778948 (D.D.C. Apr. 23, 2019).
11. Plymouth County Retirement Association v. Advisory Board Company, 370 F. Supp. 3d 60 (D.D.C. 2019).
12. Robinson v. Howard University, Inc., 335 F. Supp. 3d 13 (D.D.C. 2018).
13. Bazarian International Financial Associates, LLC v. Desarrollos Hotelco, C.A., 168 F. Supp. 3d 1 (D.D.C. 2016).

14. California Association of Private Postsecondary Schools v. DeVos, 344 F. Supp. 3d 158 (D.D.C. 2018).
15. Federal Trade Commission v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27 (D.D.C. 2018).
16. Walsh Construction Company II, LLC, v. United States Surety Company, No. No. 1:17-cv-2251-JBD, 2018 WL 2981552 (D.D.C. Jan. 16, 2018).
17. Lamb v. Millennium Challenge Corporation, 228 F. Supp. 3d 28 (D.D.C. 2017).
18. He Depu v. Yahoo! Inc., 306 F. Supp. 3d 181 (D.D.C. 2018).
19. Center for Public Integrity v. Department of Energy, 234 F. Supp. 3d 65 (D.D.C. 2017).
20. In re Rail Freight Fuel Surcharge Antitrust Litigation, 292 F. Supp. 3d 14 (D.D.C. 2017).
21. Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017).
22. Washington Tennis & Education Foundation, Inc. v. Clark Nexsen, Inc., 324 F. Supp. 3d 128 (D.D.C. 2018).
23. Sodexo Operations, LLC v. Not-for-Profit Hospital Corporation, 264 F. Supp. 3d 262 (D.D.C. 2017).
24. Howard v. Liquidity Services Inc., 177 F. Supp. 3d 289 (D.D.C. 2016).
25. Howard Town Center Developer, LLC v. Howard University, 278 F. Supp. 3d 333 (D.D.C. 2017).
26. Fawzi v. Al Jazeera Media Network, 273 F. Supp. 3d 182 (D.D.C. 2017).
27. Xie v. Sklover & Company, LLC, 260 F. Supp. 3d 30 (D.D.C. 2017).
28. EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro S.A., 246 F. Supp. 3d 52 (D.D.C. 2017).
29. Magee v. American Institute of Certified Public Accountants, 245 F. Supp. 3d 106 (D.D.C. 2017).
30. United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017).
31. Cobell v. Jewel, 234 F. Supp. 3d 126 (D.D.C. 2017).
32. United States v. Aetna, Inc., 240 F. Supp. 3d 1 (D.D.C. 2017).
33. Apton v. Volkswagen Group of America, Inc., 233 F. Supp. 3d 4 (D.D.C. 2017).
34. Sodexo Operations, LLC v. Not-for-Profit Hospital Corporation, 264 F. Supp. 3d 262 (D.D.C. 2017).
35. Lapera v. Federal National Mortgage Association, 210 F. Supp. 3d 164 (D.D.C. 2016).
36. Benton v Laborers' Joint Training Fund, 210 F. Supp. 3d 99 (D.D.C. 2016).
37. Jackson v. Teamsters Local Union 922, 204 F. Supp. 3d 97 (D.D.C. 2016).

Mere = Neutral

1. Crawford v. Presidents and Directors of Georgetown College, 537 F. Supp. 3d 8 (D.D.C. 2021).
2. United States v. Saffarinia, 424 F. Supp. 3d 46 (D.D.C. 2020).
3. In re McCormick & Company, Inc. Pepper Products Marketing and Sales Practice Litigation, 316 F. Supp. 3d 455 (D.D.C. 2018).

4. Scotland IMAPizza, LLC v. At Pizza Limited, 334 F. Supp. 3d 95 (D.D.C. 2018).
5. Presidential Bank, FSB v. 1733 27th Street SE LLC, 318 F. Supp. 3d 61 (D.D.C. 2018).
6. United States v. AT&T Inc., 916 F.3d 1029 (D.C. Cir. 2019).
7. Physicians Committee for Responsible Medicine v. United States Department of Agriculture, 316 F. Supp. 3d 1 (D.D.C. 2018).
8. CapitalKeys LLC, Democratic Republic of Congo, No. 15-CV-2079 (KBJ), 2021 WL 2255362 (D.D.C. June 3, 2021).
9. Jordan v. U.S. Department of Labor, 331 F.R.D. 444 (D.D.C. 2019).
10. United States v. Slatten, 395 F. Supp. 3d 45 (D.D.C. 2019).
11. Bradley v. National Collegiate Athletic Association, No. CV 16-346 (RBW), 2021 WL 6750533 (D.D.C. Feb. 16, 2021).
12. Bronner v. Duggan, 249 F. Supp. 3d 27 (D.D.C. 2017).
13. American Civil Construction, LLC v. Fort Meyer Construction Corporation, 296 F. Supp. 3d 198, 202 (D.D.C. 2018).
14. Bonner v. S-Fer International, Inc., 207 F. Supp. 3d 19 (D.D.C. 2016).

# # #

Almanac Excerpts

Selected works from the 2021 edition of the *Green Bag Almanac & Reader,*

AKA

The "Ethereal Version" of the

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of Useful and Interesting Tidbits for Lawyers

&

Reader

of Exemplary Legal Writing From the Year Just Passed

2021

EDITED BY

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Last Year

Preface

Many Friends, and a Secret Adversary

This is the 16th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

I.

Each year, we mix four kinds of content here: (1) much exemplary legal writing, some presented via recommendations by respectable authorities, some reprinted in whole or in part; (2) several reviews of the year just past, written by articulate people who've been paying attention; (3) interesting items of other sorts, organized around a theme[1] and scattered throughout the book; and (4) odds and ends that strike us as useful or interesting.

Also, each new edition of the *Almanac & Reader* sees some of those things change a bit while others stay pretty much the same.

This year, our coverage of exemplary legal writing and our reviews of the events in the year just past have changed not at all (in one sense) and lots (in another). In the "not at all" sense, we are covering the same subjects as last year: recommendations about judicial opinions and books (accompanied by full republication of a few of the judicial opinions) and reviews of the year in language, in law in general, in the U.S. Supreme Court, and in law and technology. In the "lots" sense, we are pleased to welcome two new recommenders of judicial opinions (James C. Ho and Susan Phillips Read, both of whom will be familiar due to their high standing in the legal community generally and their contributions to other *Green Bag* publications in particular), and three accomplished new contributors to *The Year in Law* (Kendall Turner, Sam Goldstein, and Betsy Henthorne).

As ever, the organizing theme is new.[2] This year, we have the first novel by Agatha Christie about Prudence Cowley and Thomas Beresford (aka Tommy and Tuppence), titled *The Secret Adversary*. The story is replete with people and passages that invite annotations (provided here by a formidable

[1] The themes have ranged widely over the years, and have included, for example, games (baseball in 2010, whist in 2018), individuals (Rex Stout in 2012, Thurgood Marshall in 2018), and events (presidential elections in 2008, Philadelphia's 1887 constitutional centennial celebrations in 2014). And so on and so on.

[2] Or at least as usual. In 2015 and 2016 we did publish two consecutive editions of the *Almanac & Reader* with Sherlock Holmes themes.

group of scholars) about topics of interest to lawyers and other thoughtful people. And it is pleasingly free of the most offensive of the bigotries that Christie was wont to occasionally slip into her stories (a practice not made less offensive by their removal when there was a prospect of more money to be made if they were absent from editions sold in some countries — though it is not clear whether Christie even knew about the removals).[3] Or perhaps nearly free. As Alexis Romero's thoughtful annotation near the end of the story shows, not all racist references in old books openly advertise themselves as such, at least to the modern reader. Do not look for Romero's note now — it would be a spoiler — but do be on the lookout for it when you get close to the end of the story.

And the odds and ends remain just that.

II.

As ever, our readers are our friends. They contribute good work and generously subscribe, and also generously and gently flag our occasional missteps. We got started early with the mistakes in the 2020 *Almanac & Reader*. Near the front of the book, in *The Year in Law*, we got a VIP's name wrong. Suzanne B. Corriell, Circuit Librarian for the U.S. Court of Appeals for the Fourth Circuit, noticed and sent us a funny note.

Page 45:

> In the 2020 *Almanac*, is "Brain Kemp" on page 45 an intentional error? It's pretty good comedy — at least it made me laugh.

We confess error (and express thanks, with a chuckle), but we cannot be sure Governor Brian Kemp would agree with us.

Then we have another kind of confession of error, this one from Jack Metzler, the author of *Groundhogs, the Supreme Court, and the Emperor of the United States*.[4] After the 2020 *Almanac & Reader* appeared in print, Metzler sent us a note slathered with sympathy for a slightly sloppy, and very kind, author. This is an author kind enough to nobly shoulder responsibility for an error, rather than shift it onto an editor. The editor nevertheless also confesses error and stands by the author under the weight of this blunder . . .

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[3] *See* Ross E. Davies, *An Ursine Foot Note*, Re-readings, Volume V at 1, 4 (2020). Christie has plenty of unsatisfying apologists, ranging from the relatively mild (*e.g.*, Janet Morgan, *Agatha Christie: A Biography* 264-65 (1984; pbk. ed. 1986) and Laura Thompson, *Agatha Christie: A Mysterious Life* 385-87 (2018)) to the seemingly unhinged by outrage (*e.g.*, Charles Osborne, *The Life and Crimes of Agatha Christie: A Biographical Companion to the Works of Agatha Christie* 169-70 (1982; first U.S. edition 2001)) in defense of their subject.

[4] 2020 Green Bag Alm. 178.

Page 183:

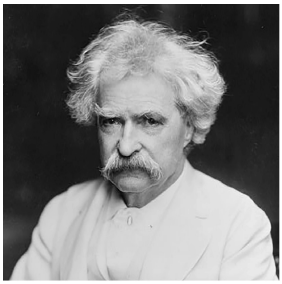
> I'm sorry to report that the scourge of errors continues to plague the *Green Bag Almanac & Reader*. On page 183, at footnote 30, the following appears: "See If Shiras was aware of the historic event that had just happened in his neighborhood, he did not mention it in his note to Fuller." It appears that the author removed almost all of a citation beginning with the "see" signal. Of course, it's also possible that "See" was intended as a prefatory phrase, in which case it deserved a comma and "if" should not have been capitalized. Whatever the intent, I'm sure the author is mortified at having submitted the piece to you in such form; I hope you will be gentle with him.

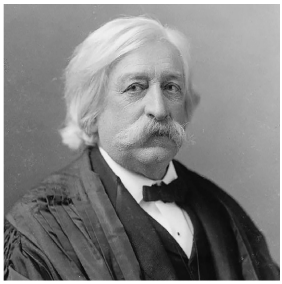
Lastly, we received a hilarious note from Professor G. Edward White.

Page 244:

> I thoroughly enjoyed this year's *Almanac*, probably because of its emphasis on the correspondence and friendships of late nineteenth and twentieth century justices. I did not know much about such justices as Blatchford, Matthews, Shiras, Day, and Minton, and it was interesting to learn about their friendships with various Chief Justices. There was, however, one detail in the volume I found particularly arresting. On page 244, the fifth page of Greg Goelzhauser's article on Taft's correspondence with Van Devanter in the summer of 1922, Goelzhauser states, "After G. Edward White's death unexpectedly opened the center chair, which Taft had previously told Harding was the only seat on the Court he would accept," Harding sought to delay naming George Sutherland as Chief Justice even though he had previously intimated he would name Sutherland to the first vacancy which occurred during Harding's presidency. Harding was waiting for a second vacancy so that he could nominate Sutherland to that seat and Taft to succeed White as Chief Justice, which he eventually did.
>
> I have occasionally been confused with C.J. Edward White over the years, but this is the first time I feel the need to invoke Mark Twain.

And now, there's a matching puzzle for you at the top of the next page. Pick up your favorite crayon and draw a line connecting Professor White's name to his picture, and then do the same thing for the other two characters and their respective names.





Samuel L. Clemens
Melville W. Fuller
G. Edward White

Thanks to all!

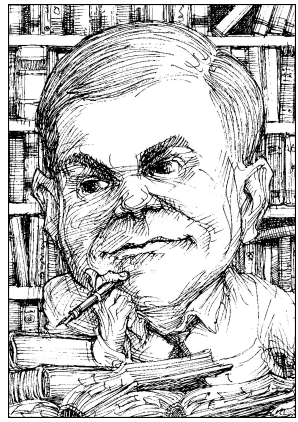
III.

Our goals remain the same, year after year: to present a fine, even inspiring, year's worth of exemplary legal writing — and to accompany that fine work with a useful and interesting (and sometimes entertaining) potpourri of distracting, thought-provoking oddments. Like the law itself, the 2020 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the . . . things . . . some people say about legal writing are not entirely accurate.

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by thanking and apologizing to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to O'Melveny & Myers LLP (for its steadfast support of our work), to Anna Ivey (for cosmopolitan range and incomparable kindness) and to the super-literate Ira Brad Matetsky, who never fails to make any work he touches better.

Finally, the *Green Bag* thanks you, our readers. Your continuing support for the *Green Bag* and your kind remarks about the *Almanac & Reader* are inspiring.

Ross E. Davies
April 16, 2021



Bryan A. Garner[†]

THE YEAR 2020

IN LANGUAGE, GRAMMAR, AND USAGE

JANUARY

The omission of the Oxford comma (aka the serial comma) on British coinage triggered conflict and recrimination. The new 50p coin, issued to commemorate Brexit, included the slogan "Peace, prosperity and friendship with all nations." According to the *Daily Telegraph* and the *Guardian*, the novelist Sir Philip Pullman promptly called on "literate people" to boycott the coin because no comma appeared after *prosperity*. The editor of the *Times Literary Supplement*, Stig Abell, claimed that the absence of the comma was "killing him." In short, the slogan as printed seemed to promote disharmony, impoverishment, and animosity. Note the pleasing comma there — after *impoverishment*. • In *United States v. Varner*, the Fifth Circuit declared that transgender federal prisoners have no right to be referred to (in the third person) by the pronouns of their choice. The court wrote that "if a court were to compel the use of particular pronouns at the invitation of litigants, it

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[†] Bryan A. Garner is the author of dozens of books about words and their uses, including *Garner's Modern English Usage* (Oxford, 4th ed. 2016). He is editor in chief of *Black's Law Dictionary* (West, 11th ed. 2019) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 17th ed. 2017). He coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012).

could raise delicate questions about judicial impartiality . . . which 'assures equal application of the law.'" And it could lead to complexity, as the court noted that at least ten sets of third-person personal pronouns have been identified in current use. • *Mental Floss* advised against using *just* in conversation on grounds that it sounds conciliatory. It's said to be possibly detrimental to your image — a "subtle message of subordination or deference" that weakens your message and diminishes your image as a decisive person. Researchers found that women use *just* more often than men. When, in a small-scale study, participants were asked to consciously omit *just* whenever possible, communication was found to be suddenly regarded as clearer and stronger. Just saying. • Observers discovered that the Justice Department's Office of Violence Against Women had tacitly changed its definitions of *sexual assault* and *domestic violence*. Both *Salon* and the *Independent* noted that the previous definition of *sexual assault* was expansive: "any type of sexual contact or behavior that occurs without the explicit consent of the recipient." Further: "Falling under the definition of sexual assault are sexual activities [such] as forced intercourse, forcible sodomy, child molestation, incest, fondling, and attempted rape." Essentially, the change amounted to one big cross-reference: "any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent." Meanwhile, the meaning of *domestic violence* was severely narrowed. *Slate* reported that the term had traditionally provided for considering the dynamics of power and control, patterns of deliberate behavior that harmed a domestic partner, and forms of emotional, economic, or psychological abuse. But the Justice Department's redefinition eliminated all psychological aggression and limited *domestic violence* to acts of physical harm that rise to felonies or misdemeanors — eliminating all kinds of psychological abuse and manipulation. Professor Natalie Nanasi of Southern Methodist University Dedman School of Law commented that these changes were "part of a broader trend toward the devaluation of women" by the Trump administration and President Trump himself. • A noted Harvard law professor sued the *New York Times*, alleging that a headline amounted to defamatory clickbait. Referring to an article published in *Medium*, the headline read, "A Harvard Professor doubles down: If you take Epstein's money, do it in secret." The lead-in continued: "It is hard to defend soliciting donations from the convicted sex offender Jeffrey Epstein. But Lawrence Lessig, a Harvard Law professor, has been trying." Professor Lessig conceded saying that if an educational institution accepted money from a criminal, it should keep the donor's name anonymous to avoid laundering the donor's reputation. But he added an explicit exception for criminals such as Epstein, recommending that all such

donations be rejected. In April, Lessig would withdraw his lawsuit after the *Times* acknowledged its own imprecision and revised the headline and lead.

February

Cleveland.com and the *ABA Journal* reported that a judge imposed a "Bart Simpson-esque" punishment on a lawyer for disruptive courtroom misbehavior. He was ordered to write out, in longhand, 25 times, two promises not to "act out" or misbehave. The judge demanded neatness and legibility. The lawyer conceded that his punishment was appropriate and condign. • The *Guardian* judged "the worst grammar crimes in film titles." But the headline writers didn't seem to recognize the difference between grammar and punctuation: all their complaints had to do with the latter. Full stop. The latest adaptation of *Emma.* was said to put the period in period dramas. The editors also derided the nonsensical use of exclamation points. The director of *mother!* gushed that he'd chosen the punctuation even before the word in the title because "it reflects the spirit of the film," which was said to have, in its conclusion, "a big exclamation point." Another film title's use of two exclamation points — *Everybody Wants Some!!* — was explained this way: "Two exclamation points will make any sentence sound uptight and manic, while just one sounds enthusiastic or sarcastic." Colons were heartily attacked. "Want to add a sense of spurious authority to your film title? Add a colon. From *xXx: Return of Xander Cage* to *Kong: Skull Island* to *Spider-Man: Far from Home*, everything sounds more important with a couple of dots in the middle." The virgule came under fire for its appearance in the unmemorable film *Face/Off*: "Traditionally a slash means 'or.' But the film isn't really about the choice between 'face' or 'off' is it? It's between 'face' (of John Travolta) or 'face' (of Nicolas Cage). So: Face/Face." This was said to be "a sad grammatical error," even though the title of this face-swapping film is pretty much altogether devoid of grammar. • The World Health Organization (WHO) officially gave the name "COVID-19" to the newly rampant coronavirus disease. WHO explained that its current guidelines for naming diseases avoided "references to a specific geographical location, animal species, or groups of people" on grounds that these can "stigmatize entire regions and ethnic groups." Unfortunately, some people continued calling COVID-19 the "Chinese disease" (and worse), which incited prejudice and violence against people of Asian descent. *The Conversation*, an independent news organization, noted that disease names have often contained smears. Syphilis, for example, was called the French, English, or Italian disease — depending on the object of one's enmity. In the 1980s, when AIDS began to spread, it

was initially labeled "gay-related immune deficiency" (GRID), with an invidious reproach of gay people. More recently, in 2012, WHO itself erred by naming a respiratory illness "Middle Eastern respiratory syndrome" (MERS), which provoked resentment and even maltreatment of Middle Easterners. • During what would later be known as the first impeachment of President Trump, Chief Justice Roberts scolded three lawyers, one a member of Congress and two representing Trump, for their inflamed accusations against each other. The *Independent* reported that the House Judiciary Committee Chairman and two of Trump's lawyers had several contemptuous exchanges, shouting epithet-filled denunciations at one another. At the end of the day's proceedings, the Chief Justice rebuked the behavior of all three, citing the 1905 impeachment trial of a federal district judge. In that trial, "A senator objected when one of the managers used the word 'pettifogging' and the presiding officer said the word ought not to have been used. I don't think we need to aspire to that high a standard, but I do think those addressing the Senate should remember where they are." Eleven months later, though, on January 6, 2020, those in the Senate chamber would fall to the lowest standards ever. • In the *Dallas Morning News*, a "consumer watchdog" named Dave Lieber wrote an open letter to the people of Arizona, calling them *Arizonians*. The term generated a spirited debate about the correct label for denizens of the state. ABC15 in Phoenix declared that it should be *Arizonans* but added: "If there are Floridians and Alabamians, could he have been onto something with Arizonians?" Although *Arizonian* was traceable to 1857, the term *Arizonan* had become standard by the 1940s. My own research shows a 17:1 ratio between the terms in print sources today. • Moving north: How would you like an enchilada in Nevada? Locals don't rhyme the words. So when presidential candidates started saying the state's name as if it rhymed with *enchilada*, many Nevadans became irked. (Arizonans were suddenly indifferent.) The governor of Nevada sent the candidates messages with instructions to say /nuh-*vad*-uh/, not /nuh-*vah*-duh/. In 2016, it seems, candidate Donald Trump — this according to the *New York Times* — presumptuously suggested that Nevadans were mispronouncing their own state's name. But some degree of confusion is understandable. In the original Spanish, *Nevada* (meaning "snow-capped") is correctly pronounced /nuh-*vah*-duh/. But when Northern and Midwestern settlers poured into the new state in the 1860s, bringing with them their own speech habits, they said /nuh-*vad*-uh/. And for the time being, that's how it's to be said. But stay tuned for a few more decades: we'll see. That's my pronunciamento.

March

Despite WHO's efforts to give COVID-19 a neutral name, many sources reported on a study that found, on Twitter, a 900% virus-related increase in hate speech toward China in particular and people of Asian descent in general. One company that specialized in tracking and measuring toxic online speech found not only that Twitter users had begun employing foul language to accuse Asian people of causing the pandemic, but also that they had shifted from using neutral hashtags (e.g., #COVID19) to incendiary ones like #chinaliedpeopledied, #Chinavirus, and #Kungflu. President Trump responded to a backlash to his own persistent use of "the China virus" by saying: "I had to call it where it came from. It did come from China. So I think it's a very accurate term." This from the man who professed to have "all the best words." • The neologism *covidiot* burst into vogue throughout the world. The first documented usage was on Twitter in late February, where the plural form was defined as "people who deny COVID-19 is real or who claim that it was created by some left-wing conspiracy." The term soon broadened in sense to denote science-deniers, toilet-paper hoarders, flouters of public-health protocols, antimaskers, and so on. Online dictionaries were quick to add the term. • *The Conversation* reported that courts around the world, having been asked to interpret the meanings of emojis, were relying on forensic linguists. At a two-day colloquium in South Africa, lawyers and linguists considered the problems with interpretation. They agreed that culture and language have an effect, as do the surrounding facts and circumstances. Within a particular culture, the meaning of an emoji may be relatively clear. For example, a French court interpreted a text message containing a gun emoji as a "death threat in the form of an image." American courts have interpreted "thumbs up," "handshake," and "fist bump" emojis as forming agreements. But in some cultures, a thumbs-up gesture is a serious insult. And within a multicultural society, the probability of misunderstandings is greatly increased. Hence I'm abstaining from my initial impulse to end this entry with an emoji. • Forensic linguists scored victories on another front: identifying pedophiles on the Internet. The *Telegraph* reported that experts in the field had analyzed text messages and chat logs for purposes of training law-enforcement personnel to mirror the linguistic behavior of potential victims. Adults typically overdo puerility when pretending to be teens, thinking that copious spelling irregularities, emojis, and initialisms (*lol*, *brb*), and omitting or misusing punctuation are de rigueur. After training, undercover online operations had reportedly become more successful at luring suspects, with rates as high as 75%.

APRIL

Several sources reported that people were finding both comfort and creativity in pandemic-related language. The editors of the *Guardian* reported that other editors and writers were asking more questions about grammar, punctuation, and spelling, including whether to write *COVID* or *Covid* or *covid* (the second was declared "correct" for British English). People increased their use of the terms *self-isolating*, *pandemic*, *key worker*, *quarantine*, *social-distancing*, and *lockdown*. They also became neologists. The German loanword *Hamsterkaufer* (literally, "hamster shopper") suggested amusing images of hoarders with cheeks crammed full of comestibles while their arms were laden with toilet paper and sanitary wipes. Soon people were quaffing *quarantinis* (an alcoholic beverage) while *doomscrolling* (obsessively searching for pandemic news on the Internet). Time disorientation in lockdown mode made every day *Blursday*. And for anyone who refused to comply with health and safety measures or to regard the pandemic as real, the neologism *covidiot* gained a synonym: *morona*. • The *Guardian* reported that Scotland had decided to abolish the common-law crime of blasphemy, which was limited to Christianity, declaring that it "no longer reflects the kind of society we live in." In an official statement, Scotland's Parliament noted that other statutes applicable to speech, such as statements meant to incite a breach of the peace, can sometimes cover blasphemy. The last charge of blasphemy was brought against a Scottish bookseller in 1843 for "selling, or exposing for sale, a number of blasphemous publications." At his trial, the bookseller pleaded not guilty and delivered a four-hour speech to the jury, which then took only 45 minutes to convict. He was sentenced to 15 months in jail. England and Wales repealed their blasphemy laws in 2008, and Ireland in 2018. What impious irreverence! Zounds! • The *Verge* discovered that Microsoft had quietly changed its Word software to flag as an error the insertion of two spaces after a sentence-ending period. This change reflected the preference in almost all modern style guides: one space after a period. But Baby Boomers determined to cling to two spaces will be able to. "As the crux of the great spacing debate," said a Microsoft representative, "we know this is a stylistic choice that may not be the preference for all writers, which is why we continue to test with users and enable these suggestions to be easily accepted, ignored, or flat out dismissed in Editor." • The *New York Journal of Books* reviewed an anthology of essays exploring how superficially complimentary words can actually devalue the women to whom they are applied: *Pretty Bitches: On Being Called Crazy, Angry, Bossy, Frumpy, Feisty, and All the Other Words That Are Used to Undermine Women*. One essayist

noted that *luck* and *lucky* are used to diminish women's accomplishments involving hard choices and hard work, while similarly situated men are said to be *successful*, *hard-working*, or *brilliant*. Another essay addressed social expectations of women to fawn over men to ingratiate themselves or else risk being denigrated as *aloof*, *cold*, or *difficult*. An exceptionally chilling recollection of a woman's kidnapping showed that every man who reported on it applied *crazy* to the victim, as if her very real experience had occurred only in her mind. • In a new book, Simon Walters explored and decoded the varied and colorful language of U.K. Prime Minister Boris Johnson. Titled *The Borisaurus: An A to Z of Borisisms*, the book chronicles Johnson's many odd words and phrases: *whiff-whaff* for ping-pong, *banana-booted demigod* in reference to David Beckham, and *boosterism* to denote what remote towns engage in when trying to attract outsiders. Johnson has long shown a flair for words (not to mention coiffure). In 1980, when only 16, Johnson wrote in the *Eton Chronicle*: "The civilised world must ignore idiots who tell us that . . . public schools demolish all hopes most cherished for the comprehensive system. This is twaddle, bunkum, balderdash, tommyrot, piffle, and fiddlesticks of the most insidious kind." If you're wondering about the absence of *pishposh*, please note that it's an exotic Americanism. • Although episodes of the television quiz-show *Jeopardy!* are routinely filmed months in advance, some viewers became upset with the one-word answer to this clue: "From the Greek word for 'people,' it describes a disease that affects many people at one time." Too obvious? No. Too topical? Yes. The self-isolating viewers found the answer too painfully self-referential. The correct question: What's a pandemic?

MAY

Economic stimulus checks were sent out to Americans with an accompanying letter from President Trump. Many recipients complained about its pompous language and pointed out that it teemed with stylistic blemishes. An anonymous teacher noted the repeated use of the royal *we*, incomplete sentences, omissions of serial commas, vague phraseology, hyperbole, and plentiful redundancies, among other flaws — assigning it a grade of "F." In *McSweeny's*, a freshman-composition teacher criticized the clichés, a missing pronoun antecedent, improper capitalization, and misused imperative voice. A more forgiving grader, this teacher gave it a D-. • A study in *PLoS ONE* discussed how social-media users stretch words to modify their meanings. *Suuuuure* implies sarcasm. *Duuuuude* conveys amazement or disbelief. *Yeeeessss!* shows excitement. *Heeeellllppp* may be a cry of desperation.

Although stretched words are often seen in social media, they never appear in formal writing and only rarely in speech, the most notable exception being *GOOOOOOOOOOOAAAAAALLLLLL!* when a soccer team scores. • Reacting to the federal government's "divisive policies and racist rhetoric," New York City passed a bill to remove the terms *alien*, *illegal immigrant*, and *illegal migrant* from the city's laws, orders, and other documents on grounds of their "harmful and xenophobic" connotations. The neutral hypernym *noncitizen* replaced them, essentially blurring a long-held distinction. City Council members who voted against the bill wanted to distinguish between noncitizens such as tourists, students, and legal residents on the one hand and unlawful entrants on the other. Those who voted for it said they sought to "delete all terms that dehumanize and divide us." • In response to queries from journalists and others, the Associated Press released a supplement to its style guide expressly for pandemic-related terms. Punctuation was a major issue: the verb phrases *stay at home* and *shelter in place* were declared to be hyphenated as phrasal adjectives: *stay-at-home orders* and *shelter-in-place recommendations*. Oddly, though, hyphens were dropped from *social distancing* in all instances, even when used adjectivally. (That's the kind of guidance that makes many writers ignore AP.) Some terms were said to require explanation whenever used because their meanings could be place or context-specific. For example, *lockdown* could be a partial or complete restriction on movement for specified periods. AP distinguished related terms, such as *respirators*, which can refer to N95 face masks, and *ventilators* or *breathing machines*. And it noted that although *isolation* and *quarantine* are commonly interchanged, the CDC has distinguished the terms: "*Isolation* is separating sick people from healthy people to prevent spread of disease. . . . *Quarantine* separates and restricts the movements of people who were [read *have been*] exposed to a contagious disease to see if they become sick." The longest entry in the guide concerned how and when to refer to coronaviruses and related pathogens — specifically advising that, in writing, COVID-19 should never be shortened to COVID. • To help British children keep up their language skills during school closures, the British Library called for them to write small — really small — books for an online National Library of Miniature Books. Adult authors and illustrators also contributed tiny tomes. One tells the story of a rabbit that lives on a writer's desk, and another of a squirrel named Fipsy, who wears a surgical mask while adjusting to life in lockdown. To ensure that children without computers or art supplies could create books, the Library distributed packets of materials to kids nationwide. • A lawyer tried to use Trumpian scurrility as a justification for his own. The Legal Professional Blog described how during a deposition, the defendant's

lawyer told opposing counsel to "certify your own stupidity," adding: "I'm going to get sanctions against your firm like you wouldn't believe, bitch." As authority to support his rudeness, he declared: "At this point in time, a man who insults on a daily basis everybody he does business with has now been elected President of the United States. The standards have changed. I'll say what I want." After a judge chastised the lawyer for his vulgar language, the unrepentant lawyer accused the judge of having "robe rage." A disciplinary board recommended a three-month suspension and compulsory attendance at a professionalism seminar. The lawyer's father defended his son's language, saying that *bitch* was not "that derogatory" and "robe rage" was just "a cutesy term."

JUNE

Like many other major media sources, the *New York Times* announced that it will capitalize *Black* when referring to people and cultures of African origin. The editors explained, "We believe this style best conveys elements of shared history and identity, and reflects our goal to be respectful of all the people and communities we cover." But *white* will not be capitalized: "There is less of a sense that 'white' describes a shared culture and history. Moreover, hate groups and white supremacists have long favored the uppercase style, which in itself is reason to avoid it." Writing in the *Atlantic*, the scholar Kwame Anthony Appiah discussed the arguments for and against capitalizing both terms. He examined the reasons and rules for capitalization, how language and labels shift over time, the social perceptions of what capitalizing a word — or not doing so — means, and how they are now treated in many style guides. Appiah proposed that both terms should be capitalized because neither is a literal or uniform description of skin color, and neither refers to a "fully formed and stable social category." Appiah concluded: "Racial identities were not discovered but created . . . , and we must all take responsibility for them. Don't let them disguise themselves as common nouns and adjectives. Call them out by their names." • The Black Lives Matter movement, many sources reported, had inspired industries to begin dropping terms and concepts associated with slavery. The BBC covered Microsoft-owned GitHub, the world's biggest resource site for software developers, as it announced it was working to drop the term *master* (referring to the main version of a code) to a neutral term and move away from using technological *master-slave* terms used to describe a system where one part controls or copies others. The *New York Times* reported that the Court of Master Sommeliers, Americas, had decided to stop using the single honorific *Master* with a sommelier's surname and instead make the title *Master Sommelier* [surname] in hopes that it

would help to encourage racial inclusion and diversity within the wine industry. And the American real-estate industry had begun dropping *master bedroom* in preference to *primary bedroom*; and *master bath* in preference to *owner's retreat*. Said one broker, "'Master' represents a stigma in time and place that we need to move forward from." • The *New York Times* reported that Merriam-Webster is revising the dictionary's definition of *racism*. Kennedy Mitchum, a college student, had encountered people who used only the first part of the dictionary's entry as a defense against charges of racism. That definition reads: "a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race." She told the dictionary's editors that the entry needed revision so that it would better reflect the idea that "racism is not only prejudice against a certain race due to the color of a person's skin" but also "prejudice combined with social and institutional power . . . a system of advantage." One of the lexicographers, in accepting the suggestion, was quoted as saying: "Activism doesn't change the dictionary. Activism changes the language." • *Time* magazine discussed the various words used to describe the unrest that followed the killing of George Floyd, and the ramifications of each of them. The term *riot* connotes meaningless violence, such as victorious sports fans overturning vehicles and looting shops. But since the 1960s, it has purportedly had a racial dimension that detracts from protestors' message. The word was said to cancel out the socioeconomic disparities that exist, to minimize calls for justice, and to focus attention instead on the criminal acts of a relative few, thereby obscuring the fact that the vast majority of protests have been peaceful. Words such as *uprising* or *rebellion* were said to give more emphasis to a fight for justice and equality and freedom from oppression. • *AdNews* issued its mid-year Hall of Shame for overused words and clichés in English-speaking countries. Among the winners (losers?) were *curated* ("Google practically anything — potatoes, burgers, you name it — and there'll be a curated list somewhere in the world. To make it worse, lists are often 'carefully curated,' which is tautologous."); *in the time of Covid* ("Gabriel Garcia Marquez it ain't."); and *disambiguate* ("A word that rather cleverly obscures the thing it seeks to clarify. Like spraying mud on windows to clean them."). Dishonorable mentions went to *preneur* ("Rule of thumb: if someone describes themselves as an entrepreneur, they probably aren't. Worse still 'cakepreneur,' 'burgerpreneur,' etc.") and *awesome* ("Not since the devaluation of the Zimbabwean dollar has something been devalued as much as the word 'awesome.' To be full of awe in the presence of a tea towel or poached egg is setting a very low bar.").

July

The Associated Press and *ABA Journal* reported on typographic issues that revealed a death certificate to be fake. While waiting to be sentenced to a prison term in New York, a criminal defendant faked his death and created a New Jersey death certificate. At first glance, the document from the Department of Vital Statistics, Health, and Registry appeared to be legitimate — except that the final word on the certificate was misspelled *Regsitry*. Subtler inconsistencies in font and type size were soon discovered. The defendant, alive but not entirely well, was quickly located, arrested, and sentenced to a punishment worse than exaggerated reports of his death. • The popular game Scrabble doesn't award or withhold points based on words' meanings. Slurs have been included in the Scrabble dictionary since 1994, when the players' associations decided to retain them as "part of the English language." But in response to social backlash, the World English Scrabble Players Association began considering removing hundreds of terms from the game's official playlist — particularly terms of disparagement. Harvard law professor Randall Kennedy expressed skepticism, commenting that although people understandably feel that any use of a slur might legitimize it and that questioning the use of words is a healthy aspect of social justice, other values may hold more sway. "My view is that the context in which a word is used always conditions the meaning of the word," he said. "If you were using a term in a setting in which it's clear that there is no message being sent, and in fact is an agglomeration, a series of symbols — a, b, c, d, e, and the rest — I don't see what the problem is." • "Dictionaries are not known for their comic timing," commented the *Telegraph*, which nonetheless cited exceptions such as the *Chambers Dictionary* definition of *éclair*: "a cake long in shape but short in duration." But "lampooning a dictionary or its maker generates a frisson that is akin to sacrilege," wrote the *Telegraph*, citing a 1989 article in which linguist John Algeo suggested that dictionaries, like the Bible, imply infallibility, and thus stimulate a similar reverence — for which he coined the term *lexicographidolatory*." Despite that, dictionaries are a natural target of parody. Hence Ambrose Bierce's definition of *dictionary*: "A malevolent literary device for cramping the growth of a language and making it hard and inelastic. This dictionary, however, is a most useful work." That definition appears in his book *The Devil's Dictionary* (1911). • The *Telegraph* also examined the links between spelling and reading skills. A tutor explained, "Spelling isn't just about passing spelling tests and avoiding embarrassing yourself on social media. It is an integral part of reading well. If your child is a poor speller, then I pretty much guarantee they cannot read as well as you

think they can." Helpful tips included breaking words into sounds to associate those sounds with the letters, concentrating on the "tricky bits" of English (such as the different ways to make the same vowel sounds), pointing out the clues to spelling that depend on where the sound appears, linking words with similar spellings, and using a funny "spelling voice" when dealing with difficult words. • The Ruhr-Universität Bochum news blog reported that although virtual assistants are supposed to activate when specifically addressed ("OK Google"), they are often accidentally activated by many other words. Researchers from the university and the Max Planck Institute compiled more than 1,000 words that caused the assistants to wake and transmit audio recordings to the manufacturer, where employees transcribed and reviewed the data. Some of the activating words weren't entirely unexpected. For example, Google Assistant responded to any "OK," and Siri woke up to "Hey." But Alexa answered not only to its (her?) name, but also to *election*, *unacceptable*, and *tobacco*.

AUGUST

NASA announced that it was changing the nicknames of some cosmic bodies because they have historical, cultural, or sociological connotations that detract from their scientific importance. People find nicknames such as "the Horsehead Nebula" more friendly and approachable than the official "Barnard 33." But others are considered questionable or offensive, such as the "Siamese Twins Galaxy," which reflects an outdated term for conjoined people, and "Eskimo Nebula," which uses a colonial name imposed on indigenous peoples. NASA explained, "Science is for everyone, and every facet of our work needs to reflect that value." • Young people continued to view sentence-ending periods, especially in text messages, as aggressive, intimidating, and insincere, according to the *Telegraph*. Hence linguists began debating the need for them in that context. One linguist opined that they're redundant: "If you send a text message without a full stop, it's already obvious that you've concluded the message. So if you add that additional marker for completion, readers will read something into it and it tends to be a falling intonation or negative tone." But another linked the omission to uptalk instead: "It strikes me that this reluctance on the part of teenagers to assert anything, as in saying something categorical enough to require a full stop, is symptomatic of an attitude of mind. It's the equivalent of an earlier kind of diction, the terminally irritating Australian uplift at the end of a sentence which turns every statement into a question. Thus, saying anything assertively, like making a statement, is seen as being aggressively sure of yourself,

whereas being tentative in your spoken or text speech is inviting agreement from your interlocutor." • Amid the generational angst about whether a full stop must come at the end of a sentence, the *Telegraph* deflated the arguments as "rubbish" because "playing fast and loose with punctuation is hardly some piece of sexy stylistic radicalism — it's a century-old literary technique used by the creators of modern literature." For example, the final chapter of James Joyce's *Ulysses* is one unpunctuated multipage sentence (it does end with a full stop, though). Some writers of notable recent literature, perhaps influenced by texting, have also dispensed with what might otherwise be regarded as obligatory punctuation. Bernadine Evaristo's *Girl, Woman, Other*, joint winner of the Booker Prize in 2019, contained no full stops; it used line breaks to signify pauses. In her 2012 novel *NW*, Zadie Smith never uses quotation marks in dialogue. A later writer who adopted the technique explained: "If it's a novel written in the first person, isn't it all quotation?" • Do you pronounce the word *emu* correctly? Australian Broadcasting Company News explored the answer after an American radio journalist pronounced it /ee-moo/ when reporting on a missing bird. Australians were collectively aghast that the majority of Americans didn't know that the *OED* shows the standard (Australian) pronunciation as /ee-myoo/. The journalist explained in a tweet that 90% of his newsroom colleagues agreed with him. But Twitter exploded into such furious debate that the journalist soon changed his username to "Nemesis of Australia." Opinions were unshakable: "It is definitely and absolutely 'EE-mew,' and an American radio station does not get to unilaterally change that." Some people laughed at the drama: "2020 continues to punish us. Americans pronouncing *emu* as 'ee-moo.'" Others were exasperatedly amused: "Why couldn't it just be a duck that got loose?" • The *Guardian* reported that a scholar had found Ernest Hemingway's published works to be riddled with uncorrected errors. Robert W. Trogdon pored over Hemingway's original manuscripts and compared them to the published editions. He found that all but two of them contain mistakes. Because Hemingway wrote in longhand, some of his letterings were misread, resulting in wrong words and misspellings. For example, in the short story "A Way You'll Never Be" (1933), a character explains to confused Italians how to catch grasshoppers: "But I must insist that you will never gather a sufficient supply of these insects for a day's fishing by pursuing them with your hands or trying to hit them with a *bat*." Hemingway's word at the end was *hat*, not *bat*. Changes to punctuation and verb tenses also occurred, as in the 1933 story "The Light of the World," where *kept* became *keep*: "She just *keep* on laughing and shaking." Hemingway himself had strong feelings about changes in his work made by editors and typesetters. When he submitted a

story to *Cosmopolitan* in 1932, he wrote, "It is understood if you publish it there are to be no changes in text or title — no additions — no cuts. Cannot submit it on any other basis. Don't let anybody write me that it is very short. I know it is and if it could be any shorter I would make it shorter. It is as good and complete a story as I can write or I wouldn't send it to you or to anybody else. And I don't sell them by the yard or the word because I will cut out a thousand words to make one word important." • The *Sunday Times* noted that British comedian Andy Hamilton hoped to revive interest in penmanship and handwriting through his new book *Longhand*. All 394 pages are handwritten. The task took Hamilton two years and 43 pens to complete. The pages even include internal changes made by crossing out and rewriting. The author made the choice not to rewrite the pages after visiting the British Library, where he encountered a letter by Queen Elizabeth I, "insisting to the court that she should decide if and whom she might marry." Hamilton commented: "It's in lovely copperplate, but as she goes on it gets more and more angry — she's crossing out, writing up the side of the page. And I thought, this is really a fantastic narrative tool. You can see the state of mind of the person right there on the page. So I've done a book where the handwriting is, at times, part of the story — it tells you what state the writer is in." Hamilton hopes that his book will inspire others to write more things in longhand. "I think that if handwriting does disappear, it will be a loss — a loss of intimacy. Type is distancing, authoritative, formal. With handwriting, you get a sense of the writer's physicality. The handwritten letter is so much more personal and special, but if you get one now it's actually an event. It may be becoming extinct." The *Sunday Times* agreed, citing a 2018 survey finding that more than 25% of Britons hadn't sent or received a handwritten letter in over a decade, and almost 70% of people aged 25 to 35 rarely touched a pen at all. Graphologists of the world, lament!

SEPTEMBER

Poor font choices can make a zero ("0") resemble an O and result in costly errors, according to the Australian Broadcasting Company. In Melbourne, the city created an app that allowed motorists to pay for parking by entering their registration-plate information. But the font used on the plates made it hard to distinguish between the two characters. At least 1,200 motorists who entered the wrong character received parking tickets and paid the wrongly levied fines. After a state-level investigation of the problem, Melbourne agreed to refund the fines and, before assessing further fines, to review tickets with the problematic characters. O cipher! O mores! • Australia's *The*

Morning Show covered a heated online debate among Australians about the proper term for the end piece on a loaf of bread. The majority agreed that it's the *crust*. But many people reported other commonly used terms, including *end piece* and *heel*. Less common terms included *topper*, *knobby*, *bunty*, *butt*, and *bird food*. Some novel terms were suggested, such as *doorstop* (for a particularly thick end piece) and *my husband's* (which is sweetly — or perhaps sarcastically — self-explanatory). • *Infosecurity Magazine* urged the U.K.'s Parliament to act on the proposed Online Harms Bill, which was intended to protect freedom of expression and, according to a white paper, "to make the UK the safest place in the world to be online." But the Centre for Policy Studies issued a report opposing the bill because it called for plans to create a new category of speech that is "legal but harmful," would require new laws to ban those "harmful" words from the Internet, and would stifle free speech. A former Labour MP commented, "We all recognize that there is a problem with online hate, but you simply can't legislate for cultural change." • The meaning of *militia* was widely discussed after the term was used to refer to the men who plotted to kidnap Michigan's Governor Gretchen Whitmer. The governor objected to the word, tweeting: "They're not 'militias.' They're domestic terrorists endangering and intimidating their fellow Americans. Words matter." But in a thread on Twitter, historian Kathleen Belew expressed concern about "the sudden pushback/confusion about the use of the word *militia*," arguing that "it's important to use it" even though modern paramilitary groups calling themselves *militia* are mostly white-power activists interested in overthrowing the nation. "I worry that the push to qualify definitions might create the idea of good or neutral militias that ARE legitimate. They are *not* good. They are *not* neutral observers. They are *not* keepers of law and order." Confusion is widespread. *USA Today* says: "Avoid the terms *militia* or *guard* to describe an armed group of people. They may be using the term to convey authority they do not have." But the *Detroit Free Press* observed: "Some are just guys roaming around the woods shooting their rifles." *Buzzfeed* noted that Merriam-Webster dictionaries record several senses for *militia*, most of which suggest government backing. So *Buzzfeed* advises us to avoid *militia* when referring to an armed extremist group and instead to consider alternatives such as *right-wing militants*, *armed extremists*, or *armed civilians*. In short, none of the uses of the term today appear to be well-regulated. • Although dyslexia is commonly diagnosed in children who have difficulty learning to read and write, the *Guardian* reported that some experts had long been questioning whether the disorder even exists. As long ago as 1964, a researcher studying dozens of children with serious reading difficulties who all attended the

same schools couldn't find any common diagnostic criteria among the children. Each child's specific problems were significantly different. A noted educational psychologist, Julian Elliott, has been arguing for years that dyslexia is indistinguishable from struggling to read, so no diagnosis should be required. He suggests that it's a middle-class excuse for poor reading. But the British Dyslexia Association rejected his claims as counterproductive and inflammatory. Showing no signs of conciliation, Elliott also disputed what he called the "wrong perception that dyslexics are generally intellectually bright." Elliott called dyslexia nothing more than an "emotional construct." • In the *Telegraph*, Madeline Grant lambasted vague language and its pervasiveness in speech. Instead of thinking or talking, we're expected to *ideate* or *interface* about *equitable empowerment* with *impactful content* to *unlock action* while not really empowering anybody. In business, employers talk about *offboarding* and *streamlining* when they really mean "firing people." Politicians face *challenges* instead of problems and make *cost-savings*, not cuts. What's the purpose of vagueness? To absolve the speakers of responsibility. And perhaps to be so uninspiring that listeners fail to pay attention, thereby "letting the speaker get away with appalling logical leaps, their flawed ideas unchallenged." Let this impactful warning be a synergistic action item for us all.

OCTOBER

Amazon apologized shortly after launching its new website in Swedish because its machine-generated translations from English produced shocking gaffes, many of them offensive. Reuters pointed out that boxer shorts turned into "men's luggage trunks," and those with pictures of roosters on the front used the Swedish term for male genitals. Pearl earrings were described as being ideal for "European prostitutes." A baking tray was said to be suitable for "chocolate, excrement, and goose water." Among the worst translations was for "rape," a type of plant: many items such as shower curtains were decorated with "violent sexual assault flowers." Amazon explained that no humans had proofread any part of the site's contents before it went live. • The term *sexual preference* sparked an issue during the confirmation hearing for Supreme Court nominee Amy Coney Barrett. She said, "I have never discriminated on the basis of sexual preference and would never discriminate on the basis of sexual preference." Shortly after LGBTQ advocates objected that sexual orientation doesn't involve choice — and that *preference* connotes choice — Merriam-Webster quickly updated its entry on *preference* to note that it can be offensive. Earlier, it had used *sexual preference* as an illustrative use of *preference*. • Word-lover Susie Dent was horrified when she opened

her newly published book, *Word Perfect*. "It was anything but," quipped the *Telegraph*, as it was full of typos. Somehow, a draft version rather than the final corrected proof was used to print thousands of copies of what had been praised in advance as a "brilliant linguistic almanac full of unforgettable true stories tied to every day of the year." Dent tweeted: "Today I can testify to the effectiveness of 'lalochezia': the use of swearing to alleviate stress and frustration." • *Mental Floss* explored the meaning of *October surprise*, which had returned to prominence as the 2020 election approached — and ominous fears mounted. The phrase's 19th-century origins were plainly commercial: "Our October surprise sale is all that it's [sic] name implies. Our SURPRISE VALUES in SILKS, PLUSHES, and VELVETS are worth noting," announced an advertisement in 1888. Many businesses held annual "surprise" sales in October, and the phrase was associated with them until the 1960s, when the *Chicago Tribune* called the Chicago Cubs' hiring of Leo Durocher an "October surprise." About the same time, the *Pittsburgh Press* used the headline "October Surprises" to describe unusual autumn weather. The phrase acquired political associations during the 1980 presidential campaign, when a Reagan staffer told *Time* that they "expect [Carter] to pull what they call 'the October surprise,' meaning that shortly before Election Day, he will inflate the importance of some overseas event in an attempt to rally the country around him." With that, the phrase became entrenched in coverage of federal elections, which are held in early November. • The *Telegraph* reported that the language in U.K. banks' debt-collection letters has traditionally been so confusing and threatening that it has harmed borrowers' mental health and even driven some to suicide. In response, H.M. Treasury began updating the 40-year-old rules about the language of collection letters to make them less intimidating. Changes include using bold or underlined text instead of all-caps because many people found all-caps alarming; replacing legal jargon with plain English; and giving directions to free debt-advice services instead of recommending that debtors consult lawyers. A spokesperson for the Money and Mental Health Policy Institute applauded the changes: "The last thing people struggling with debt need is a bunch of thuggish letters dropping through the letterbox, in language they can't understand, written in 'shouty' capitals alongside threats of court action." • As the worldwide pandemic continued, people coped by coining words to express their experiences. The online magazine *You* provided definitions of humorously useful terms such as *Blursday* (the indeterminate day you're experiencing because life has become one long, unending grey smear during lockdown); *upperwear* (waist-up garments used for conducting a video call while you're actually half-dressed, so that those on the other side

of the camera might assume you're wearing a full suit instead of pajama pants or less); and *background curation* (the careful choice of a Zoom background that's intended to be the perfect distillation of your personality). Obsessions with the *infodemic* (information about the pandemic) resulted in *doomscrolling* (the manic checking on the torrent of bad news on your phone). People had started enjoying *quarantinis* (self-explanatory) from their home *isobars* (the vast personal stocks of alcohol kept to sustain you through the pandemic).

NOVEMBER

The *Providence Journal* reported that a majority of voters approved a proposal to change the state's traditional but cumbersome name: Rhode Island and Providence Plantations. Since 1975, campaigners have sought to drop *and Providence Plantations* because "plantation" is associated with slavery. Opponents have countered that the word was adopted with its original meaning of a tract of land or a farm, arguing that the name merely reflected the founding era. Voters had mixed feelings about the name change. One opposing voter opined: "I've always enjoyed it because being a true Rhode Islander, I've always said 'Hey, we're the smallest state with the largest name,' so we kind of had that as a talking point when it comes to Rhode Island history." But a supporter of the change responded: "I've lived in Rhode Island my entire life, and I don't think I've ever been like, 'Hi, yeah, I live in Rhode Island and the Providence Plantations.' Nobody says that." • The U.K. mobile-phone network SMARTY announced on its blog that it had teamed up with comedian Guz Khan to produce a *Jargonary* of the most-hated phrases in modern speech. Khan helpfully comments on *elephant in the room*: "How am I not supposed to talk about it stomping around my house, destroying the carpets? Elephants are a security risk. Don't give me any of that about them being herbivores. No animal gets that big just eating salads." And on *going forward*: "Absolutely one of the biggest tricks in office jargon. You ever travel backwards in time? Sideways? Has anyone ever gone any temporal direction except forward?" • The Oxford Dictionary Department updated its entry for *woman* in one of its dictionaries by amending the main definition to include "a person's wife, girlfriend, or female lover." It also relabeled terms such as *bitch* and *bint* as derogatory, offensive, or dated. Many other terms acquired these labels — those referring to women, girls, appearance, and sexual behavior. The updates are part of a permanent program of examining language relating to rapid social changes. Despite demands for terms to be deleted from the flagship dictionary — the *OED* — Oxford University Press said in a statement: "Our dictionaries provide an accurate

representation of language, even where it means recording senses and examples of words that are offensive or derogatory, and which we wouldn't necessarily employ ourselves." • In the aftermath of the 2020 presidential election, Trump lawyer Sidney Powell filed multiple voter-fraud lawsuits dubbed "krakens." (A *kraken* is a gigantic, octopus-like sea monster from Scandinavian folklore.) Multiple media outlets mocked her error-ridden filings. A complaint filed in Georgia misspelled *district* in two different ways on the cover page alone (*distict* and *distrcoict*). A third variation appeared on the cover page of a complaint filed in Michigan: *distrct*. The chief expert's name — William Briggs — was variously spelled as "William s Briggs" and "William Higgs." The briefs were also poorly formatted, making some sections unreadable. For example, in many places, words ran together with no spaces and some were omitted altogether, making sentences exceptionally difficult to read and comprehend: "The politicalparty[orinterestedorganizati on]shallindicatewhichprecinctsthe challenger will serve when designating challengers under subsection." Powell had no comment on whether these characteristics were intended to lend her court papers some kind of punctuationless literary flair. • In the *Atlantic*, Professor Eric L. Muller engaged in an originalist analysis of whether President Trump could pardon himself for federal crimes. He pointed out that "the question shouldn't be whether the president can pardon himself but whether he can *grant* himself a pardon — and those are not the same thing." Article II of the U.S. Constitution gives a president "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." The verb *grant* was said to be linguistically crucial: "Some verbs entail a transfer to someone else; the actor can't be the recipient." Examples of such transitive verbs include *handing over*, *surrendering*, and *relinquishing*. Other verbs have reflexive meanings: "If, for example, the Constitution had empowered the president . . . to *announce* a pardon, one would be hard-pressed to insist that the president could not announce himself as a recipient." Using textualism to interpret *grant*, which should have a consistent meaning within the Constitution, Muller examined the word in other clauses. He found that in its many uses in the document — as well as in other 18th-century sources — it consistently indicates something conveyed from one person or entity to another. So does the Constitution's text allow a president to grant himself or herself a pardon? Muller's answer: "The evidence, at least according to the text of the Constitution and its original meaning, says no." • The *Telegraph* reported that while many people in lockdown occupied themselves with baking bread or cleaning, one U.K. man solved an extremely intricate 85-year-old literary puzzle, becoming only the third person to do so. John Finnemore explained

his motivation: "The first time I had a look at it, I quickly thought, 'Oh, this is just way beyond me.' The only way I'd even have a shot at it was if I were, for some bizarre reason, trapped in my own home for months on end, with nowhere to go and no one to see. Unfortunately, the universe heard me." The puzzle is a 100-page murder mystery called *Cain's Jaw*, which was printed in 1934 with an announced prize of £15 for the correct solution. Nothing indicated in what order the pages should be read. The text "is strange and oblique and largely incomprehensible at the level of basic meaning; surreal, meandering sentences are punctuated with knottily precise references to lesser-known Robert Louis Stevenson novels and 18th-century French murder trials." *Cain's Jaw* was republished in 2019, and again a prize for the correct solution was offered — this time of £25,000. Part of Finnemore's method came from his own experience as a writer: "I've struggled with enough plots, and spent enough time taking apart things that aren't working, and rearranging them, to try to make them work. I suppose I was quite used to the physical process of chopping around bits of text to try to make them make more sense."

DECEMBER

The Law Society Gazette reported that prominent U.K. law firm Clifford Chance changed all its legal templates to gender-neutral language (relying heavily on *they*) because gender-neutral drafting has "multiple benefits for equality and inclusion." The firm's announcement said: "The words and language we use matter greatly. They send a signal of our values and can have both a positive and negative impact on others and on our culture. Removing gendered language from our communications is a subtle but impactful way of demonstrating what we stand for." But the move wasn't universally hailed as a good one. In the *Daily Mail*, a self-identified feminist claimed that gender-neutral language, "far from showing a commitment to end the age-old sexism in our legal system . . . is about pandering to trans activists." The writer noted that Clifford Chance has serious gender-inequality problems, as "women at the firm earn just 63 pence to every pound that the men earn. There are very few women in top jobs. . . . While inequality between women and men still exists under the law and in politics and personal relationships, using *they* instead of the correct gender pronoun, besides being disingenuous, is a slap in the face." • The *New York Times* reported that in 2017, a high-school cheerleader, angry about not qualifying for the varsity squad, sent a "Gimme a F***!" Snapchat message to 250 friends, her spoken words being accompanied by a vulgar gesture. Although Snapchat posts are auto-

matically and quickly deleted, one person made a screenshot and showed it to the school's principal, who summarily suspended the student from cheerleading. The student successfully sued the school district. On appeal, the Third Circuit Court of Appeals held that the First Amendment protected students' speech when off school grounds. But because that decision conflicted with holdings in other circuits, the school district appealed to the Supreme Court, arguing that schooling had been disrupted regardless of the place from which the message was sent. The Supreme Court granted review. • *PLoS One* published a study in which researchers examined how the language used to formulate New Year's resolutions affected success. They found goals expressed in approach-oriented language were significantly more likely to succeed than those in avoidance-oriented language (59% vs. 47%). Greater success was found when people resolved to *start* doing something as opposed to *stop* doing something. Approach-oriented language often required forming a new habit to replace an old habit, whereas avoidance-oriented language consisted only of breaking a habit. • The U.S. Supreme Court heard arguments in *Facebook v. Duguid* — a case in which the reach of an adverbial modifier would determine whether telemarketers could, without the recipient's consent, call and text cellphone numbers with impunity. In 1991, Congress had enacted the Telephone Consumer Protection Act, which made it illegal to call such a number with a device that can "store or produce numbers to be dialed, using a random number generator." The question was whether *using a random number generator* modified just *produce*, or *store* as well as *produce*. I argued the case for the class of plaintiffs represented by Duguid; Paul Clement argued for Facebook. I argued that the adverbial phrase *using a random number generator* matched up with *produce* but was a mismatch with *store* — and that "these words in the statute are not just fungible morphemes." Clement argued that the so-called Series-Modifier Canon, first enunciated in the Scalia-Garner text *Reading Law*, meant that both verbs were modified. It was a gruelingly grammar-filled oral argument that attracted a fair amount of attention in the legal press. In the end, the Court would side unanimously with Clement, issuing its opinion on April Fool's Day 2021. • A North Dakota federal court creatively sanctioned a lawyer who said abusive things during a deposition. In its order, the court quoted several pages from the deposition transcript, in which the lawyer repeatedly dropped F-bombs, obstructed the opposing lawyers, and told them, "You know what, you know what guys, I mean, I mean like can I — you know, can I like fly up to North Dakota and just fucking hit you right in the middle of the forehead, with an upper cut?" and "You are screwing with the wrong dude, man," "You are not dicking around with, you know, a rookie. I'm going to bury you guys." The

court decided not to order monetary sanctions, declaring that the lawyer "has endured the indignities of being fired by plaintiff in the middle of a deposition and of having his churlishness and general lack of professionalism memorialized for posterity in this order. This is sanction enough." • Reddit users discussed poorly worded math questions and their linguistically correct answers. The discussions began with a photo of a primary-school test that read: "Jane has 12 crayons and Kim has 7 crayons. How many more crayons does Susan have than Kim?" The child taking the test answered, "Who is Susan?" Redditers suggested that the question tested reading comprehension and logical reasoning rather than math skills. Another question read: "There are 8 birds on a branch. There are 3 birds on another branch. How many birds are in the tree?" Redditers discussed whether the branches were on the same tree, whether there might be other bird-bearing branches on the same tree, or whether the birds mentioned in the question might actually be on branches of a bush. Hard to get the question — much less the birds — in hand. • Although Oxford University Press rarely deletes a term from one of its dictionaries, it was made aware, by a campaign of women and others residing in Essex, that the *Oxford Advanced Learner's Dictionary*, which is meant for people learning English as a second language, contained an archaic put-down that might mislead those learning English as a second language. *Essex girl* is a "contemptuous term applied (usually jocularly) to a type of young woman, supposedly to be found in and around Essex, and variously characterized as unintelligent, promiscuous and materialistic." Reasoning that the term was "not helpful to current learners," OUP agreed to delete it.




Rakesh Kilaru, Kendall Turner, Sam Goldstein & Betsy Henthorne[†]

The Year in Law

2019-2020

November 2019

November 4: The U.S. Court of Appeals for the Second Circuit issues its decision in *Trump v. Vance*, denying President Trump's request to block the Manhattan District Attorney, Cyrus Vance, Jr., from accessing the President's tax records as part of the DA's investigation into possible hush-money payments made before the 2016 presidential election. In so doing, the Court of Appeals rebuffs Trump's argument that sitting presidents are immune not just from prosecution, but also from investigation. Trump's legal team says that the President will seek Supreme Court review.

November 6: The U.S. House of Representatives' impeachment team publicly discloses the transcript of the testimony given to the team by Bill Taylor, the U.S. Ambassador to Ukraine. According to Taylor's testimony, President Trump directed officials to link aid to Ukraine to his demands that Ukraine investigate the 2016 election and the Bidens. "That was my clear understanding: security assistance money would not come until the president [of Ukraine] committed to pursue the investigation," Taylor testified.

November 8: Like numerous other White House officials, acting White House Chief of Staff Mick Mulvaney no-shows for his scheduled deposition by House of Representatives impeachment investigators, even though the House had subpoenaed him to secure his attendance (see preceding entry).

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November 12: The Supreme Court hears argument in a suite of cases challenging the Trump Administration's plan to terminate DACA, the Deferred Action for Childhood Arrivals program, which allowed so-called "Dreamers," undocumented young adults who came to the United States as kids, to apply for protection from deportation. • The Court also hears argument in *Hernandez v. Mesa*, about the viability of a *Bivens* suit brought by the family of a Mexican teen who was shot and killed by a U.S. border agent while the teen was on the Mexican side of the U.S.-Mexico border.

November 13: Public hearings regarding the potential impeachment of President Trump commence before the House Intelligence Committee. Ambassador Bill Taylor and Deputy Assistant Secretary of State George P. Kent testify. Taylor reiterates the testimony revealed in the public transcript of his earlier private deposition (see Nov. 6 entry). • The U.S. Court of Appeals for the D.C. Circuit denies President Trump's bid for an en banc rehearing of his case challenging a House subpoena issued to his personal accounting firm, Mazars. As a result, two Trump-related subpoena cases are now on track to be decided by the Supreme Court soon.

November 14: The Senate confirms Steven Menashi to a seat on the U.S. Court of Appeals for the Second Circuit, flipping that court from a majority of Democratic appointees to a majority of Republican appointees. Senate Majority Leader Mitch McConnell lauded Menashi's "strong academic and legal qualifications," while Democrats were highly critical, citing, for example, Menashi's 2010 law review piece criticizing "ethnically heterogeneous societies." • President Trump files a petition for certiorari seeking Supreme Court review of the Second Circuit's decision in the Manhattan DA subpoena case (see Nov. 4 entry).

November 15: Former U.S. Ambassador to Ukraine Marie Yovanovitch testifies during further public impeachment hearings before the House Intelligence Committee that she was "shocked and devastated" by President Trump's personal attacks on her (see Nov. 13 entry). • Trump also asks the Supreme Court to stay the D.C. Circuit's decision upholding a subpoena for his financial records issued to Trump's accounting firm, Mazars, pending his filing of a petition for certiorari in the case (see Nov. 13 entry). • An Oklahoma court reduces the fine imposed on Johnson & Johnson for its alleged role in Oklahoma's opioid epidemic by about $107 million, after discovering that it had miscalculated the fine.

November 19: Lieutenant Colonel Alexander Vindman, the National Security Council's head of European affairs, and Kurt Volker, the former U.S. Special Representative for Ukraine, among others, testify as part of the ongoing

public impeachment hearings before the House Intelligence Committee (see preceding entry).

November 20: U.S. Ambassador to the European Union Gordon Sondland, among others, testifies at the still-ongoing impeachment hearings. He testifies that he understood a White House invitation to the Ukrainian president to be contingent on Ukraine's announcing investigations into the 2016 elections and the Bidens. "We followed the president's orders," Sondland said (see preceding entry and Nov. 6 entry).

November 21: Fiona Hill, formerly of the National Security Council, testifies at the impeachment hearings, criticizing Republicans for broadcasting the "fictional narrative" that Ukraine, not Russia, interfered in the 2016 U.S. presidential election (see preceding entry). • President Trump overrules the Navy's disciplinary decision-making by announcing on Twitter that "The Navy will NOT be taking away Warfighter and Navy Seal Eddie Gallagher's Trident Pin," despite testimony that Gallagher shot civilians and killed a wounded prisoner with a hunting knife. • Congress approves a spending bill to avoid a government shutdown until just before the winter holidays, meaning legislators will have to negotiate for permanent funding at the same time they will likely be deciding whether to impeach President Trump.

November 25: The Supreme Court grants President Trump's request to stay the D.C. Circuit's decision upholding the House's subpoena to Mazars for Trump's financial records until he files a petition for certiorari in the D.C. case (see Nov. 15 entry). • The Supreme Court denies review of the case of Adnan Syed, whose murder conviction riveted the nation in the viral podcast "Serial." • Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia issues the decision in *Committee on the Judiciary v. McGahn*, holding that former White House Counsel Donald F. McGahn II must testify before House impeachment investigators about President Trump's attempts to obstruct Special Counsel Robert Mueller's investigation of Russian interference in the 2016 elections. "Presidents are not kings," emphasizes the opinion.

DECEMBER 2019

December 2: The Supreme Court hears argument in *New York State Rifle & Pistol Association v. City of New York*, a Second Amendment case, considering the constitutionality of a now-repealed New York regulation restricting the movement of guns in New York City. The argument largely focused on whether the dispute was moot in light of the regulation's repeal during the litigation.

December 3: The House Intelligence Committee votes to adopt and publish a report announcing that President Trump abused the power of his office for personal and political gain, at the expense of U.S. national security. The impeachment inquiry is then passed on to the House Judiciary Committee. • The U.S. Court of Appeals for the Second Circuit rules in a third Trump-subpoena case that House Committees had authority to issue congressional subpoenas for Trump's personal financial records to Deutsche Bank.

December 4: The House Judiciary Committee begins public hearings on President Trump's potential impeachment (see preceding entry). • Trump files a petition for certiorari in the House subpoena case, seeking review of the D.C. Circuit's decision requiring his accounting firm, Mazars, to disclose his personal financial records (see Nov. 25 entry).

December 5: House Speaker Nancy Pelosi announces that she is directing the House Judiciary Committee to draft Articles of Impeachment against President Trump (see preceding entry).

December 6: The Supreme Court announces that the Trump Administration cannot restart any federal executions after a nearly two-decade long break, effectively staying four executions scheduled in the near term. • President Trump files an application to recall and stay the mandate in the Deutsche Bank subpoena case, to prevent enforcement of the House subpoenas pending his filing of a petition for certiorari in the case (see Dec. 3 entry).

December 9: The U.S. Court of Appeals for the D.C. Circuit hears argument in *Blumenthal v. Trump*, which involves Emoluments Clause claims brought against President Trump.

December 10: House Democrats unveil two Articles of Impeachment, charging President Trump with abuse of power and obstruction of Congress (see Dec. 5 entry). • The Supreme Court hears argument in *Maine Community Health Options v. United States*, a case involving the Affordable Care Act's "risk corridors" provisions. The case presents the question whether health insurance companies that lost money offering policies on the ACA's insurance exchanges are entitled to government compensation for those losses. • The Court also hears argument in *Holguin-Hernandez v. United States*, a case about what a criminal defendant must do in order to preserve an appellate challenge to his sentence.[1] • A federal district court in Texas enjoins the Trump Administration from using $3.6 billion in military construction funds to build a wall along the southern border of the U.S., on the ground that it would violate statutory restrictions on border-wall funding. • A Pennsylvania appellate court

[1] *Editor's note:* Kendall Turner, one of the authors of this timeline, argued on behalf of the petitioner.

rejects Bill Cosby's appeal of his 2018 sexual assault conviction, concluding that Cosby was not denied a fair trial.

December 11: Harvey Weinstein reaches a tentative $25 million settlement agreement with an array of his alleged sexual misconduct victims, potentially bringing an end to most of the civil lawsuits filed against him.

December 12: The en banc U.S. Court of Appeals for the Fourth Circuit hears argument in a case brought by the District of Columbia and Maryland claiming President Trump violated the Emoluments Clauses by profiting from his D.C. hotel.

December 13: The House Judiciary Committee votes to move the Articles of Impeachment against President Trump to the House floor (see Dec. 10 entry). • The Supreme Court grants certiorari in the three separate lower court cases that ruled against Trump's efforts to prevent access to his personal financial records.

December 16: The House Judiciary Committee releases a nearly 700-page report about its Articles of Impeachment against President Trump, alleging bribery and wire fraud violations as part of the abuse of power Article (see preceding entry). • Curtis Flowers, whose capital conviction was repeatedly vacated (including by the Supreme Court) based on the prosecutor's misconduct, walks free after 23 years in prison.

December 17: The Foreign Intelligence Surveillance Court issues an order accusing the FBI of misleading the court about the wiretapping of a former Trump advisor, Carter Page, as part of its Russia investigation.

December 18: The House of Representatives impeaches President Trump. The first Article of Impeachment charges him with abuse of power, and the second charges him with obstruction of Congress (see Dec. 16 entry). • The Supreme Court grants certiorari in *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*, which ask the Court to define the scope of the "ministerial exception" barring courts from reviewing religious employers' employment decisions for ministers. • The U.S. Court of Appeals for the Fifth Circuit rules that the ACA's insurance mandate is unconstitutional, though it does not decide whether the entire ACA must be invalidated as a result. • Rick Gates, who worked for the Trump presidential campaign, is sentenced to 45 days in jail and a $20,000 fine for conspiracy and lying to the FBI in connection with Special Counsel Mueller's investigation.

December 19: After vigorous and contentious debate, and with the stopgap funding measure approved in November about to expire, Congress enacts two spending packages, totaling $1.4 trillion, to avert a government shutdown slated for the end of the next day.

December 20: President Trump signs the two spending packages, preventing a shutdown from occurring later in the day.

JANUARY 2020

January 2: In *June Medical Services LLC v. Russo*, the Solicitor General files a brief encouraging the Supreme Court to hold that the challengers to Louisiana's admitting-privileges law restricting access to abortions do not have standing to sue, and in any event that the requirement is lawful. The brief also argues that the Court should, if necessary, overrule *Whole Woman's Health v. Hellerstedt*, even though the federal Government had argued in support of the abortion providers in a successful challenge to a virtually identical Texas law in 2016.

January 3: The U.S. Court of Appeals for the D.C. Circuit hears argument in *Committee on the Judiciary v. McGahn*, presenting the question whether Congress can sue Executive Branch officials to enforce a congressional subpoena (see Nov. 25 entry).

January 4: The White House formally notifies Congress pursuant to the War Powers Act about President Trump's ordering of a drone strike to kill Iranian Major General Qassim Suleimani.

January 5: Harvey Weinstein's criminal trial on sexual assault charges begins in Manhattan, starting with an evening pre-trial hearing (see Dec. 11 entry).

January 6: Harvey Weinstein is charged with rape in Los Angeles as the case in New York against him proceeds to jury selection (see preceding entry).

January 13: Sparking another round in the ongoing "Going Dark" decryption debate, Attorney General William Barr declares that the recent shooting at a naval air base in Florida was an act of terrorism, and asks Apple to provide the Government access to two phones used by the shooter.

January 14: The Supreme Court hears argument in *Kelly v. United States*, the so-called "Bridgegate" case, challenging the conspiracy and wire-fraud convictions of Republican Chris Christie's allies following their attempt to punish a Democratic mayor who refused to endorse Christie by creating a traffic blockage impeding access to and from the mayor's town.

January 15: Speaker of the House Nancy Pelosi names seven impeachment managers to prosecute the House's impeachment case against President Trump in the Senate. The House of Representatives also votes to transmit its Articles of Impeachment against Trump to the Senate (see Dec. 18 entry).

January 16: The House's Articles of Impeachment are officially accepted by the Senate, Chief Justice John Roberts assumes his role as presiding officer

for the impeachment trial, and Roberts then administers the oath to the full Senate (see preceding entry).

January 17: The Supreme Court grants certiorari to decide the validity of the Trump Administration's rules broadening the exemption to the ACA's contraceptive coverage mandate. Previously, the Court heard two cases on the opposite question, *viz.*, whether religious groups could refuse to comply with Obama-administration regulations requiring contraceptive coverage.

January 21: President Trump's first impeachment trial officially begins, with debate over and votes on trial rules (see Jan. 16 entry).

January 22: The House's impeachment managers begin their arguments in the Senate impeachment proceedings (see preceding entry). • The Supreme Court hears argument in *Espinoza v. Montana Department of Revenue*, about the constitutionality of a Montana rule prohibiting the use of certain scholarship funds at religious schools.

January 27: The Supreme Court issues an order allowing the Trump Administration to enforce its so-called "public charge" rule, barring non-citizens from getting a green card if the Government believes the person is likely to become reliant on Government assistance, while it appeals from federal court rulings striking down the rule.

January 30: In the ongoing impeachment proceedings against President Trump, Senators ask their final questions of House prosecutors and the President's defense team (see Jan. 22 entry).

January 31: The Senate votes against allowing further subpoenas for documents and calling witnesses, including former National Security Advisor John Bolton, in connection with the impeachment proceedings against President Trump, signaling that the Senate will almost certainly acquit Trump soon (see preceding entry).

FEBRUARY 2020

February 2: The Trump Administration's travel restrictions on those traveling from mainland China go into effect at 5:00 p.m. ET.

February 3: President Trump declares the coronavirus a public health emergency in the United States. • Deborah A. Batts of the U.S. District Court for the Southern District of New York, the first openly gay federal judge in U.S. history, passes away at the age of 72. • The U.S. Court of Appeals for the Federal Circuit hears argument in a class action accusing the federal judiciary of using fees from its PACER online access system for purposes beyond maintaining the system.

February 5: At the conclusion of his (first) impeachment trial, the Senate votes 52-48 to acquit Donald Trump on the first Article of Impeachment for abuse of power, with Mitt Romney becoming the first senator in U.S. history to vote to convict a president of his own party, and 53-47 on the second Article for obstruction of Congress (see Jan. 31 entry). • New York charges the National Rifle Association with violating state insurance laws. • After notching two Supreme Court wins — first over his floating home and later over his arrest at a city council meeting — Fane Lozman receives an $875,000 settlement from the Riviera Beach, Florida City Council. • Exoneree Martin Tankleff, who served 17 years in prison before his murder conviction was overturned in 2007, is sworn in to the New York bar.

February 6: A New Jersey jury awards $750 million in punitive damages against Johnson & Johnson in litigation over its talc-based baby powder.

February 7: President Trump fires Ambassador Gordon Sondland and Lieutenant Colonel Alexander Vindman (along with his twin brother), both of whom testified about the President during his impeachment trial. • The U.S. Court of Appeals for the D.C. Circuit issues its decision in *Blumenthal v. Trump*, throwing out congressional Democrats' Emoluments Clause lawsuit on standing grounds (see Dec. 9 entry).

February 8: Democratic presidential candidates speak at an "Our Rights, Our Courts" forum, decrying President Trump's success confirming conservative federal judges. Democratic Presidential candidate Pete Buttigieg calls for expanding the Supreme Court while candidate Andrew Yang proposes 18-year term limits for Justices.

February 10: Federal prosecutors in Washington, DC file a sentencing memorandum recommending 7-9 years of prison time for Roger Stone, a longtime friend and ally of President Trump. • Justice Ruth Bader Ginsburg suggests in remarks at Georgetown University Law Center that the deadline to ratify the Equal Rights Amendment has passed. • Judge Dolly M. Gee of the U.S. District Court for the Central District of California denies a motion by Uber and Postmates to enjoin California's Assembly Bill 5, which seeks to extend labor protections to gig economy workers. • New York sues the Trump Administration for barring its residents from the Trusted Traveler program, alleging the ban is "political retribution" for New York's making driver's licenses available to all residents regardless of citizenship or immigration status. • Senior Judge Jack Weinstein takes inactive status on the U.S. District Court for the Eastern District of New York after more than 50 years on the bench.

February 11: President Trump complains on Twitter about the sentencing recommendation for Roger Stone. By the afternoon, three of the prosecutors who filed the recommendation withdraw from the case, with one, Jonathan Kravis, resigning from the Department of Justice. A new prosecutor then files an amended recommendation, claiming the original recommendation "would not be appropriate or serve the interests of justice," and "ultimately defer[ring] to the Court as to the specific sentence." By evening, the fourth prosecutor on the original sentencing recommendation withdraws from the case as well (see Feb. 10 entry). • Judge Andrew Brasher is confirmed to a seat on the U.S. Court of Appeals for the Eleventh Circuit, after spending less than a year on the U.S. District Court for the Middle District of Alabama prior to his nomination.

February 12: Pennsylvania Attorney General Josh Shapiro announces the creation of a Conviction Integrity Unit to review past convictions, following similar measures in New Jersey and Michigan. • Three high school girls, represented by the Alliance Defending Freedom, file a Title IX lawsuit challenging Connecticut's policy allowing transgender athletes to participate in sports consistent with their gender identity.

February 13: In an interview regarding the Roger Stone reversal, Attorney General William Barr tells ABC News that President Trump has "never asked [him] to do anything in a criminal case" (see Feb. 10 entry). • Olivia Warren, former law clerk to the late Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, testifies before a House Judiciary subcommittee regarding sexual harassment and a "profane atmosphere" in the judge's chambers. • Former Deputy Solicitor General Larry Wallace, who argued 157 cases at the Supreme Court, passes away at the age of 88. • Senate Majority Leader Mitch McConnell pledges to confirm a nominee for any Supreme Court vacancy that may arise before the election, despite refusing to hold hearings for Obama nominee Merrick Garland in 2016 in similar circumstances.

February 14: Michael Avenatti is convicted on federal extortion and fraud charges stemming from an attempt to blackmail Nike executives. • The U.S. Department of Justice announces it will not pursue criminal charges against former FBI Deputy Director Andrew McCabe. • The U.S. Supreme Court Clerk's Office issues a memorandum outlining the Court's procedures related to certiorari-stage pleadings and the scheduling of petitions for consideration by the Justices.

February 18: Judge Carlos Murguia of the U.S. District Court for the District of Kansas resigns amidst workplace harassment charges. • The Boy Scouts of

America file for Chapter 11 bankruptcy in the wake of sexual abuse claims and other issues.

February 19: A unanimous panel of the U.S. Court of Appeals for the Eleventh Circuit strikes down a Florida law prohibiting those with felony records who cannot pay legal fines and fees from voting, finding that the law's "continued disenfranchisement is indisputably punitive in nature" and thus unconstitutional.

February 20: Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia sentences Roger Stone to three years and four months in prison, saying that "[h]e was not prosecuted, as some have complained, for standing up for the president," but rather "he was prosecuted for covering up for the president" (see Feb. 13 entry).

February 21: Jurors in Harvey Weinstein's criminal trial send a note suggesting they are deadlocked on the two most serious counts. The judge urges them to continue deliberating and approach the charges with an open mind, then sends them home for the weekend (see Jan. 5 entry).

February 24: A New York jury convicts Harvey Weinstein of criminal sexual acts and third-degree rape, but hangs on the more serious charges of predatory sexual assault and first-degree rape (see preceding entry). • Vanessa Bryant files a wrongful death suit against the helicopter operator and pilot involved in the crash that killed her husband Kobe Bryant and their daughter Gianna, alleging the helicopter should not have been flying in unsafe weather conditions. • The Supreme Court agrees to hear a challenge to Philadelphia's decision not to contract with a Catholic foster care agency because it refused to place children with same-sex couples. • Former Solicitor General Paul Clement argues his 100th case at the Supreme Court.

February 25: The Senate Judiciary Committee holds a hearing on nationwide injunctions. Most Senators and witnesses agree they are a problem, but fail to agree on possible solutions. • The Supreme Court issues its 5-4 decision in *Hernandez v. Mesa*, declining to extend its 1971 decision in *Bivens v. Six Unknown Named Agents*, to allow the family of a 15-year-old boy shot and killed by a U.S. Border Patrol agent while playing on the Mexican side of the border to seek money damages for his death. Justice Alito writes the majority opinion, joined by the Chief Justice and Justices Thomas, Gorsuch, and Kavanaugh. Justice Ginsburg writes the dissent, joined by the remaining Justices (see Nov. 12 entry).

February 26: Eighteen state attorneys general sue the Department of Labor over its joint employer rule, alleging it would "undermine critical workplace protections for the country's low- and middle-income workers, and lead to

increased wage theft and other labor law violations." • The Trump campaign sues the *New York Times* for libel, alleging that the paper falsely claimed there was a "quid pro quo" between Russia and the 2016 Trump campaign. • The U.S. Court of Appeals for the Second Circuit allows the Trump administration to withhold federal law-enforcement grants from New York City over its so-called "sanctuary city" policy, creating a split with the Third, Seventh, and Ninth Circuits. • New York announces it will no longer require bar applicants to answer a question about their mental health. • The U.S. Supreme Court issues a unanimous opinion in *Holguin-Hernandez v. United States*, holding that a criminal defendant who advocates in trial court for a shorter sentence than the one imposed has sufficiently preserved a challenge to the unreasonableness of a longer sentence. Justice Stephen Breyer's opinion is just six pages long (see Dec. 10 entry).

February 27: The U.S. Court of Appeals for the Ninth Circuit upholds an Arizona trial judge's decision not to vacate former sheriff Joe Arpaio's court record following his pardon by President Trump.

February 28: The U.S. Court of Appeals for the D.C. Circuit issues its decision in *Committee on the Judiciary v. McGahn*, holding that former White House counsel Don McGahn may refuse to testify before Congress, warning that allowing Congress to use courts to enforce such subpoenas would be a slippery slope (see Jan. 3 entry). • The D.C. Circuit also rejects a D.C. wine bar's claims that it lost business to the Trump International Hotel because patrons wanted to curry favor with the president.

February 29: The U.S. reports its first death from COVID-19, in Seattle. Two earlier deaths were later discovered that had not been diagnosed at the time.

March 2020

March 2: The Supreme Court grants review in *California v. Texas*, yet another challenge to the Affordable Care Act. The question presented in this case is whether Congress's decision to set the "individual mandate" tax penalty at $0 requires invalidating the entire ACA (see Dec. 18 entry). • Representatives Hank Johnson, Mike Quigley, and Jerry Nadler introduce a bill calling for a judicial code of conduct for the Supreme Court, live-streaming of judicial proceedings, and free PACER access. It fails to receive a full vote in the House. • Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia appoints Alan Raul of Sidley Austin to represent jurors in Roger Stone's criminal trial after a third party seeks to intervene in the case and obtain copies of jurors' questionnaires (see Feb. 20 entry).

March 3: Maureen Scalia, widow of the late Justice Antonin Scalia, attends argument at the Supreme Court in *Seila Law LLC v. Consumer Financial Protection Bureau*, returning to the courtroom for the first time since Justice Scalia's death in 2016. (Three out of the four advocates in *Seila Law* are former Scalia clerks.) The case involves a constitutional challenge to the CFPB's structure.

March 4: The Supreme Court hears argument in *June Medical Services LLC v. Russo*, a challenge to abortion restrictions in Louisiana. At an abortion-rights rally outside the Court after the argument, Senate Minority Leader Chuck Schumer calls out Justices Gorsuch and Kavanaugh by name, saying "you won't know what hit you if you go forward with these awful decisions." Chief Justice Roberts later condemns Schumer's "threatening" remarks as "inappropriate" and "dangerous" (see Jan. 2 entry). • NYU Law School cancels classes after a student comes into contact with New York's second confirmed person with coronavirus.

March 5: Judge Thomas B. Griffith announces his retirement from the U.S. Court of Appeals for the D.C. Circuit, effective September 1, 2020, giving President Trump a third seat to fill on the influential appeals court. • Senator Schumer apologizes for his remarks at the Supreme Court, saying he was referring to "political consequences" for Republicans if the Court's decision in *June Medical Services* upholds abortion restrictions (see preceding entry).

March 8: Quinn Emanuel Urquhart & Sullivan announces one of its partners has tested positive for COVID-19 and the firm will close its New York office for a week.

March 9: The en banc U.S. Court of Appeals for the Ninth Circuit hands Led Zeppelin a copyright victory over its song "Stairway to Heaven." • Concerned over potential COVID-19 spread, Berkeley, Columbia, Hofstra, Fordham, and Stanford Law Schools cancel classes. • Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York bars anyone who has visited Italy, China, South Korea, Japan, or Iran in the prior 14 days from entering the courthouse. • A Florida attorney files a lawsuit on behalf of clients stuck on a coronavirus-stricken cruise ship, accusing Princess Cruise Lines of gross negligence.

March 10: The U.S. Court of Appeals for the D.C. Circuit rules that the House Judiciary Committee can access redacted grand jury information in the Mueller Report. • The Florida legislature approves a bill to provide exoneree Clifford Williams $50,000 for each of the 43 years he was wrongfully imprisoned, for total compensation of $2.15 million.

March 11: Harvey Weinstein is sentenced to 23 years in prison (see Feb. 24 entry). • The Supreme Court grants a Trump Administration request to enforce its "remain in Mexico" policy (or officially, Migrant Protection Protocols) while it appeals a district court's nationwide injunction blocking the policy. • The U.S. Court of Appeals for the Eleventh Circuit cancels its judicial conference, originally scheduled to take place in May, over COVID-19 concerns. • The U.S. Soccer Federation hires Latham & Watkins as counsel in a lawsuit challenging allegedly unequal pay, following a much-maligned filing in which the Federation's lawyers argued that players on the U.S. Women's National Team have less "skill" than men.

March 12: Congress, the White House, and the Supreme Court close to the public amid concerns about COVID-19. The Court remains open for "official business."

March 13: President Trump declares COVID-19 a national emergency, thus unlocking billions of dollars in federal funding to combat the virus. • The Trump Administration imposes a travel ban on non-U.S. citizens who visited any of 26 European countries within 14 days of their arrival in the U.S. • The U.S. Court of Appeals for the Fourth Circuit announces it will reschedule its March 17-20 argument session "due to concern for the safety of our communities and our employees." • The U.S. District Court for the Eastern District of Pennsylvania suspends all jury trials for a month because of a COVID-19-related juror shortage. • The U.S. Court of Appeals for the D.C. Circuit grants rehearing en banc in the U.S. House of Representatives' lawsuit seeking to compel testimony from former White House Counsel Don McGahn (see Feb. 28 entry).

March 15: New York City Mayor Bill de Blasio announces the closure of the city's public schools in response to growing fears of COVID-19.

March 16: The Supreme Court announces a postponement of its March argument session, saying it will "examine the options for rescheduling those cases in due course in light of developing circumstances." • The Labor Department's joint employer rule goes into effect (see Feb. 26 entry), but is eventually invalidated on September 8, 2020. • The U.S. District Court for the District of Columbia postpones all trials until May 11 and all other proceedings until April 17. • Apple is hit with a $1.2 billion antitrust fine in France. • The March sitting of the LSAT is canceled.

March 17: The Federal Judicial Conference seeks $7 million in emergency funding from Congress, anticipating that COVID-19 will affect court operations for the next three months. • David Lat, founder of the *Above the Law* website, tests positive for COVID-19.

March 18: President Trump issues an executive order invoking the Defense Production Act, which could allow prioritizing production of medical equipment and supplies to fight COVID-19.

March 19: California Governor Gavin Newsom issues the country's first COVID-19 statewide stay-at-home order. • "In light of the ongoing public health concerns relating to COVID-19," the U.S. Supreme Court extends the deadline to file petitions for certiorari from 90 days to 150 days. • The U.S. Court of Appeals for the Second Circuit holds its first-ever arguments by teleconference.

March 20: The U.S. Court of Appeals for the D.C. Circuit holds its first set of telephonic arguments.

March 23: The Supreme Court issues opinions in pending cases electronically, without taking the bench to do so in person. • In one of those cases, *Kahler v. Kansas*, Justice Elena Kagan authors a 6-3 majority opinion holding that states are not required to adopt an insanity test that hinges on whether a person can understand her crime was morally wrong. Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissents. • Senator Amy Klobuchar's husband, Baltimore law professor John Bessler, is hospitalized after testing positive for COVID-19. • California's Pacific Gas and Electric Company announces it will plead guilty to 84 charges of manslaughter stemming from the 2018 Camp Fire wildfire.

March 24: Judge William H. Pauley III of the U.S. District Court for the Southern District of New York rejects former Trump attorney Michael Cohen's request to serve out the remainder of his three-year prison sentence at home because of COVID-19 concerns. • U.S. Senator Richard Burr is accused of securities fraud in a lawsuit over stock trades based on allegedly non-public information about the coronavirus.

March 25: The Department of Justice files a statement of interest in *Soule v. Connecticut Association of Schools*, supporting plaintiffs' claims that they are disadvantaged by defendants' allowing transgender students to compete in girls' athletics (see Feb. 12 entry).

March 26: The U.S. Senate passes the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the largest economic recovery package in U.S. history. • In the wake of warnings about the potential for catastrophic COVID-19 outbreaks in prison facilities, Attorney General William Barr issues a memo directing the federal Bureau of Prisons to prioritize the use of existing statutory authority to release people to home confinement. • The Department of Justice charges Venezuelan President Nicolás Maduro and 14 others with money laundering and other charges related to a scheme to

"flood" the U.S. with cocaine.

March 27: The U.S. House passes the CARES Act, and President Trump signs it into law (see preceding entry). • The National Conference of Bar Examiners announces an alternative fall bar exam for jurisdictions that cannot hold the test in July.

March 30: The Food and Drug Administration issues emergency use authorization for hydroxychloroquine, a malaria treatment touted by President Trump as a COVID-19 remedy.

APRIL 2020

April 1: Congress passes the "Better Resistance Of Covid-19 with Coverings Of Lips Indefinitely" Act, or "BROCCOLI Act" for short, which implements a nationwide, universal mask mandate to stem COVID-19. The preamble notes, "you really thought we'd make people eat a *vegetable*"?[2]

April 2: Judge Trevor McFadden of the U.S. District Court for the District of Columbia rules that President Trump has the authority to declare a national emergency on the U.S.-Mexico border, but allows environmental groups to proceed with a challenge to Trump's authority to divert $3.6 billion in military funds to build a border wall. • Three more partners leave Boies Schiller Flexner, bringing the total to 16 who have left so far this year.

April 3: President Trump picks Justin Walker, a judge he previously appointed to the U.S. District Court for the Western District of Kentucky, to fill the vacancy on the U.S. Court of Appeals for the D.C. Circuit created by Judge Thomas Griffith's retirement (see Mar. 5 entry). • The New York State legislature amends the state's bail reform law, making more crimes eligible for cash bail and allowing judges to consider a person's legal history as well as the offense at issue. • The U.S. Supreme Court postpones its April argument session, originally scheduled to begin April 20. In its announcement, the Court says it will "consider rescheduling some cases from the March and April sessions before the end of the Term, if circumstances permit in light of public health and safety guidance at that time." • Amid continued concerns over COVID-19's spread in prisons, Attorney General William Barr issues a more strongly worded memorandum to Bureau of Prisons officials, which includes a finding under the CARES Act that "emergency conditions are materially affecting the functioning of the Bureau of Prisons," thus expanding eligibility for consideration for release to home confinement (see Mar. 26 entry).

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[2] April Fools!

April 6: In a 5-4 decision, the Supreme Court blocks a court-ordered extension of Wisconsin's absentee ballot deadline intended to account for the backlog of requests for such ballots due to COVID-19, keeping in place the original primary-day deadline of tomorrow. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissents, framing the question as "whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic." • Meanwhile in Wisconsin, Governor Tony Evers, a Democrat, issues an executive order rescheduling the primary election to June 9. Republican state lawmakers ask the Wisconsin Supreme Court to overturn the order, which it does, thus ensuring the election will move forward with in-person voting on April 7.

April 7: The Law School Admission Council announces an online take-at-home LSAT exam will be available in May (see Mar. 16 entry). • The U.S. Court of Appeals for the D.C. Circuit overturns a district court's injunction blocking the Trump Administration's effort to execute a federal prisoner for the first time since 2003.

April 9: Covington & Burling, which had represented former Trump national security advisor Michael Flynn, turns over additional emails and notes they "inadvertently" left out of records turned over to Flynn's new lawyers last year. • Georgia Secretary of State Brad Raffensperger reschedules the state's primary elections from May 19 to June 9.

April 10: Justice Ginsburg rejects a request by former New York Assembly Speaker Sheldon Silver to delay his sentencing while he appeals his conviction to the Supreme Court. • A federal judge in California orders Michael Avenatti's temporary release from a Manhattan detention center after a bout of pneumonia that his lawyers argued made him more susceptible to COVID-19 (see Feb. 14 entry).

April 13: The Supreme Court announces it will hear argument by telephone starting May 4 in a "limited number of previously postponed cases" and will provide a live audio feed of those arguments to the media (see Apr. 3 entry). • Harvard Law professor Larry Lessig drops his federal defamation lawsuit against the *New York Times* after the paper makes corrections to a story discussing Lessig's comments on MIT's accepting donations from Jeffrey Epstein. • Judge Stephanie Gallagher of the U.S. District Court for the District of Maryland finds the CARES Act does not include a private right of action allowing plaintiffs to sue Bank of America over its application process for small business loans.

April 15: "In light of the ongoing public health concerns relating to COVID-19," the Supreme Court suspends its usual paper filing requirements for cert-

stage filings, allowing filing on standard letter-size paper instead of in booklet form. • The U.S. Court of Appeals for the Eleventh Circuit turns down an attempt by over 30 Jeffrey Epstein victims to bring suit under the Crime Victims' Rights Act because federal prosecutors had not initiated charges against Epstein during the relevant time period.

April 16: Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia rejects Roger Stone's request for a new trial, calling the request "unmoored from the facts" (see Mar. 2 entry).

April 20: In a 6-3 decision authored by Justice Gorsuch, the Supreme Court holds, in *Ramos v. Louisiana*, that the Sixth Amendment right to a unanimous jury applies in both state and federal criminal trials. Justices Ginsburg and Breyer join the majority opinion in full, and Justices Sotomayor and Kavanaugh join in part. Justice Thomas concurs in the result and writes separately to explain his reasoning. Justice Alito dissents, joined by Chief Justice Roberts and, in part, Justice Kagan, noting that stare decisis "gets rough treatment in today's decision."

April 21: Two California residents who died on February 6 and 17 become the earliest known U.S. victims of COVID-19, after they are diagnosed posthumously. • Former federal prosecutor Jonathan Kravis, who resigned in the wake of controversy over a sentencing recommendation for Roger Stone, joins the D.C. Attorney General's Office as special counsel for public corruption (see Feb. 11 entry). • Missouri sues China, alleging that Chinese officials covered up what they knew about COVID-19 and ultimately caused the global pandemic. • Utah becomes the first state to allow newly minted lawyers to become licensed without taking the bar exam during the pandemic.

April 23: The largest pork producer in the U.S., Smithfield Foods, is sued over working conditions in its plants, where COVID-19 has spread among workers who are required to work "shoulder to shoulder" and without sufficient personal protective equipment. • Fifteen more Boies Schiller partners leave the firm (see Apr. 2 entry).

April 24: The Supreme Court turns down a request to block the Trump Administration from enforcing its "public charge" rule during the COVID-19 pandemic (see Jan. 27 entry). • Amardeep Singh is the first person charged under the Defense Production Act in the COVID-19 era, for allegedly hoarding personal protective equipment and engaging in price gouging. • Chief Judge Randal Hall of the U.S. District Court for the Southern District of Georgia rejects Reality Winner's request to serve the remainder of her sentence at home due to COVID-19, finding that she has not properly ex-

hausted administrative remedies.

April 27: The Supreme Court issues a per curiam decision in *New York State Rifle & Pistol Association v. City of New York*, holding that a challenge to a New York City gun regulation it had agreed to hear is moot given the city's intervening change to the rule, and sends the case back to the lower courts. Justice Alito, joined by Justices Thomas and Gorsuch, dissents, claiming the Court is permitting its "docket to be manipulated" (see Dec. 2 entry). • The Court also decides *Maine Community Health Options v. United States*, holding 8-1 that health insurance companies are entitled to compensation through the "risk corridors" program for losses created by their participation on ACA exchanges. Justice Sotomayor writes the opinion for the Court (see Dec. 10 entry). • The Court requests supplemental briefing on the applicability of the political-question doctrine to a dispute over Congress's attempts to subpoena President Trump's tax records (see Dec. 13 entry).

April 28: Judge Carl Nichols of the U.S. District Court for the District of Columbia refuses to grant a temporary restraining order to suspend immigration court proceedings in light of the COVID-19 pandemic. • The first in-person jury selection since COVID-19 ends abruptly when the defendant has trouble breathing and is escorted from the courtroom and placed under quarantine with his attorney. The parties are scheduled to try again in mid-May.

April 29: Judge Casey Cooper of the U.S. District Court for the District of Columbia sides with the ACLU in a First Amendment challenge to a rule barring employees of the federal judiciary from making political contributions, attending campaign events, and engaging in other political speech on their own time.

April 30: American, Delta, JetBlue, and Frontier Airlines announce new rules requiring passengers to wear face coverings during flights.

May 2020

May 4: The Supreme Court hears argument in *PTO v. Booking.com*, a case about the validity of so-called "generic.com" trademarks. The argument occurs via telephone and is broadcast live via C-SPAN, both firsts for the Court (see Apr. 4 entry).

May 7: The Department of Justice moves to dismiss its case against Michael Flynn, President Trump's former National Security Adviser. Flynn had twice pleaded guilty to making false statements to the FBI and was ready for sentencing. • Justice Kagan authors the Supreme Court's unanimous opinion in *Kelly v. United States*, overturning convictions of two former staffers for

Governor Chris Christie for actions taken during the "Bridgegate" scandal (see Jan. 14 entry).

May 11: Nearly 2,000 former officials of the Department of Justice publish a letter urging Judge Emmet Sullivan of the U.S. District Court for the District of Columbia to "closely examine the Department's stated rationale for dismissing the charges" against former National Security Adviser Michael Flynn, including by "holding an evidentiary hearing with witnesses" (see preceding entry).

May 12: Renee Knake and Hannah Brenner Johnson release *Shortlisted: Women in the Shadows of the Supreme Court*, a book describing the nine women considered for Supreme Court appointments before Sandra Day O'Connor became the first woman nominated and confirmed to its bench.

May 14: The U.S. Court of Appeals for the Fourth Circuit issues its en banc decision in *In re Trump*, denying President Trump's request for mandamus to forestall pending lawsuits alleging that he has violated the Foreign and Domestic Emoluments Clauses. The district court had dismissed a lawsuit relating to Trump Organization operations outside the District of Columbia, but permitted a lawsuit to proceed based on alleged violations relating to the Trump International Hotel (which is located in DC). Trump then sought mandamus after the district court declined to certify the case for an interlocutory appeal (see Dec. 12 entry).

May 16: Judge Kiyo Matsumoto of the U.S. District Court for the Eastern District of New York rejects former pharmaceutical executive Martin Shkreli's motion for release from prison. Shkreli had argued that his release would aid efforts to find a cure for COVID-19.

May 18: The U.S. Court of Appeals for the Ninth Circuit issues its decision in *In re NCAA GIA Antitrust Litigation*, affirming Judge Claudia Wilken's injunction against certain NCAA rules limiting education-related benefits that can be provided to student-athletes playing NCAA basketball and football. The injunction, entered in March 2019, generally upheld the NCAA's limits on compensation unrelated to education but selectively lifted or revised certain other rules.

May 19: Johnson & Johnson announces it will discontinue sales of its talc-based baby powder, citing a "portfolio assessment related to COVID-19" and declining demand caused by misinformation about the product's safety. The company has faced years of litigation over claims that the product causes various type of cancer (see Feb. 6 entry). • Judge Randolph Moss of the U.S. District Court for the District of Columbia allows a gender discrimination lawsuit to proceed against Jones Day. Moss dismisses some of the claims by former associates, but not the case as a whole.

May 20: A study by Michigan Law School professor Leah Litman reflects that the Court's female Justices were cut off in questioning more often than their male colleagues during the first-ever session of telephone arguments before the Court.

May 23: Chief Justice Roberts gives the commencement address at Westminster School, where his son is a member of the graduating class. In his remarks, he notes that the COVID-19 pandemic is "the world's way of saying to mankind, 'you're not in charge.'" • Judge Emmet Sullivan hires Wilkinson Stekloff LLP, a trial boutique, to represent him in responding to a mandamus petition filed by former National Security Adviser Michael Flynn. The government had moved to dismiss Flynn's indictment, to which he pleaded guilty, and Judge Sullivan elected to appoint an amicus and hear argument on the motion rather than simply dismissing the indictment (see May 11 entry).

May 29: Senators Charles Grassley and Patrick Leahy send a letter to Chief Justice Roberts urging him to keep livestreaming Supreme Court arguments even after the COVID-19 pandemic ends. • Chief Justice Roberts joins Justices Ginsburg, Breyer, Sotomayor, and Kagan in denying injunctive relief in *South Bay United Pentecostal Church v. Newsom*, an emergency petition challenging the validity of an executive order by California's governor regarding COVID-19 as applied to certain religious gatherings. • The Department of Justice files its amicus brief in *Nestle USA v. Doe*, arguing that the Alien Tort Statute does not permit domestic corporations to be held liable in the U.S. for alleged violations of international law.

June 2020

June 1: Judge Emmet Sullivan's response to Michael Flynn's mandamus petition (which seeks to force Sullivan to grant the government's pending motion to dismiss Flynn's indictment) argues that "further proceedings in the district court will ensure the integrity of the judicial process and serve the public interest" (see May 23 entry). • The Supreme Court declines to evaluate the constitutionality of mandatory membership in state bar associations.

June 4: Protestors, including Black Lives Matter D.C., sue President Trump, Attorney General Barr, and other federal officers for breaking up a protest in Lafayette Park with tear gas and pepper spray to allow the President to pose for a photo in front of St. John's Church.

June 5: The U.S. Court of Appeals for the D.C. Circuit issues its opinion in *Karem v. Trump*, unanimously holding that the White House deprived Playboy reporter Brian Karem of due process when it suspended his "hard pass" to the White House based on a conflict with former White House staffer

Sebastian Gorka at President Trump's 2019 Social Media Summit. The opinion, written by Judge David Tatel and joined by Judges Sri Srinivasan and Nina Pillard, holds that Karem "lacked fair notice that the White House might punish his purportedly unprofessional conduct by suspending his hard pass for a month."

June 9: Judge Randolph Moss denies Jones Day's request for sanctions against a group of former associates suing the firm for gender discrimination under the Equal Pay Act. Judge Moss concludes that the evidence has, thus far, not significantly undermined the plaintiffs' claims (see May 19 entry).

June 10: Former U.S. District Judge John Gleeson files his amicus brief in opposition to the government's motion to dismiss its indictment of former National Security Adviser Michael Flynn. Judge Emmet Sullivan had appointed Gleeson as amicus after Flynn and the government agreed the charges should be dismissed. Sullivan's actions prompted Flynn's mandamus petition, which at this point in time is pending at the D.C. Circuit (see June 1 entry).

June 15: The Supreme Court issues its opinion in *Bostock v. Clayton County*, holding that an employer who fires an individual merely for being gay or transgender violates Title VII. Justice Gorsuch's opinion for the Court notes that while "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result," the "limits of the drafters' imagination supply no reason to ignore the law's demands." Justice Alito dissents, joined by Justice Thomas. Justice Kavanaugh pens a separate dissent.

June 18: The Supreme Court issues its opinion in *Department of Homeland Security v. Regents of the University of California*, invalidating the Trump Administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program. Writing for the Court, the Chief Justice observes that the memorandum rescinding DACA did not contain sufficient reasoning or consider all sides of the issue before the agency, and the agency could not paper over that failure with subsequent memoranda. "An agency," the Court holds, "must defend its actions based on the reasons it gave when it acted." Justices Ginsburg, Breyer, and Kagan join the Chief Justice's opinion in full, and Justice Sotomayor joins as to all but the part of the opinion rejecting the further claim that the rescission violates the Fifth Amendment's equal protection guarantee because it was motivated by animus. The remaining Justices concur in the equal protection holding but otherwise dissent (see Nov. 12 entry). • The Senate confirms Justin Walker for the U.S. Court of Appeals for the D.C. Circuit, by a 51-42 vote. Walker, 38, will be one of the youngest appellate judges in the country (see Apr. 3 entry).

June 19: Judge Royce Lamberth of the U.S. District Court for the District of

Columbia holds a hearing on whether he can block the release of former National Security Adviser John Bolton's memoir, noting that the proverbial horse may be "out of the barn" because the book has already been printed and distributed to bookstores, but also questioning whether Bolton took adequate measures to avoid disclosing classified information.

June 20: Geoffrey Berman steps down as U.S. Attorney for the Southern District of New York, after a 24-hour standoff during which Attorney General Barr announced Berman was resigning and Berman contradicted him.

June 24: Aaron Zelinsky, a prosecutor in the U.S. Attorney's Office for the District of Maryland and a former member of Special Counsel Robert Mueller's staff, testifies before Congress that the "highest levels" of the Department of Justice politicized sentencing proceedings regarding Roger Stone (see Apr. 16 entry). • In a 2-1 opinion, the U.S. Court of Appeals for the D.C. Circuit grants mandamus and directs Judge Emmet Sullivan to grant the government's motion to dismiss the indictment against Michael Flynn. Judge Neomi Rao, joined by Judge Karen LeCraft Henderson, issues the majority opinion. Judge Robert Wilkins dissents, noting that the decision marks the first time the D.C. Circuit has granted mandamus to prevent a judge from considering a pending motion (see June 10 entry). • Bayer announces a $10.9 billion putative global settlement of litigation involving claims that Roundup causes cancer. The settlement resolves 75% of the pending litigation involving Roundup and features a "futures" component designed to address potential unfiled claims.

June 25: The Department of Justice files its merits brief in *California v. Texas*, the latest challenge to the Affordable Care Act in the Supreme Court, arguing that the individual mandate is unconstitutional and that the entire ACA "must fall" as a result (see Mar. 2 entry).

June 26: Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia allows Roger Stone to delay his prison surrender date by two weeks (rather than the two months he had requested) in light of the COVID-19 pandemic (see June 24 entry).

June 29: In a fractured decision, the Supreme Court holds in *Seila Law LLC v. Consumer Financial Protection Bureau* that the CFPB's structure violates the Constitution's separation of powers and adopts a limited structural remedy to solve the problem. Five Justices — the Chief Justice, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh — agree on the existence of a constitutional violation. Seven Justices, across two separate opinions, agree that the appropriate remedy is to sever the provision restricting the President's ability to remove the CFPB director. One of those opinions is by the Chief Justice, joined by Justices Alito and Kavanaugh. The other is Justice Kagan's

partial dissent (on the constitutional violation), joined by Justices Ginsburg, Breyer, and Sotomayor. Justices Thomas and Gorsuch write a separate opinion disagreeing with the Court's ruling on severability (see Mar. 3 entry). • The Supreme Court also issues its ruling in *June Medical Services v. Russo*, striking down Louisiana abortion restrictions materially identical to those struck down by the Court in 2016. Justice Breyer writes the lead opinion, joined by Justices Ginsburg, Sotomayor, and Kagan. The Chief Justice, who dissented from the 2016 opinion, concurs in the judgment, writing that the 2016 case "was wrongly decided," but that "[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike." Each of the other Justices issues a dissenting opinion (see Mar. 5 entry).

June 30: The Supreme Court issues its 5-4 decision in *Espinoza v. Montana Department of Revenue*, holding that Montana violated the Free Exercise Clause by prohibiting financial assistance for parents who send their children to private schools. The Chief Justice authors the majority opinion, which is joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. Justice Ginsburg, Justice Breyer, and Justice Sotomayor issue dissenting opinions (see Jan. 22 entry).

July 2020

July 1: Judge Timothy Kelly of the U.S. District Court for the District of Columbia vacates a Trump Administration rule that blocks migrants from seeking asylum in the U.S. without having first been denied protection by other countries on their way to the U.S. Judge Kelly concludes the administration failed to comply with the APA when it promulgated the rule without notice and comment, noting that the administration's defense of its use of that procedural mechanism largely rested on a single news article.

July 8: A group of plaintiffs' attorneys, led by Elizabeth Cabraser, withdraws a motion for approval of a $1.1 billion dollar "futures" settlement relating to potential future litigation over whether Bayer's herbicide Roundup causes cancer. Judge Vince Chhabria of the U.S. District Court for the Northern District of California had expressed skepticism about the settlement, which accompanied a series of settlements of pending cases totaling up to $10.9 billion (see June 24 entry). • The Supreme Court issues its decision in *Little Sisters of the Poor v. Trump*, upholding the Trump Administration's rule exempting certain employers with religious and conscientious objections to the ACA mandate to provide contraceptive services (see Jan 17 entry). Justice Thomas issues the majority opinion, which is joined by the Chief Justice and Justices Alito, Gorsuch, and Kavanaugh. Justice Kagan, joined by Justice Breyer, concurs in the judgment, agreeing that the government has the authority to

create an exemption, but questioning whether the exemption is the product of reasoned decisionmaking. Justices Ginsburg and Sotomayor dissent.

July 9: In connection with a putative Equal Pay Act class action by former Jones Day associates claiming gender discrimination, Judge Randolph Moss of the U.S. District Court for the District of Columbia orders the firm to produce salary data for every associate nationwide between 2012 and 2018 (see June 9 entry). • The Supreme Court issues its decision in *McGirt v. Oklahoma*, concluding that a large area located within the borders of Oklahoma is actually reservation land belonging to the Creek Indian Nation. In his opinion for the Court (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), Justice Gorsuch writes that the case is really about whether promises made to the Creek in a treaty can be cast aside because the "price of keeping them has become too great." The Court's answer? "We reject that thinking." The Chief Justice pens the lead dissent, and Justice Thomas also files a dissent. • The Supreme Court also issues its opinions in *Trump v. Mazars USA* and *Trump v. Vance*. In *Mazars*, the Court concludes that Congress's subpoenas for President Trump's financial records may be enforceable, but that the lower courts did not take adequate account of the separation of powers concerns presented by the subpoenas. The Chief Justice writes the majority opinion, which is joined by all Justices besides Justices Thomas and Alito. In *Vance*, the Court rejects the view that Article II and the Supremacy Clause of the Constitution preclude, or require heightened scrutiny of, a state criminal subpoena to a sitting president. The lineup for this opinion is identical, except Justices Kavanaugh and Gorsuch concur only in the result.

July 10: President Trump grants clemency to Roger Stone, calling his sentence "unjust" and declaring that he is a "victim of the Russia Hoax that the Left and its allies in the media perpetuated for years in an attempt to undermine the Trump presidency" (see June 26 entry).

July 14: Stephen Susman, founder of Houston trial boutique Susman Godfrey, passes away after contracting COVID-19 during his recovery from a serious bicycle accident. • The Supreme Court announces that Justice Ginsburg has been hospitalized for treatment of a possible infection. • The federal government executes Daniel Lewis Lee, its first execution since 2003, hours after the Supreme Court rules that his execution can proceed.

July 16: The Washington Football Team announces it has retained Wilkinson Stekloff, a trial boutique in DC, to conduct an internal investigation of its culture and explore allegations of workplace misconduct. • The federal government executes Wesley Ira Purkey.

July 17: The Supreme Court announces that Justice Ginsburg has been un-

dergoing chemotherapy for cancerous lesions on her liver. Ginsburg, 87, states that she remains "fully able" to "do the job full steam." • The federal government executes Dustin Lee Honken.

July 19: A gunman shoots the husband and the son of Judge Esther Salas of the U.S. District Court for the District of New Jersey. Judge Salas's son is killed and her husband is in critical condition.

July 23: The U.S. Court of Appeals for the Sixth Circuit issues its decision in *Bearden v. Ballard Health*, affirming the dismissal of a complaint and chiding plaintiffs' counsel for his many colorful insults, including references to Adolf Hitler, Porky Pig, and Sodom and Gomorrah. • Judge Alvin Hellerstein of the U.S. District Court for the Southern District of New York orders Michael Cohen released from prison, granting Cohen's petition for habeas corpus and finding that the government's decision to remove Cohen from home confinement was a form of retaliation for Cohen's publication of a book (see Mar. 24 entry).

July 24: Judge Ronald Wilson of West Virginia's First Judicial Circuit (which serves the three northernmost counties in the state) decides to delay an asbestos trial set to begin in the next month, based on the "frightening" numbers of COVID-19 cases in the state, as well as the "increasing nervousness" of those around him.

July 27: Lawyers for Michael Avenatti move to withdraw as counsel in his criminal prosecution for stealing money from Stormy Daniels, citing Avenatti's inability to pay their bills.

July 28: Attorney General William Barr testifies before the House Judiciary Committee, addressing criticisms of his handling of the sentencing recommendation for Roger Stone. Barr asks, "Do you think it's fair for a 67-year-old man to be sent to prison for seven to nine years?" (see July 10 entry). • A survey of over 1,000 new lawyers by the American Bar Association shows that more than half have postponed homebuying, more than 25% have postponed or avoided getting married, and more than 45% have decided to delay having or not to have children, all as a result of educational debt.

July 29: Judge George B. Daniels of the U.S. District Court for the Southern District of New York again stays the Trump administration's "public charge" rule, citing the COVID-19 pandemic and the lack of adequate measures by the federal government to ensure that the rule will not dissuade immigrants from seeking needed medical care (see Apr. 24 entry).

July 30: The Judicial Conference Committee on Codes of Conduct drops an advisory opinion that would have prohibited federal judges from joining the

American Constitution Society or the Federalist Society. • The U.S. Court of Appeals for the D.C. Circuit grants rehearing en banc in mandamus proceedings arising out of Judge Emmet Sullivan's handling of the government's motion to dismiss its indictment of Michael Flynn (see July 20 entry).

AUGUST 2020

August 1: Wisconsin Supreme Court Justice Jill Karofsky is sworn into office 35 miles into a 100-mile run.

August 3: The U.S. Court of Appeals for the Fourth Circuit revives *Maryland Shall Issue v. Hogan*, a constitutional challenge to Maryland's rules for obtaining a handgun, which require gun buyers to complete four hours of safety training, pass background checks, be at least 21 years old, and be a Maryland resident.

August 4: Judge Carlton W. Reeves of the U.S. District Court for the Southern District of Mississippi dismisses a lawsuit against a police officer, citing the doctrine of qualified immunity, in *Jamison v. McClendon*. The opinion begins with a list of 15 recent examples of police misconduct and questions whether the doctrine of qualified immunity should have ongoing vitality.

August 5: The Supreme Court splits 5-4 in *Barnes v. Ahlman*, undoing a preliminary injunction requiring the Orange County jail to take various public health measures to combat the spread of COVID-19. • Gallup releases a poll finding that 58% of Americans approve of the Supreme Court Justices' performance. • The U.S. Court of Appeals for the Fourth Circuit votes 2-1 to uphold the Trump Administration's effort to implement regulations that make it harder for immigrants to seek permanent residency in the U.S. if they have relied on public assistance programs.

August 6: The U.S. Court of Appeals for the Eleventh Circuit agrees to rehear en banc whether prosecutors broke the Crime Victims' Rights Act in 2008 when they concealed from Jeffrey Epstein's victims a lenient non-prosecution agreement with him (see Apr. 15 entry). • In *National Veterans Legal Services Program v. United States*, the U.S. Court of Appeals for the Federal Circuit affirms a district court decision deeming excessive some, but not all, of the fees charged for accessing federal court records through the Public Access to Court Electronic Records (PACER) system. The judiciary collected more than $920 million in PACER fees from the beginning of fiscal year 2010 to the end of fiscal year 2016 (see Feb. 3 entry).

August 7: Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit dies of the coronavirus. • The en banc D.C. Circuit holds 7-2 that House Democrats can sue to force President Trump's former White

House Counsel Donald McGahn to comply with a congressional subpoena (see Mar. 13 entry). • The U.S. Court of Appeals for the Eleventh Circuit rules 2-1 that a Florida school board's refusal to allow a transgender boy to use the bathroom that matches his gender identity is unconstitutional.

August 10: A split New Jersey Supreme Court rules in *State v. Andrews* that law enforcement may compel disclosure of the cellphone passcodes of a former sheriff's officer accused of tipping off a suspect in a drug-trafficking investigation, reasoning that the information is not protected by the Fifth Amendment right not to incriminate one's self.

August 11: Joe Biden names Senator Kamala Harris as his running mate. Senator Harris is the first Black woman to compete on a major party's presidential ticket. • The Supreme Court grants an emergency request by the State of Oregon to stay a ruling that would require the state to relax its requirements for adding a proposed amendment to the State's Constitution on the ballot in the November election. Justices Ginsburg and Sotomayor indicate they would deny the request. • The U.S. Court of Appeals for the Ninth Circuit reverses a 2019 antitrust ruling that Qualcomm abused its monopoly position in wireless chips. • The en banc U.S. Court of Appeals for the Seventh Circuit holds that convicted prisoners have some limited Fourth Amendment rights to bodily privacy, including during visual inspections.

August 12: Vacating a denial of habeas relief in *McKathan v. United States*, Judge Robin S. Rosenbaum of the U.S. Court of Appeals for the Eleventh Circuit quotes both Homer's epic poem *The Odyssey* and lyrics from The Police (the band, not the law enforcement agency).

August 13: The Supreme Court rebuffs a request by the Republican National Committee and Rhode Island Republicans to block an order by a federal district court that permitted relaxation of the State's witness requirement for absentee ballots. Justices Thomas, Alito, and Gorsuch indicate they would have granted the request. • The U.S. Court of Appeals for the Fifth Circuit upholds the all-male military draft against allegations of sex discrimination in *National Coalition for Men v. Selective Service System*.

August 14: The U.S. Court of Appeals for the D.C. Circuit rules that Hillary Clinton does not have to sit for a deposition in a Freedom of Information Act lawsuit that Judicial Watch filed in 2014 to obtain documents related to the 2012 Benghazi attack. • The U.S. Court of Appeals for the Ninth Circuit strikes down a California law banning large-capacity gun magazines. • The Administrative Office of the U.S. Courts approves measures to increase security for federal judges, citing the recent fatal attack on Judge Esther Salas's family (see July 19 entry).

August 17: Senior District Judge Frederic Block of the U.S. District Court for the Eastern District of New York blocks implementation of a Trump administration rule that would allow healthcare providers to discriminate against transgender individuals under Section 1557 of the Affordable Care Act. • After considering the President's petition for 11 months, the U.S. Court of Appeals for the Second Circuit declines to rehear President Trump's request to dismiss a suit claiming he is violating the Emoluments Clause by profiting from foreign governments and U.S. office holders during his time at the White House.

August 18: The Tampa Bay Rays relief pitcher Chaz Roe pitches to New York Yankees second baseman Tyler Wade, leading to an unexpected *Roe v. Wade* rematch. As in the original Supreme Court case, Roe prevails.

August 19: A *Los Angeles Times* editorial advocates permanent provision of live audio of Supreme Court arguments. • As Chief Justice Nathan Coats retires, the Colorado Supreme Court adopts term limits for the Chief Justiceship.

August 20: The Trump Administration asks the Supreme Court to restore President Trump's power to block individual Americans from following his Twitter account.

August 21: The Michigan Court of Appeals upholds a ruling that Governor Gretchen Whitmer did not exceed her emergency powers under the state's Emergency Powers of Governor Act by declaring and extending a state of emergency and issuing related executive orders during the pandemic.

August 24: In *United States v. Miselis*, the U.S. Court of Appeals for the Fourth Circuit upholds the Anti-Riot Act convictions of two defendants who participated in the 2017 "Unite the Right" rally in Charlottesville, Virginia, but says that part of the Act may unconstitutionally prohibit speech protected by the First Amendment.

August 25: Reuters releases the second part of its data-driven investigation into the legal doctrine of qualified immunity. The investigation finds "wide regional disparities" in how often courts grant qualified immunity to police officers accused of excessive force.

August 26: The U.S. Court of Appeals for the Fourth Circuit holds in *Grimm v. Gloucester County School Board* that "equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender." • The federal government executes Lezmond Mitchell, the only Native American person on federal death row. • The federal government asks the Supreme Court to reinstate a requirement

for patients seeking abortions to visit doctor's offices to obtain one of the drugs used in medication-induced abortions. Judge Theodore D. Chuang of the U.S. District Court for the District of Maryland ruled in July that requiring an in-person visit to obtain the medication during the pandemic was unduly burdensome.

August 27: The New Jersey Senate votes 39-0 to confirm Fabiana Pierre-Louis, the first Black female Supreme Court justice in the State's 244-year history. • In *Connecticut v. Liebenguth*, the Supreme Court of Connecticut rejects a criminal defendant's argument — which had been adopted by the state's intermediate appellate court — that his utterance of racial epithets to a Black parking enforcement official were protected First Amendment speech.

August 28: The federal government executes Keith Dwayne Nelson.

August 31: The en banc U.S. Court of Appeals for the D.C. Circuit holds that Judge Emmet Sullivan may proceed with his plans to scrutinize the Department of Justice's request to drop the prosecution of Michael Flynn (see July 30 entry). • Oregon Supreme Court Justice Hans Linde dies.

September 2020

September 1: The U.S. Court of Appeals for the First Circuit overturns a district court order temporarily blocking federal immigration agents from making civil arrests at Massachusetts courthouses.

September 2: The U.S. Court of Appeals for the Ninth Circuit rules that a government surveillance program that collected millions of Americans' phone records violated the law and that claims made by the FBI and other national security officials in defense of the program were inaccurate. • Judge Clyde Henry Hamilton of the U.S. Court of Appeals for the Fourth Circuit dies.

September 3: In *Mayor & City Council of Baltimore v. Azar*, the U.S. Court of Appeals for the Fourth Circuit affirms a district court's permanent injunction of the Trump administration's rule prohibiting Title X grant recipients from making abortion referrals. • The U.S. Court of Appeals for the Seventh Circuit rebuffs a request for a preliminary injunction of Illinois Governor J.B. Pritzker's executive orders designed to limit the spread of the coronavirus.

September 4: The Mississippi Attorney General drops charges against Curtis Flowers, who was prosecuted six times for the same offense. In the six trials combined, prosecutors used peremptory challenges to strike 41 of the 42 Black prospective jurors (see Dec. 16 entry).

September 9: President Trump releases a new list of potential Supreme Court nominees.

September 10: A Long Island, NY student protesting his high school's hybrid method of instruction is arrested for attending class in person on a virtual day.

September 11: The en banc U.S. Court of Appeals for the Eleventh Circuit upholds a Florida law requiring felons to pay all fines, fees, or restitution before they can be eligible to vote (see Feb. 19 entry).

September 14: In a 2-1 decision, the U.S. Court of Appeals for the Ninth Circuit reverses a district court decision blocking President Trump's move to phase out Temporary Protected Status for immigrants from certain countries. • A federal judge in Pittsburgh rules that Pennsylvania's pandemic-based stay-at-home orders and restrictions on non-life-sustaining businesses and outdoor gatherings are unconstitutional. • Chief Justice Ralph D. Grants of the Massachusetts Supreme Judicial Court dies. • Florida Governor Ron DeSantis names Judge Jamie R. Grosshans to the Florida Supreme Court. • The Wisconsin Supreme Court declines to order the state to include Green Party presidential nominee Howie Hawkins on the presidential ballot.

September 15: The House Judiciary Committee approves a bill, the Open Courts Act, that would grant the public free access to the electronic database of federal court records known as PACER.

September 16: The Supreme Court announces that it will start October Term 2020 by hearing arguments remotely and allowing the public to continue to listen live. • The U.S. Court of Appeals for the First Circuit hears argument in a case accusing Harvard University of intentional discrimination against Asian American applicants.

September 17: Constitution Day. • Justice Breyer speaks to George Washington University Law Students via Facebook Live, while Justice Gorsuch participates in a Virtual Student Town Hall hosted by the National Constitution Center. • The National Constitution Center awards its 32nd annual Liberty Medal to Justice Ginsburg. • In a 2-1 ruling, the U.S. Court of Appeals for the Second Circuit temporarily bars the release of all New York Police Department disciplinary records in a lawsuit by police seeking to prevent the information from going public under a new state law.

September 18: Justice Ginsburg dies. • Chief Judge Greg Stivers of the U.S. District Court for the Western District of Kentucky signs an order closing the Gene Snyder U.S. Courthouse and Custom House from September 21 to 25 in anticipation of a decision in the investigation of the shooting of Breonna Taylor by Louisiana police. • The Ingham County, MI, county clerk files a complaint with the sheriff's office, reporting that a resident has installed a toilet on the resident's lawn with a sign reading "Place Mail-In Ballots Here."

September 19: President Trump announces that he will nominate a woman to fill the vacancy on the Supreme Court left by the death of Justice Ginsburg.

September 22: The federal government executes William Emmett LeCroy. • The Trump administration asks the Supreme Court for expedited intervention in a dispute about whether undocumented immigrants living in the United States must be included in the apportionment of congressional seats. • The U.S. Court of Appeals for the Ninth Circuit holds its first-ever virtual en banc hearings. • The Berkeley, CA, city council unanimously votes to bar junk food from the checkout lanes of local supermarkets. The law applies to anything with over five grams of added sugar or 250 milligrams of sodium, as well as drinks with high levels of sugar or artificial sweeteners. • Former New York Mayor Michael Bloomberg raises $16 million to help pay the outstanding fines and fees of felons in Florida, allowing them to regain their voting rights ahead of Election Day. LeBron James, John Legend, and many other celebrities contribute additional funds, hoping to cover the roughly $27 million owed by approximately 40,000 felons.

September 23: Justice Ginsburg begins two days of lying in repose at the Supreme Court.

September 24: The federal government executes Christopher Andre Vialva. • The U.S. Court of Appeals for the Second Circuit holds in *Rukoro v. Germany* that descendants of those killed by colonizing Germans from 1904 to 1908 in current-day Namibia cannot sue in New York for reparations under the Foreign Sovereign Immunities Act.

September 25: House Democrats introduce a bill providing term limits for Supreme Court Justices. • Justice Ginsburg lies in repose at the U.S. Capitol, becoming the first woman and the first person of Jewish faith to do so.

September 26: President Trump nominates Judge Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit to the Supreme Court.

September 28: Pennsylvania Republicans file an emergency request asking the Supreme Court to block a ruling by the Pennsylvania Supreme Court that would require election officials to count absentee ballots received within three days after Election Day, November 3. • The Supreme Court of Georgia rules that a couple may sue a sperm bank over false advertising about the characteristics of the sperm donor. • A Pennsylvania appeals court rules that the federal Protection of Lawful Commerce in Arms Act, passed in 2005 to give the gun industry broad immunity from civil liability, violates the Tenth Amendment because it strips States of the power to rely on their common law to hold the industry accountable for negligence. • Boulder, CO prohibits people 18 to 22 years old from gathering in groups of any size.

September 29: The U.S. Court of Appeals for the Third Circuit rules 2-1 that Philadelphia courts do not violate spectators' constitutional rights by preventing them from recording audio of bail hearings, even when they have no other way to access the proceedings besides attending them in person.

September 30: A Dade City, FL dementia patient who wanders away from her nursing home is arrested when police run her name through their database, turning up a decade-old warrant for her arrest for driving under the influence.

OCTOBER 2020

October 1: The U.S. Court of Appeals for the Eleventh Circuit upholds termination of a 20-year-old consent decree regulating Miami's treatment of its homeless residents, finding that the city has overhauled its policing of homeless individuals to the point where ongoing court supervision is no longer required.

October 5: The Supreme Court hears arguments in *Texas v. New Mexico* and *Carney v. Adams* on the first day of its new Term. • The Supreme Court denies review of a petition for certiorari filed by a Kentucky clerk who refused to issue marriage licenses to same-sex couples. Justices Thomas and Alito dissent. • The Supreme Court reinstates a South Carolina law — enjoined by the U.S. Court of Appeals for the Fourth Circuit — requiring voters to sign absentee-ballot envelopes in the presence of a witness. • California Governor Newsom announces that he will nominate Martin Jenkins to be a Justice of the State's Supreme Court. • The Oklahoma County, OK district attorney indicts two former detention officers and their supervisor for cruelty to prisoners and conspiracy. The three defendants allegedly handcuffed inmates to the walls of an attorney visitation room and forced them to listen to the children's song "Baby Shark" for extended periods of time.

October 6: The Department of Justice asks the Supreme Court to reinstate the death penalty for Boston Marathon bomber Dzhokhar Tsarnaev. • The Supreme Court rejects an emergency request from Republicans in Maine to block the State from using ranked-choice voting in the 2020 presidential election.

October 8: The Supreme Court rejects a request from Republicans in Montana to block a plan allowing county election officials to choose whether to send mail-in ballots to all registered voters in the State on October 9. • The Supreme Court hears argument in the copyright case *Google v. Oracle*. The Justices use many low-tech analogies to explore the issues in the case, including analogizing Oracle's code to the QWERTY typewriter keyboard

and a grocery store's produce-organization system. • The Department of Justice files a suit against Yale University alleging that the university discriminated against applicants based on their race and national origin.

October 9: The Supreme Court announces that it will hear arguments remotely for the remainder of 2020, with live audio available to the public in real time. • The U.S. Court of Appeals for the Ninth Circuit rules against the State Department in its effort to deny citizenship of one of two twins born abroad to a same-sex married couple. The twin was conceived with sperm of an Israeli father and born in Canada using a surrogate mother. • The Ninth Circuit rules 2-1 that President Trump's use of emergency powers to allocate millions of dollars in funding for the construction of a southern border wall was illegal. • The Arizona Supreme Court unanimously holds that courts may sentence juvenile offenders convicted of multiple offenses to de facto life sentences.

October 12: The Senate Judiciary Committee begins hearings on President Trump's nomination of Judge Barrett to the Supreme Court (see Sept. 26 entry). • Bernard Cohen dies. He represented Mildred and Richard Loving, the interracial couple whose marriage the Supreme Court held was protected by the Constitution in *Loving v. Virginia* (1967).

October 13: The Supreme Court grants review of a trio of petitions asking whether administrative judges of the Patent Trial and Appeal Board of the U.S. Patent and Trademark Office must be appointed by the President and confirmed by the Senate. • The Supreme Court grants the Trump Administration's emergency request to allow immediate cessation of the head-count portion of the 2020 census. • President Trump asks the Supreme Court to stay a ruling by the U.S. Court of Appeals for the Second Circuit that would allow New York County District Attorney Cyrus Vance to enforce a subpoena granting him access to the President's financial records (see July 9 entry).

October 15: Texas Governor Greg Abbott appoints Rebeca Huddle to the Texas Supreme Court.

October 19: The Supreme Court votes 4-4 on Pennsylvania Republicans' emergency request to block a requirement to count absentee ballots received within three days after Election Day. The split ruling leaves the requirement in place (see Sept. 28 entry).

October 21: The Supreme Court issues an emergency 5-3 ruling allowing Alabama officials to reinstate a ban on curbside voting in the November 2020 election.

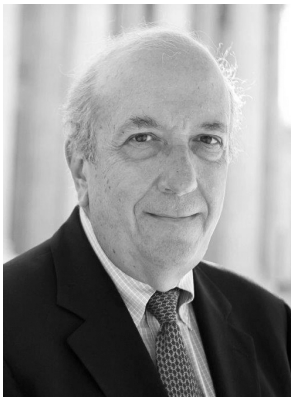
October 22: The Oregon Supreme Court in *Chernaik v. Brown* rebuffs a climate-change suit against the state and its governor contending that they are required to act as trustees under the public trust doctrine to protect various natural resources from substantial impairment by greenhouse gas emissions, resulting climate change, and ocean acidification. • Judge Barrett's nomination to the Supreme Court moves to the Senate floor (see Oct. 12 entry). • Democratic presidential nominee Joe Biden says that, if he is elected, he will form a bipartisan commission to recommend changes to the Supreme Court. • President Trump nominates Thomas L. Kirsch to fill Judge Barrett's seat on the U.S. Court of Appeals for the Seventh Circuit. • A Florida high school student sues his school for violating the First Amendment by requiring him to relinquish his school parking permit or remove an elephant sculpture painted with the word "TRUMP" from the bed of his truck. • The Virginia Supreme Court overturns a lower-court ruling that had barred Fairfax, VA police from collecting license plate data from passing cars using automatic scanners.

October 23: Hawaii Governor David Ige nominates Todd Eddins to the State's supreme court.

October 26: The Senate votes 52-48 to confirm Judge Barrett as the 115th Justice of the U.S. Supreme Court and the fifth woman to serve on the Court (see Oct. 22 entry). • The Supreme Court votes 5-3 to reject requests from Wisconsin voters and the Democratic National Committee to reinstate modifications to election rules that a federal judge had ordered for the November election because of the pandemic. • Judge Juan Torruella of the U.S. Court of Appeals for the First Circuit dies.

October 27: Chief Justice Roberts swears Amy Coney Barrett in as the newest Justice to the Supreme Court.

October 28: With Justices Thomas, Alito, and Gorsuch dissenting and Justice Barrett not participating, the Supreme Court rejects a request from the Trump campaign and North Carolina Republicans to block an extension of the deadline for absentee ballots in North Carolina to nine days after the election. • Massachusetts Governor Charlie Baker nominates Kimberly Budd to be Chief Justice of the State's Supreme Judicial Court.



Tony Mauro[†]

A YEAR IN THE LIFE OF THE SUPREME COURT

2020

A summary of developments involving the Supreme Court of the United States in 2020, most of which are unlikely to be memorialized in the United States Reports.

Okay Boomer: During argument in *Babb v. Wilkie* on January 15, Chief Justice John Roberts introduced the phrase "Okay Boomer" into the court's lexicon. The case involved age discrimination, and Roberts said aloud, "Let's say in the course of . . . weeks' long process, one comment about age, you know, the hiring person is younger, says, you know, 'OK Boomer,' once to the applicant . . . . It doesn't have to have played a role in the actual decision. So, is that actionable?"

Impeachment Pettifogging: In a historic moment on January 16, Chief Justice Roberts was sworn in to preside over the impeachment proceedings of President Donald Trump. As expected because of his limited role under the Constitution, Roberts was low-key and did not interfere with the proceedings, except to keep decorum. At one point, he admonished Democrats and Republicans for their bickering, recalling a 1905 trial in which a senator "objected

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when one of the managers used the word 'pettifogging' and the presiding officer said the word ought not to have been used. I don't think we need to aspire to that high of a standard, but I do think those addressing the Senate should remember where they are." He injected a lighter touch when Senate Majority Leader Mitch McConnell wished him happy birthday on January 27. Roberts said, "Well, thank you very much for those kind wishes, and thank you to all the senators for not asking for the yeas and nays."

Around the Table: At a New York Bar Association event on January 30, Justice Elena Kagan shed some light on the court's private conferences at which the justices discuss opinions and incoming petitions. By tradition, every justice must talk at least once before anyone is allowed to speak again, she said. "Sometimes we go around the table and people are where they are and I know nothing is going to change and we just keep talking and we just keep annoying each other," Kagan said. On the positive side, she added, "I continue to think that, if people could see it, they would be really proud of the institution, that the institution works really well, that people engage with each other on a very high plane, that there is really good and substantive conversation . . . . There's never any anger," she said. "People are trying to convince other people, and that's how a court should work."

Fearless Solicitor: Former deputy U.S. Solicitor General Lawrence Wallace, who died February 13 at age 88, retired in 2003 after arguing 157 cases before the U.S. Supreme Court, a 20th-century record. He was a fearless civil servant, best known for a memorable footnote he dropped in 1982 in a brief signaling that he would not support the Reagan administration's position in *Bob Jones University v. United States*. Wallace signed the brief but said he disagreed with it. The late Erwin Griswold, who served as the U.S. solicitor general from 1967 to 1973, told *The Washington Post* in 1982 that Wallace's action was "an attempt to preserve the credibility of the office."

Pandemic Precautions: The court's first formal recognition of the COVID-19 pandemic came on March 16. "In keeping with public health precautions recommended in response to COVID-19, the Supreme Court is postponing the arguments currently scheduled for the March session," the court announced in a news release. "The Court will examine the options for rescheduling those cases in due course in light of the developing circumstances. The Court will hold its regularly scheduled Conference on Friday, March 20. Some Justices may participate remotely by telephone . . . . The Court is expanding remote working capabilities to reduce the number of employees in the Building, consistent with public health guidance. The Building will remain closed to the public until further notice." Befitting the court's fidelity toward precedent, the

announcement also stated, "The Court's postponement of argument sessions in light of public health concerns is not unprecedented. The Court postponed scheduled arguments for October 1918 in response to the Spanish flu epidemic. The Court also shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks."

Teleconferencing Arguments: After announcing that April arguments would also be postponed, the court finally devised a plan that would accommodate arguments at least for some of the pending cases before the end of the court's term. "The Court will hear arguments by telephone conference on May 4, 5, 6, 11, 12 and 13 in a limited number of previously postponed cases," the court announced, adding, "The Court anticipates providing a live audio feed of these arguments to news media. Details will be shared as they become available." That anticipation was fulfilled in an unprecedented fashion. For the first time in the court's history, it allowed live streaming of arguments, available to the public through outlets like C-SPAN. Previously, the court would allow arguments to be broadcast only several days after they took place.

New Argument Order: The current Supreme Court has long been known as a "hot bench" because of the barrage of questions during arguments, with justices interrupting each other and advocates. Justices have apologized on occasion, but they have had a hard time changing their free-for-all habits. But all that changed with the advent of the teleconference arguments beginning on May 4. With the justices speaking from home or elsewhere, chaotic questioning would have created even more interruptions and confusion. So, the questioning took place seriatim by seniority, with each justice allotted several minutes of uninterrupted time. Gone would be an instant follow-up question or interruption from a justice telegraphing his or her views. The procedure got mixed reviews from advocates and journalists. Chief Justice Roberts lamented that the court's long tradition of justices shaking hands before argument could not take place. Lyle Denniston, who began covering the Supreme Court in 1958, tweeted that the arrangement "gives the CJ arbitrary power, diminishes cross-bench exchanges, promotes wool-gathering by lawyers, prizes order over depth, lets technology triumph, looks amateurish." There were, in fact, some awkward moments, such as the times when justices forgot to unmute their phones, and one instance in which it was easy to hear that someone flushed a toilet during an argument.

Thomas Speaks: One consequence of the telephonic argument protocol that won fairly uniform praise was that it encouraged Justice Clarence Thomas to ask questions. Before the pandemic, Thomas almost never asked questions for a variety of reasons, mainly because he disliked the chaos and he wanted

to hear more from the advocates than from the other justices. In approximately 2,200 arguments during his 28-year tenure, Thomas asked questions only 39 times — until the pandemic. The more orderly, one-by-one offer to speak seemed to suit Thomas well. An article published by *The Journal of Appellate Practice and Process* reported, "Thomas spoke in all ten of these [May 2020] cases. And, as he did, his colleagues referenced his questions or comments twelve times — or more than once per case. Like the old E.F. Hutton commercials it seems that, when Thomas spoke in May 2020, his colleagues listened."

Fishy Business: Justices are required to file their financial disclosure forms that are eventually released to the public. In addition to listing assets, stock holdings, and the like, they also reveal gifts they've received that are valued at more than $390. In June, Justice Neil Gorsuch reported that he had received a $500 fishing rod from someone named Bob Todd. It turns out that Todd is not a lawyer and has never met Gorsuch, but he owns a bait and tackle shop in Colorado near where Gorsuch used to live. In a phone interview, Todd said he decided in 2019 to give Gorsuch a gift for "giving up his life as a Coloradan, his life in the outdoors" by moving to Washington, DC in 2017. "It's a nice fishing rod, but that's just an estimate." Todd added, "I hope he lives a long and healthy life, and I hope he picks up the rod once in a while and takes a break."

Zoom Hour: What was it like for Supreme Court law clerks during the scrambled schedule and work-from-home shift during the pandemic period from March to July? Michael Francisco, a clerk for Justice Gorsuch and the first clerk to land a law firm job at the end of that term, offered a glimpse in an August interview with *The National Law Journal*. Things weren't all that different at first, Francisco said. "It's appellate work, fundamentally, so it's actually quite portable." But court and clerk rituals fell by the wayside. "The skit got canceled," Francisco said, referring to the annual roast-like sketch put on by clerks for the justices at the end of the term. "I can't say that I was sad about that. The trivia competition didn't happen either." The clerk tradition of having lunch with other justices during the term was also disrupted to a degree. One tradition continued, Francisco said. "The clerks' happy hours on Thursdays just didn't happen in the normal sense, although the clerks created a Zoom happy hour on Thursdays. People were still having libations during happy hour."

RBG Dies: Justice Ruth Bader Ginsburg died on September 18 at the age of 87. The cause was complications of metastatic pancreas cancer, according to court spokeswoman Kathy Arberg. Ginsburg served on the high court for 27

years after an important career as a professor and advocate for women's rights as well as a turn as a judge on the U.S. Court of Appeals for the D.C. Circuit. She was only the second female Supreme Court justice, following Sandra Day O'Connor. Ginsburg had several bouts with cancer and other ailments over the years, but she persevered and became a popular icon, known as The Notorious RBG, and the subject of numerous books, movies, and documentaries. Chief Justice Roberts said of Ginsburg: "Our nation has lost a jurist of historic stature. We at the Supreme Court have lost a cherished colleague. Today we mourn, but with confidence that future generations will remember Ruth Bader Ginsburg as we knew her — a tireless and resolute champion of justice." Ginsburg had resisted pleas that she retire during a Democratic administration so she could be replaced with a like-minded successor. But she was adamant about continuing on the court as long as she felt she could do the work at "full steam." She died four months before President Joe Biden, a Democrat, took office.

Justice Barrett: Eight days after Justice Ginsburg's death, President Trump announced he would nominate U.S. Court of Appeals for the Seventh Circuit Judge Amy Coney Barrett to replace her. It was the beginning of an unusually swift nomination and confirmation process. She had been on Trump's short list for a Supreme Court nomination since he took office. Barrett was viewed as a social conservative and was a favorite of the Christian right. Democrats were furious at the fast-tracking of Barrett in an election year, especially because Republicans had refused to confirm Obama appointee Merrick Garland in an election year in 2016. The American Bar Association declared that she was "well qualified," and she was confirmed by the Senate by a 52-48 vote, with no votes from Democrats. She was sworn in at the White House on October 26 by Justice Thomas, and by Chief Justice Roberts at the court the next day.

Circuit Vacancy: After the death of Justice Ginsburg, no one replaced her as the circuit justice for the Second Circuit until November 20. Justice Stephen Breyer, who has long been the circuit justice for the First Circuit, also took on the position for the Second Circuit temporarily. When he handled emergency applications and the like, he was titled "Acting Circuit Justice Stephen Breyer." When the new allotment of the circuit justices was announced in November, Justice Sonia Sotomayor assumed Ginsburg's position at the Second Circuit, which was familiar territory for her since Sotomayor served on that court from 1998 to 2009. She had been the circuit justice for the Tenth Circuit. Her move to the Second resulted in Justice Gorsuch also returning to home territory and filling that position.

Year-end Report: Unsurprisingly, Chief Justice Roberts' year-end report on the state of the judiciary, released on December 31, focused on the pandemic's impact on court proceedings and employees. "For the past ten months, it has been all hands on deck for the courts, as our branch of government confronted the COVID-19 pandemic," he wrote. "Hearings of all sorts went virtual. Judges quickly (or at least eventually) learned to use a wide range of available audio and video conferencing tools," Roberts said. As for the Supreme Court, Roberts said, "In May we held oral argument by teleconference for the first time. Although we look forward to returning to normal sittings in our Courtroom, we have been able to stay current in our work." The report also revealed that the number of filings at the high court decreased from 6,442 in the 2018 term to 5,411 in the 2019 term, likely a result of the pandemic.

A party should not be estopped as against an adversary whom he never knew; but a secret adversary should be estopped if subsequently it is shown that he had made himself an adversary.

E.W. Bliss Co. v. Cold Metal Process Co.,
1 F.R.D. 193, 196 (N.D. Ohio 1940)

Catherine Gellis & Wendy Everette[†]

THE YEAR IN LAW & TECHNOLOGY

2020

Welcome to the 2020 edition of The Year in Law and Technology! It was a year that seemed to zoom by — with Zoom trials, Zoom law schools, Zoom CLEs . . . . Of course, despite all that zooming, it was also a year that seemed to take forever as it threw challenge after challenge at everyone, including our industry that in nine short months was forced to adapt and adopt to new technologies, and make other changes, in ways that would have otherwise taken years. If you can bear to relive the past year, this article is for you, chronicling some of those changes and challenges the legal world faced.

Are we on mute still? No? Ok, let's dive in!

JANUARY

2020 kicked off with a ruling from the Ninth Circuit, holding that *Courthouse News Service* and other media companies have a right to timely, if not necessarily immediate, access to newly filed civil complaints. This overturned

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Ventura County's "no-access-before-process" policy which had led to significant delays in the availability of new filings to the news media or to the public.[1] • What legal resources do you see when you look up a legal question online? Margaret Hagan, Director of the Legal Design Lab at Stanford Law, presented her research on this at the 2020 LSC Innovations in Technology Conference. She found that Google favors national, commercial websites over public interest websites (which are more likely to offer free or low-cost access to the legal resources) in search results.[2] • In more Google news, moving into the Android world and away from search engines, 26 amici filed this month in support of Google in the *Google v. Oracle* SCOTUS case, one of the most anticipated cases of the term.[3] We've featured this long-running case, which would eventually be argued remotely in October 2020,[4] in past years as it has moved through the district and appellate courts. • While this year's online arguments have provided the public with greater access to court workings, the court filings system, PACER, has often been criticized by users for its high fees. The criticism eventually led to the selection this month of 12 members of a new PACER Electronic Public Access Public User Group to advise the U.S. courts on ways to improve PACER.[5] We look forward to seeing what changes the working group proposes. • We're nerds who love a good legal analytics system comparison, and so we're sharing a recent match up of tools. Libraries recently tested 16 different research questions involving federal court cases across Bloomberg Law, Docket Alarm, Docket Navigator, LexMachina, MonitorSuite, and Westlaw Edge. The study was an interesting analysis of what sort of results you might expect using each of these options and as one might expect given the different resources and algorithms used by each, they got back wildly different results from each tool.[6] Differences also stemmed, however, from "the PACER problem." The metadata pulled from PACER is often inaccurate and definitely non-standardized, and so unless the research platform expended effort to normalize it, what came out reflects the incorrect data going in. • Meanwhile, a recurrent theme throughout the year is Section 230, which turned out to be one hot topic as everyone and their brother decided to take a swing at it. "Section 230" of course refers to 47 U.S.C. Section

[1] http://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/16-55977.pdf.
[2] https://twitter.com/legalaidtech/status/1217947324334239744.
[3] https://www.project-disco.org/intellectual-property/011420-broad-support-for-google-in-the-first-round-of-supreme-court-briefing/.
[4] https://www.scotusblog.com/2020/10/argument-analysis-justices-debate-legality-of-googles-use-of-java-in-android-software-code/.
[5] https://www.uscourts.gov/news/2020/01/09/members-pacer-user-group-selected.
[6] https://www.lawsitesblog.com/2019/11/legal-analytics-products-deliver-widely-divergent-results-study-shows.html.

230, the bit of the Communications Decency Act that wasn't found to be unconstitutional, and is the foundational law enabling the Internet. Doing away with it, or even changing it, puts the Internet and online expression at risk, which we discovered a few years ago when Congress amended it with a law called FOSTA. A constitutional challenge had been brought and originally dismissed over standing concerns, but in January the Court of Appeals for the D.C. Circuit revived it.[7]

FEBRUARY

When robots make music: programmer-musicians Damien Riehl and Noah Rubin wrote a computer program[8] that generated every possible 8-note, 12-beat melody combo. Their software ran at 300,000 melodies per second, which were then released as open source material on the Internet Archive.[9] Their goal? To help musicians sued for copyright infringement by making available these "public commons" melodies for songwriters to reference; a sort of copyright-defense-by-algorithm effort. • Are class action lawsuits the best means of securing connected devices and cars? In *Click Here to Sue Everybody: Cutting the Gordian Knot of the Internet of Things with Class Action Litigation*,[10] out this month, Dallin Robinson proposed the use of proactive class-action lawsuits as a way to pressure the makers of connected devices to design their products with better cybersecurity protections. • Speaking of lawsuits, this was the month that the Ninth Circuit shut down the lawsuit from Praeger University, which was trying to sue Google for having de-emphasized its content so that it would not show up so often in algorithmic display on YouTube. The court reminded Praeger that YouTube is not a public forum, and as a private actor is able to choose what expression to have on its systems without it violating Praeger's rights.[11] • You may have seen suggested text in your Gmail or Outlook client, but are the same predictive text algorithms mature enough to help you draft legal documents? Will attorneys look for fully drafted briefs from these tools, or use them to supplement their own research and writing skills? On Twitter, discussing CaseText Compose,[12] Joe Borstein noted

[7] https://www.techdirt.com/articles/20200125/14073943797/welcome-news-dc-circuit-revives-constitutional-challenge-fosta.shtml.
[8] http://allthemusic.info/.
[9] https://archive.org/download/allthemusicllc-datasets.
[10] Dallin Robinson, *Click Here to Sue Everybody: Cutting the Gordian Knot of the Internet of Things with Class Action Litigation*, 26 RICH. J.L. & TECH., no. 1, 2020, https://jolt.richmond.edu/files/2020/02/Robinson-FE.pdf.
[11] https://www.techdirt.com/articles/20200226/17111143991/law-doesnt-care-about-your-feelings-9th-circuit-slams-prager-university-silly-lawsuit-against-youtube.shtml.
[12] https://compose.law/.

"[. . .] I'd argue that the AI (which is awesome) guides a lawyer through their options in crafting an argument and choosing legal avenues of attack/defense (rather than drafting briefs for you)."[13] Indeed, we suspect that fully-automated briefs are a long ways off, and unlikely to appear in most types of litigation. On the other hand, tools that assist lawyers in exploring arguments or suggesting relevant case law are likely to become commonplace. • Criminal investigations are now often driven by the collection of large quantities of data from license plate readers, body cameras, and other tools. The Criminal Justice Policy Program at Harvard Law School, along with the Stanford Criminal Justice Center at Stanford Law School, released some guidance for police departments who need to draft policies and procedures for data retention, deletion, access, and use for the reams of data generated by these tools. "Emerging Police Technology: A Policy Toolkit"[14] offered suggestions on governance structures and data retention guidelines to police departments. • Speaking of electronic databases, the U.S. Court of Appeals for the Federal Circuit heard arguments in one of the PACER fee lawsuits this month.[15] The 10-cent/page fee for electronic access to public records was subject to litigation by the National Veterans Legal Services Program and other non-profits, as we've covered in past years. The case has now made it to the appeals court, where it was argued that the judicial system used the fees for purposes beyond the statutorily allowed use to pay for "services rendered." The non-profits argued that the fees are an access to justice issue, and that the court system could operate PACER on a budget far below the amount collected today in fees. • In one of the first signs of the shift to remote court hearings due to Covid-19 that would soon sweep the globe, China announced on February 17 that court hearings would be held remotely.[16] In just a few months, U.S. court systems would similarly move to remote hearings, but at the time this change went largely unremarked in the U.S. • Sensitive data about PTSD claims by veterans, held by law firms who have worked with them, was targeted by hacker groups this month.[17] The attackers posted patient care records and legal fee agreements online, seeking to pressure the firms into paying a ransom for deletion of the records. • Meanwhile ransomware attacks also continued to target other sectors of the legal industry, taking e-

[13] https://twitter.com/jborstein/status/1232406777377042438.

[14] https://law.stanford.edu/wp-content/uploads/2020/01/Emerging-Police-Technology-A-Policy-Toolkit.pdf.

[15] https://www.nytimes.com/2019/02/04/us/politics/pacer-fees-lawsuit.html.

[16] https://www.scmp.com/abacus/news-bites/article/3050998/china-moves-courts-online-due-coronavirus-following-classes-and.

[17] https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2020/02/19/hacker-group-targeted-law-firms-released-veterans-stolen-data-related-to-ptsd-claims/.

discovery firm Epiq Global offline this month. The firm took down their platforms on February 29 after being attacked by a Ryuk ransomware variant.[18] It was reported that computers in up to 80 global offices were affected by the attack,[19] which may have begun when one computer was infected with malware in December 2019.[20] The firm brought in a third party forensics firm to mitigate and investigate and resumed operations shortly after. • Sean Marotta (@smmarotta) offered a reminder for all of us who save legal documents as "Final Brief_v2_really_final.doc" — when exporting a Microsoft Word document to PDF, the original Word document's title is visible. As he noted on Twitter, "[r]emember, federal e-filers: Change the name of your .doc before you run the .pdf because the .doc file name shows up in some metadata. (Not that it really matters, but I chuckle at seeing the 12-23 FINALFINALFINAL names on some briefs I read online.)"[21] • And finally, at the ABA Techshow in Chicago, a panel titled "Cloudy, With a Chance of Sanctions — or Success!" explored the ways in which attorneys can avail themselves of the security and reliability of cloud-based platforms without jeopardizing the sensitive client confidential data they're entrusted with.[22] We strongly support efforts to use cloud computing, when configured and administered appropriately, as it relieves law firm IT departments of having to patch, monitor, and maintain servers on their own. However, as Nicole Black noted during the panel, appropriate configurations are key, and information the cloud can be breached through carelessness. "Stuff happens, and there's no such thing as absolute security," she noted. We agree, but find that the default level of security is generally higher in cloud-based solutions, and we encourage our readers to use them as appropriate.

MARCH

Cue record scratch sound here, as we now we reach March, the month that turned the legal technology world upside down, along with the rest of the country, and made Zoom a household word. Courts were of course immediately impacted as "stay home" orders spread and courthouses closed to the public.[23] The wheels of justice needed to grind on, however, and a series of

[18] https://www.bleepingcomputer.com/news/security/ryuk-ransomware-attacked-epiq-global-via-trickbot-infection/.
[19] https://techcrunch.com/2020/03/02/epiq-global-ransomware/.
[20] https://www.lawsitesblog.com/2020/03/new-details-emerge-on-the-ransomware-attack-against-epiq-global.html.
[21] https://twitter.com/smmarotta/status/1228014091849142275.
[22] https://www.abajournal.com/news/article/lawyers-should-weigh-risks-and-ethics-in-cloud-computing.
[23] https://www.jdsupra.com/legalnews/covid-19-update-covid-19-and-the-courts-20807/; https://www.law.com/nationallawjournal/2020/03/20/its-kind-of-a-mess-phone-arguments-get-rocky-debut-at-dc-circuit-during-covid-19-pandemic/.

orders this month in various federal court circuits shifted arguments to telephone conference calls and instituted various other emergency measures. The Fifth Circuit began the rapid-fire changes on March 15, when it first postponed oral arguments to late April (later updating them to be heard remotely). The Tenth Circuit instituted remote hearings on March 16, the same day that the Supreme Court issued a press release postponing arguments for its March session.[24] On March 18, the Federal Circuit and the Seventh Circuit ordered all cases scheduled for April to be held via phone conference. The same day, the D.C. Circuit stopped in-person oral arguments and allowed judges to decide whether to postpone arguments, hold them by phone, or rely on briefs. Soon after, on March 20, the Eleventh Circuit also allowed remote hearings by telephone. The Second Circuit moved to telephone conferences for arguments on March 23, while in the Fourth Circuit cases were to be heard via telephone, delayed, or decided only on written briefs. On March 25, the Fifth Circuit cancelled arguments through late April. On March 26, the First Circuit cancelled arguments and extended non-emergency deadlines. Also that day the Ninth Circuit cancelled arguments through May and let participants decide to reschedule or shift to a remote format. Looking ahead a bit to the next month, on April 3, the Supreme Court postponed arguments for their April session.[25] On April 13 it was announced that they would hear some previously scheduled arguments remotely during a May session, along with a momentous announcement that "[t]he Court anticipates providing a live audio feed of these arguments to the news media," which was something that had never happened before.[26] • Meanwhile, law firms also scrambled to shift their workforces to remote work. In 2019, only 84% of law firms had been set up to support remote work.[27] As stay home orders were issued, many law firm IT departments scrambled to enable remote work capabilities for their firms,[28] bringing about in one month a sea change in how legal work was performed that many had expected would take years.[29] • Law professors, who were now also teaching remotely, soon realized that Zoom's ability to include virtual backgrounds could present an educational opportunity. For instance, Professor Eric Muller (@elmunc) of University of North Carolina School of Law decided to lecture from thematically appropriate locations for his Constitutional Law course: "@OrinKerr I'm gonna go green

[24] https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.
[25] https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20.
[26] https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20.
[27] https://abovethelaw.com/2020/03/coronavirus-could-be-tipping-point-for-tech-competence-in-law/?rf=1.
[28] https://www.natlawreview.com/article/how-to-manage-your-law-firm-remotely-during-covid-19.
[29] https://www.law.com/americanlawyer/2020/10/05/covid-19-is-driving-long-term-changes-in-big-law-for-remote-work-fees-hiring/.

screen and teach Con Law from constitutionally significant locations. Monday I'll be out front of Ollie's Barbecue. Tuesday I'm thinking maybe the Watergate. Thursday definitely a Manzanar mess hall."[30] • Of course, all this remote activity ran smack into copyright law. Could you sing to your neighbors from your balcony without a license? Just in case, a collecting society in Spain issued a blanket license, but the issue remains unlitigated. On the other hand, if you wanted to paint your own building, per the Second Circuit you could end up in a lot of trouble under the Visual Artists Rights Act if you painted over someone else's work.[31] • All the while, cases about the intersection of technology and law continued. On March 10, the D.C. Circuit issued an opinion in *Evans v. Federal Bureau of Prisons* that excoriated the federal government for claiming it they lacked the ability to obfuscate faces in videos and therefore could not release video responsive to a FOIA request.[32] Foreshadowing the "I'm here live, I'm not a cat" cat-face filter from February 2021,[33] the court wrote, "The government further does not explain why it cannot by use of such techniques as blurring out faces, either in the video itself or in screenshots, eliminate unwarranted invasions of privacy. The same teenagers who regale each other with screenshots are commonly known to revise those missives by such techniques as inserting cat faces over the visages of humans." • At the end of March, the U.S. District Court for the District of Columbia held in *Sandvig v. Barr* that "the CFAA does not criminalize mere terms-of-service violations on consumer websites."[34] Researchers had brought a pre-enforcement challenge seeking a declaratory judgement that providing false information to an employment website in the course of doing research would not violate the CFAA, even if it violated the Terms of Service of the website. The court found that violating a Terms of Service agreement might trigger civil liability, but "is not sufficient to trigger criminal liability under the CFAA. In other words, terms of service do not constitute 'permission requirements' that, if violated, trigger criminal liability." • Relatedly, the Justice Department's Computer Crime and Intellectual Property Section ("CCIPS") released a guide to avoiding CFAA liability while performing open source intelligence investigations (or "OSINT") online. Available at https://www.justice.gov/criminal-ccips/page/file/1252341/download, the guide, "Legal Considerations when Gathering Online Cyber Threat Intelligence and Purchasing Data from

[30] https://twitter.com/elmunc/status/1237943665290608640.
[31] https://www.techdirt.com/articles/20200305/20175044048/new-5pointz-decision-second-circuit-concludes-that-vara-trumps-constitution.shtml.
[32] https://www.politico.com/f/?id=00000170-c4d7-d2d3-a9f6-eedf663b0000.
[33] https://www.cnn.com/2021/02/09/us/cat-filter-lawyer-zoom-court-trnd/index.html.
[34] https://www.aclu.org/sandvig-v-barr-memorandum-opinion.

Illicit Sources" addresses how to perform "cyber threat intelligence gathering efforts" without running afoul of the CFAA. • For readers looking for more interesting cybersecurity law writing, we point you to Robert Chesney's *Cybersecurity Law, Policy, and Institutions (version 3.0)* released this month.[35] Written as an eCasebook, it explores the "intertwined nature of the legal and policy questions associated with cyber-security," including "the legal environment in which all of this takes place."

APRIL

Good news this month, as Carl Malamud and Public.Resource.Org won a 5-4 decision in the Supreme Court declaring the Georgia annotations not copyrightable.[36] We've followed *Georgia v. Public.Resource.Org* for the last few years as it has made its way through the courts, and as advocates of open access to law we're delighted in this victory. Congratulations to Public Resource and all the attorneys who worked on this case. • Can copyright law be used to take down deep fakes? Vocal Synthesis, a YouTube channel dedicated to audio deep fakes (synthesized speech from audio samples of a human's voice), was ordered to take down two videos featuring faked audio of Jay-Z (one reciting the "To Be or Not To Be" soliloquy from Hamlet and the other featuring Billy Joel's "We Didn't Start the Fire"). The videos were labeled as speech synthesis, but the copyright reason given for the takedown was "infringing use of Jay-Z's copyright" and "this content unlawfully uses an AI to impersonate our client's voice." The videos were returned to YouTube after Google reviewed the DMCA claim and found it to be "incomplete."[37] • And while AI may be able to impersonate Jay-Z in music videos, can it be an inventor? The USPTO says no. It denied a petition to grant the "DABUS" software status as inventor.[38] • How old is the field of cyberlaw? If you thought only five or ten years old, think much much older. This month, the Harvard Cyberlaw Clinic at the Berkman Klein Center turned 20.[39] Formed by a handful of students from an Internet Law class taught by Jonathan Zittrain, the clinic provides a chance for law students to provide pro bono legal services on technology law related issues. Happy birthday! • Sadly, we also lost a cyberlaw pioneer this month, as Joel Reidenberg of Fordham passed away. He was an early contributor to privacy law and government surveillance studies.

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[35] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547103.
[36] https://www.supremecourt.gov/opinions/19pdf/18-1150_7m58.pdf.
[37] https://waxy.org/2020/04/jay-z-orders-deepfake-audio-parodies-off-youtube/.
[38] https://www.uspto.gov/sites/default/files/documents/16524350_22apr2020.pdf?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.
[39] https://today.law.harvard.edu/cyberlaw-clinic-turns-20/.

He also wrote on the idea that "code is law,"[40] an idea later championed by Lawrence Lessig. • As courts moved oral arguments to video and phone conferencing systems, Chief Justice McCormack (@BridgetMaryMc) of the Michigan Supreme Court shared a common can-do sentiment among courts who rose to meet new challenges: "I am sure it will be clunky. But that just means we will learn from it."[41]

MAY

The U.S. District Court for the Eastern District of Virginia held that a computer security incident response report written by Mandiant for Capital One must be shared with plaintiffs in the 2019 Capital One data breach class action lawsuit.[42] Capital One attempted to shield the report, written about an intrusion into their Amazon Web Services ("AWS") environment, by applying the work-product doctrine. However, the court found that it was clear that Capital One likely faced litigation at the time it commissioned the report, and "Capital One failed to establish that the Report would not have been prepared in substantially similar form but for the prospect of that litigation." • "Are there any teenagers in the locale?" As courts continued to hear cases over video conferencing, a presiding judge in Pennsylvania's Superior Court asked an attorney who had difficulty activating his camera during oral argument if there were teenagers in his vicinity who might offer assistance.[43] The attorney's daughter was able to activate the camera 12 minutes after oral arguments began.[44] Meanwhile in Texas, jury selection in one of the first trials held over Zoom hit a slight problem as "[a] juror wandered off screen during a break and couldn't hear the judges calling him back."[45] Similar scenes appeared on video conferences across the country as courts began hearing arguments again, but over the internet or via phone. And from the Federal Circuit, the first attorneys to make their arguments by phone praised the excellent preparatory work by the court clerks, who held orientations, managed muting and unmuting the participants, and ensured a smooth and seamless argument.[46] • Moving on to the highest court in the land. For the first time in its history, the Supreme Court streamed oral arguments live,

[40] https://news.fordham.edu/law/fordham-law-mourns-the-loss-of-professor-joel-reidenberg/.
[41] https://twitter.com/BridgetMaryMc/status/1247244807875047425.
[42] https://casetext.com/case/in-re-capital-one-consumer-data-sec-breach-litig-1.
[43] https://twitter.com/howappealing/status/1263116128563466242.
[44] https://twitter.com/howappealing/status/1263118118991417344.
[45] https://twitter.com/eteichert/status/1262840534743293953.
[46] https://www.law360.com/ip/articles/1263101/lessons-from-1st-attys-to-argue-at-the-fed-circ-by-phone.

praised as a win for transparency even if implemented as a response to the pandemic.[47] And in a light moment, Parker Higgins (@xor) shared on Twitter: "Justice Sotomayor just gave the court its first ever 'sorry, I didn't realize I was on mute' moment. It's beautiful being a witness to history."[48] • Finding that cell phone access was essential to self-represented litigants, the Michigan Supreme Court ordered this month all courts in the state to allow cell phones in courtrooms and courthouses.[49] Phones must still be silenced, and other restrictions remain in place. Users "cannot communicate with any courtroom participant or photograph or record any juror or potential juror; cannot record court proceedings without the permission of the judge; and, cannot record or photograph people in the courthouse without their consent." However, users are allowed to access notes on the devices, or to "access the internet, and send/receive text messages." • Of course, while some parts of government were embracing the Internet, the White House was taking aim at it. Back in May that meant releasing an executive order[50] that ran straight into the teeth of Section 230 (and the First Amendment) and called upon the FCC to find some authority to override it. Later this year it will try, at the behest of the NTIA[51] and the White House, but ultimately no action will be taken before the change of administration.

JUNE

Visualizations of case citations are among our favorite legal tech innovations to feature, and this month the Caselaw Access Project debuted a fun new one. The new map view and grid view options[52] allowed users to track "the many interesting questions about citation patterns and influence"[53] available, such as which states cited each other more often. For example, the map allowed you to easily discover that North Dakota is more likely to cite South Dakota than any of the other 49 states, New York is most likely to cite New Jersey, while Idaho is the state most likely to cite California. Yeah, we're surprised by that one too! • The pandemic and the Internet continued to dance together this month, including in some ways that had not been seen before. For instance,

[47] https://twitter.com/FreedomofPress/status/1257283479206793219.
[48] https://twitter.com/xor/status/1257314705325977605.
[49] https://courts.michigan.gov/News-Events/press_releases/Documents/Media%20Release%20Cell%20Phone%20Order%20FINAL.pdf.
[50] https://www.techdirt.com/articles/20200529/00392844604/trumps-final-executive-order-social-media-deliberately-removed-reference-to-importance-newspapers-to-democracy.shtml.
[51] https://www.techdirt.com/articles/20200728/00241644990/ntia-follows-trumps-unconstitutional-order-to-request-fcc-review-section-230.shtml.
[52] https://case.law/exhibits/cite-grid.
[53] https://twitter.com/abziegler/status/1275112103100243968.

protesters uncomfortable being out in crowds found that The Sims video game could offer a virtual avenue for taking to the streets.[54] On the other hand, some pandemic activities ran into snags, such as when Chef Andres's cooking videos got nuked from Twitter on unspecified copyright grounds, despite his seeming to have adequate licensing where he needed.[55] • There were also other ways things weren't all rosy on the Internet front. For instance, Zoom court hearings discriminated against defendants by quite literally filtering the emotion out of the voices of people testifying, said Lauren Kirchner in a survey of equity issues unique to video hearings.[56] The compression utilized by many video conferencing platforms "uses a middle bandwidth filter that cuts off low and high voice frequencies, which are typically used to transmit emotion." Poorer litigants also lacked access to high-speed bandwidth and computers able to run the software and transmit video, as well as a quiet, private space to dial in from, which could lead to greater discrimination. • And would you be surprised to learn that there are only weak Fourth Amendment protections for your IP address when you log into Facebook? Finding that a user's affirmative action sent their IP address to Facebook, Judge Brady of the District Court for the Northern District of Indiana held that *Carpenter* does not apply to IP addresses. Instead they continue to "fall[] comfortably within the scope of the third-party doctrine" and therefore are obtainable with a subpoena, not a warrant.[57]

JULY

Do attorneys have an ethical obligation to keep up with new technologies? The State Bar of Michigan Ethics Committee said yes, maintaining that attorney competence included "the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter . . . This duty includes a lawyer's safeguarding of clients' electronically stored information (ESI) through cybersecurity."[58] • Will live streaming of court hearings persist once hearings no longer need to be held remotely post-Covid-19? Chief Judge Bill Pryor of the Eleventh Circuit issued Amended General Order No. 45[59] this month, which made permanent the court's oral argument live streaming to the public

[54] https://www.techdirt.com/articles/20200617/10002944734/sims-becomes-outlet-would-be-protesters-who-cannot-attend-protests.shtml.
[55] https://www.techdirt.com/articles/20200617/17540144738/copyright-gets-way-chef-andres-recipes-people-because-dmca-takedown-system-is-still-broken.shtml.
[56] https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice.
[57] https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3242&context=historical.
[58] https://www.michbar.org/opinions/ethics/numbered_opinions/RI-381.
[59] http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder45Amended.pdf.

for the foreseeable future. • And another court moved to Zoom, as Alaska courts tested out the use of videoconferencing for grand jury proceedings. In Alaska's Second Judicial District, encompassing Utqiagvik, Kotzebue, and Nome, use of videoconferencing in the past had been limited primarily to addressing the extraordinary remoteness of some villages. Starting this July, that was expanded as grand juries met largely over Zoom, with only the grand jury foreperson in the physical courtroom.[60] • But the future of online expression generally took a hit with a decision from the Second Circuit reviving defamation litigation against Joy Reid. In *La Liberte v. Reid* the court denied her a Section 230 defense by ascribing a duty of care not called for by the statute, as well as a defense based on La Liberte being a limited-purpose public figure. It also denied her the use of state-based anti-SLAPP law in federal court.[61] The good news for free speech, however, is that this month New York state passed a usable anti-SLAPP law,[62] which was signed into law in November.[63]

AUGUST

This month brought us the "standout emoji law opinion of 2020"[64] in *Burrows v. Houda*, where an Australian court held that "[a] single emoji, with nothing more, served as the grounds for a defamation lawsuit that apparently survived a motion to dismiss." The emoji in question, the "zipper mouth" emoji, was

deployed in a conversation about a disciplinary hearing, where the "imputation pleaded, namely that the plaintiff has not merely been the subject of a referral, but also a result adverse to her, is reasonably capable of being conveyed." Courts have found themselves increasingly interpreting emoji; according to his year-end wrap-up, Eric Goldman found a 25% increase of cases referencing emoji over 2019's total.[65] • The Fastcase 50, out this month, honored "the law's smartest, most courageous innovators, techies, visionaries, & leaders."

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[60] https://www.ktoo.org/2020/06/30/zoom-in-to-jury-duty-a-pilot-project-in-rural-alaska-starts-in-august/.

[61] https://www.techdirt.com/articles/20200715/17222544909/second-circuit-wrecks-all-sorts-first-amendment-protections-to-keep-lawsuit-against-joy-reid-alive.shtml.

[62] https://www.techdirt.com/articles/20200723/15523044965/about-time-new-york-finally-passes-anti-slapp-bill.shtml.

[63] https://www.techdirt.com/articles/20201110/23305545680/about-time-ny-governor-cuomo-signs-anti-slapp-law.shtml.

[64] https://blog.ericgoldman.org/archives/2020/08/australian-court-says-using-a-zipper-mouth-emoji-can-be-defamatory-burrows-v-houda.htm.

[65] https://blog.ericgoldman.org/archives/2021/01/emoji-law-year-in-review-for-2020.htm.

Honorees included Judge Anna Blackburne-Rigsby of the District of Columbia Court of Appeals, who "challenged judges and court staff to continuously question programs and procedures to ensure they are treating the community fairly." Also honored, Lisa Colpoys, Program Director of the Institute for the Future of Law Practice, who focused on "educating early law students on the latest techniques of modern practice," and Professor Michelle Cosby of Temple University Beasley School of Law and 2019-2020 President of the American Association of Law Libraries, which she guided through the pandemic and their first virtual conference. Congratulations to all the honorees! • Meanwhile, storm clouds continued to gather on the Internet front. One issue is that, despite all the talk about "Zoom Court" this year, many court systems were still using old computer systems. "Fun fact:," shared Matt Chapman (@foiacap) on Twitter, "the clerk of the circuit court of cook county still uses Windows XP."[66] He explained the steps the clerk must go through in order to print out documents, as well as an observation that each computer had a sticker on it reminding users to "Power your scanner off" and "Restart your computer" each day.[67] • But lawmakers were also setting their sights on the very technology holding the country together during the pandemic. At the end of July Senators spent 5.5 hours raking tech execs over the coals for their platforms not being perfect enough.[68] And then in August President Trump went to war on TikTok, demanding a cut of their purchase price[69] and eventually issuing multiple executive orders[70] attempting to ban it and WeChat[71] which courts subsequently[72] enjoined.[73]

SEPTEMBER

The Supreme Court heard oral arguments this month in *Nathan Van Buren v. United States*,[74] a Computer Fraud and Abuse Act ("CFAA") case on Terms

[66] https://twitter.com/foiachap/status/1299545982737285121.
[67] https://twitter.com/foiachap/status/1299547197432836097.
[68] https://www.techdirt.com/articles/20200730/01174945007/house-judiciary-spends-55-hours-making-themselves-look-foolish-without-asking-many-actual-tough-questions-tech-ceos.shtml.
[69] https://www.techdirt.com/articles/20200804/01445645033/stupid-to-bizarre-trump-demands-that-his-government-should-take-substantial-cut-tiktoks-purchase-fee.shtml.
[70] https://www.techdirt.com/articles/20200816/23380145124/so-now-we-needed-another-ridiculous-executive-order-about-tiktok-that-goes-beyond-presidents-authority.shtml.
[71] https://www.techdirt.com/articles/20200806/23225245070/trump-issues-ridiculous-executive-orders-banning-tiktok-wechat.shtml.
[72] https://www.techdirt.com/articles/20200928/10330845399/judge-rejected-ban-tiktok-because-trumps-doj-cant-show-any-real-national-security-threat.shtml.
[73] https://www.techdirt.com/articles/20200920/23485545344/judge-issues-preliminary-injunction-saying-that-us-cannot-block-wechat-says-ban-raises-1st-amendment-concerns.shtml.
[74] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-783.html.

of Service violations. The plaintiff performed an unauthorized search of government databases, seeking information about undercover officers. Van Buren otherwise had access to the databases for work, and so the case turned on whether his non-work related searches, which were Terms of Service violations, were also grounds for a CFAA violation. • Meanwhile, on the Section 230 front, every day this year it seemed that another member of Congress was announcing a bill to fundamentally change it. (In fact, there were way too many to even be worth tracking, although some have come back in 2021.) But back in September they were also joined by the Department of Justice, which announced a proposal to revise that stalwart law as well, albeit in ways that were unlikely to be consistent with the First Amendment.[75] • E-discovery is one of the indisputable legal technology growth areas, and this month Relativity, one of the most widely used e-discovery platforms, launched a new user interface.[76] The new interface was aimed at balancing the needs of power users with those of new users, as well as improving speeds and workflow. New automated workflows were made available, and users could create their own custom automations. Relativity was also redesigned to increase accessibility, in large part by adjusting the color palette to be optimized for color blind users. • In more discovery news, Marriott and CrowdStrike sought to protect a computer security forensics report from a November 2018 data breach suffered by Marriott.[77] Plaintiffs in a class action lawsuit against Marriott sought access to the forensics report. This month Magistrate Judge John M. Facciola issued a report and recommendation in the case, finding that the threshold issue was whether CrowdStrike would serve as an expert witness for Marriott.[78] • As everyone continued to work remotely, a tongue-in-cheek Twitter account, Room Rater ("@ratemyskyperoom"), began rating the home offices of media personalities as they appeared on television shows from their homes. How does this tie into our year-in-review? Well, on September 9, Room Rater gave Steve Vladeck a 9/10, calling out in particular the Supreme Court bobbleheads visible in his background — the very same bobbleheads created by our home, the *Green Bag*. "Has medals. Supreme Court art. Founding fathers figures. Bobbleheads. RBG for 9/10 @steve_vladeck."[79]

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[75] https://www.techdirt.com/articles/20200923/14472345369/justice-department-releases-dangerous-unconstitutional-plan-to-revise-section-230.shtml.

[76] https://www.lawsitesblog.com/2020/09/e-discovery-platform-relativityone-gets-its-next-generation-interface-aero-ui.html.

[77] In re Marriott International Inc. Customer Data Security Breach Litigation, MDL No. 2879 (District of Maryland, Aug. 30, 2019).

[78] https://www.johnreedstark.com/wp-content/uploads/sites/180/2020/09/mdd-8_2019-md-02879-00634.pdf.

[79] https://twitter.com/ratemyskyperoom/status/1303702358963220480.

• Tiffany Li reviewed many of the changes the Covid-19 pandemic had brought about, from healthcare robots to medical AI, in *Privacy in Pandemic: Law, Technology, and Public Health in the COVID-19 Crisis*, published this month on SSRN, but upcoming in the *Loyola University Chicago Law Journal*, Volume 52, Issue 3. The "first comprehensive account of privacy impacts related to technology and public health responses to the COVID-19 crisis," it explored the "need for both wide scale and small scale reform of privacy law" and sought to be a "contemporary scholarly understanding of privacy in pandemic."[80] • RSS (or "Really Simple Syndication") is a machine readable, structured format for presenting summaries of recent updates to websites, especially blogs or other frequently updated event driven information. They're useful for any users who would like to build tools that take actions when new information is made available, such as a tool that might update whenever court filings are posted. Back in August, the Free Law Project sent a letter to the Administrative Office of the US Courts and the Federal Judicial Center requesting a national policy on the availability of RSS feeds from federal courts.[81] This month, the Administrative Office of the US Courts replied that it would encourage courts to enable RSS feeds, and would work to "identify and resolve specific implementation issues" in implementing court data feeds[82]

OCTOBER

Malware attacks against law firms unfortunately continued unabated this month. Seyfarth Shaw was attacked by a ransomware variant that shut down systems[83] but did not, according to the firm, compromise client confidential information. A similar attack against Immigration law firm Fragomen, Del Rey, Bernsen & Loewy, however, led to the exposure of the personal information of an unknown number of current and former Google employees.[84] • In more uplifting news, software-assisted contract review tools continued to expand in 2020. This month, construction-law-contracts focused DocumentCrunch, which built their contract review assistant on top of the machine learning and natural language processing ("NLP") software provided by KiraSystems, won the Virtual IGI 2020 Startup Battle.[85] • And if you're drafting, rather than

[80] https://ssrn.com/abstract=3690004.
[81] https://free.law/pdf/letters/Letter-from-Free-Law-Project-re-RSS-feeds-to-Directors-Duff-and-Cooke.pdf.
[82] https://free.law/pdf/letters/ao-response-to-flp-letter-re-pacer-rss-feeds.pdf.
[83] https://www.abajournal.com/news/article/seyfarth-shaw-is-in-restoration-phas-after-malware-attack.
[84] https://techcrunch.com/2020/10/26/fragomen-data-breach-google-employees/.
[85] https://www.tauc.org/toolsResources/industry/index.cfm?fa=article&id=2473.

reviewing, Casetext's "Compose" tool launched a Microsoft Word "automated brief-drafting" plug-in this month. The "Parallel Search" feature allowed attorneys to search for relevant case law based on words in the brief. While the tool was limited to employment law and some federal civil procedure and discovery motions at launch time, Casetext planned to continue to expand into other types of briefs and motions.[86] • Do you work with state privacy laws? And did you know there are state privacy laws beyond just California's CCPA? The International Association of Privacy Professionals ("IAPP") launched an update to their U.S. State Comprehensive Privacy Law Comparison chart, tracking updates to the comprehensive privacy bills and enacted state laws in Washington, Nebraska, and New Hampshire.[87] • The privacy of some bar takers was inadvertently violated this month by a USC Law School dean, who flubbed an email and released confidential bar exam grades, including passing and failing scores for recent graduates.[88] He swiftly realized his mistake, and sent a second email asking recipients to delete the original, unopened, explaining that he forwarded an email that he did not realize had the results file attached to it. A sobering lesson to us all to always take care to check the full contents of messages we forward. • The Department of Justice filed charges against six Russian GRU Officers for malware attacks against a variety of targets, including the Ukrainian government and French elections, as well as the "NotPetya" ransomware attacks against critical infrastructure including hospitals.[89] The hacking charges, brought by a federal grand jury in Pittsburgh, include conspiracy to conduct computer fraud and abuse, conspiracy to commit wire fraud, wire fraud, damaging protected computers, and aggravated identity theft charges. • While many oral arguments shifted to remote video or phone calls — not seamlessly but well enough — jury trials were greatly impacted by the Covid-19 crisis. What is a jury of your peers if all jury participants need a high speed internet connection and webcam at home? On the other hand, is it fair to subject jury participants to hours of sitting in a perhaps-not-well-ventilated courtroom with strangers? How would one socially distance a jury in the courtroom? And what if jury participants become ill? In Ontario, Canada, of 14 criminal jury trials that resumed this month, three were mistried for Covid-19 related reasons.[90] In the U.S., more than

[86] https://www.lawsitesblog.com/2020/10/casetext-add-in-enables-automated-brief-drafting-in-microsoft-word.html.
[87] https://iapp.org/resources/article/state-comparison-table/.
[88] https://www.thestate.com/news/local/crime/article246424720.html.
[89] https://www.justice.gov/opa/pr/six-russian-gru-officers-charged-connection-worldwide-deployment-destructive-malware-and.
[90] https://www.thestar.com/opinion/contributors/2020/10/07/jury-trials-at-risk-of-being-another-victim-of-covid-19.html.

two dozen district courts suspended jury trials or grand jury proceedings due to health concerns related to the pandemic.[91] • Moving everything online did have some issues, of course. Like this paleontology conference, where the automated moderation filter interfered with the scientific discussion about beaver pubic bones found in streams, which all referenced words disapproved of by the filter.[92] But getting things *offline* ran into problems this month when the RIAA demanded Github remove access to youtube-dl, a tool that helped users download videos on YouTube for local viewing, including for myriad legitimate reasons.[93] (Fortunately, it was put back up the following month.[94]) On the other hand, there was good news on the copyright front with the announced settlement of one of the lawsuits against Public.Resource.Org over its publishing of standards incorporated as part of the Code of Federal Regulations.[95] • Standing in privacy lawsuits has been the biggest roadblock to consumers seeking relief from data breaches and other privacy harms. This month, Professor Thomas Haley published *Data Protection in Disarray*,[96] a review of the standing doctrine in 217 federal data-protection decisions as well as his arguments about why plaintiffs have suffered "injury in fact" in many privacy cases. • Meanwhile, the "bashing Section 230 bandwagon" grew increasingly crowded this month. The Senate once again dragged tech CEOs before it to be yelled at.[97] Then in a denial of cert for *Enigma Software v. Malwarebytes*, a case involving a questionable Section 230 ruling by the Ninth Circuit, Justice Thomas issued a sua sponte dissent also taking aim at Section 230.[98] And on top of that, the Department of Justice brought an antitrust complaint against Google, albeit one that had a funny idea about market domination, given that Google search has several competitors the government acknowledged.[99] Part of the problem is that no one seems to have any idea how Section 230 actually works. For instance, is

[91] https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge.

[92] https://www.techdirt.com/articles/20201021/11230945553/stupid-use-profanity-filter-makes-mess-virtual-paleontologist-conference.shtml.

[93] https://www.techdirt.com/articles/20201023/19035045569/riaa-tosses-bogus-claim-github-to-get-video-downloading-software-removed.shtml.

[94] https://www.techdirt.com/articles/20201116/17110245717/github-eff-push-back-against-riaa-reinstate-youtube-dl-repository.shtml.

[95] https://www.techdirt.com/articles/20201015/14111445510/we-interrupt-this-hellscape-with-bit-good-news-copyright-front.shtml.

[96] 95 Wash. L. Rev. 1193 (2020), https://ssrn.com/abstract=3600515.

[97] https://www.techdirt.com/articles/20201028/16025145604/senate-snowflake-grievance-committee-quizzes-tech-ceos-tweets-employee-viewpoints.shtml.

[98] https://www.techdirt.com/articles/20201013/11283545491/clarence-thomas-doesnt-like-section-230-adding-to-his-anti-free-speech-legacy.shtml.

[99] https://www.techdirt.com/articles/20201020/11340745544/trademark-genericide-one-big-way-doj-admits-that-antitrust-lawsuit-against-google-is-utter-garbage.shtml.

"publisher vs platform" a meaningful distinction? Thankfully, one of us wrote up a short primer on it, published this month. Check it out at TechDirt (spoiler: no).[100] • And finally to close out the month, *May It Please the Bot?*,[101] published in the MIT Computational Law Report this month, might be our favorite paper title this year. It's also a delightful dive into the field of legal informatics, where practitioners use software assisted analysis to make predictions about judicial rulings based on textual analysis of past cases from particular courts. This analysis is challenging as most judicial opinions do not follow a common structure or use similar phrases or language. This paper argued that courts might begin to impose a standardized structure and language guidelines, in order to allow easier software analysis of opinions, which would in turn increase the efficiency of the courts. We leave it as an exercise for the reader to decide whether this is a desired outcome or not.

NOVEMBER

Election Day this year brought about a number of significant changes, not just in the White House and Congress but in various states. Massachusetts voters, for instance, approved an expanded "right of repair" law.[102] And on the West Coast voters passed the California Privacy Rights Act ("CPRA"). The CPRA called for the creation of a California Privacy Protection Agency to investigate data breaches and consumer privacy violations, with additional substantive provisions, including a new private right of action, to go into effect January 1, 2023.[103] It was not an election without controversy, however, and led to President Trump firing U.S. Cybersecurity Director Chris Krebs after Krebs took issue with Trump's unfounded claims of election systems fraud.[104] • Legal automation seeks to make us more efficient attorneys, but does that efficiency sometimes have a dark side? In *Regulating Mass Prosecution*,[105] Professor Irene Oritseweyinmi Joe explored the ethical duties that prosecutors have to uphold fairness, loyalty, and competence, and the impact of charging decisions and the caseload crisis in indigent defense. • Next, let's tap into a perennial tech law litigation dispute . . . . What notice and actions are required to bind a user to a website's Terms of Service? "By tapping

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[100] https://perma.cc/C77S-HSGN.
[101] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678030.
[102] https://www.techdirt.com/articles/20201105/09512345656/massachusetts-voters-overwhelmingly-support-expanded-right-to-repair-law.shtml.
[103] https://iapp.org/resources/article/the-california-privacy-rights-act-of-2020/.
[104] https://www.techdirt.com/articles/20201117/17334745726/trump-fires-us-cybersecurity-director-chris-krebs-after-krebs-debunks-trumps-claims-election-systems-fraud.shtml.
[105] 53 U.C. Davis L. Rev. 1175 (2020).

Next, I agree to the Terms of Service and the Privacy Policy" was held to be adequate notice when a contrasting font was used to make the text noticeable on a screen.[106] It also goes without saying that we're in solidarity with Professor Goldman over the horror of the term "pure clickwrap."

DECEMBER

And so we reach December. Are we sure it's not still March? Time still moves on, and we note that Warren and Brandeis's groundbreaking article, *The Right to Privacy*, was published 130 years ago this month.[107] Their article is credited with first articulating the legal concept of a right to individual privacy. Thank you to these pioneers for developing a new legal concept and creating the modern field of Privacy Law. • Speaking of privacy, the blurred lines between home and courthouse brought by remote trials have frustrated some judges in Texas courts. When virtual hearings commenced in April, the courts put out guidance reminding lawyers "the key thing is to be prepared just as you would if you were appearing in person before the judge. She may be in your living room, but you are still in her court." Since then, however, courts have had participants dial in from beds, from massage tables, and from cars. Zoom court hearings have opened access to more participants, who might not be able to make the trip to a courthouse to attend a hearing to support a friend or family member, and participants point out that observers can all hear equally well (or not well, depending on the sound quality), and everyone has the same view of all participants.[108] • In addition to things beginning with "p," December also brought us news about some things beginning with "r," like ROSS Intelligence, featured in many of our past updates, when it announced that it would shut down at the end of 2020. On its way out, however, it filed a counterclaim in its lawsuit with Thomson Reuters over the copyrightability of headnotes and the key number system.[109] • "R" also stands for "redaction," and a redaction fail noticed by Roger Sollenberger. It seems a sole apostrophe appeared at the end of a redacted word to clue in readers about what the not-so-well-obscured name was.[110] Extend your redactions a bit further to include the apostrophe in this instance! • And what

[106] https://blog.ericgoldman.org/archives/2020/11/court-upholds-gaming-apps-clickthrough-tos-ball-v-skillz.htm.
[107] https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-right-to-privacy.
[108] https://www.houstonchronicle.com/news/houston-texas/houston/article/In-Houston-s-Zoom-court-proceedings-decorum-15825974.php.
[109] https://www.law.com/therecorder/2021/01/25/ross-intelligence-accuses-thomson-reuters-of-crushing-competitors-with-sham-copyrights-and-intimidation-tactics.
[110] https://twitter.com/SollenbergerRC/status/1333922573881630720.

about when the robots (another word beginning with "r") are embedded in your city's sidewalks and street lights? Professor Andrew Ferguson published *Structural Sensor Surveillance*,[111] a "[d]eep dive into 'smart cities' and the Fourth Amendment," looking at the post-*Carpenter* implications of smart sensors embedded in our public infrastructure. Also, how about robot lawyers? DoNotPay, started by Joshua Browder as an automated form to dispute parking tickets, expanded this month to add several new kinds of standardized legal documents like NDAs and Bills of Sale, as well as a useful tool for all of us: the ability to send faxes (remember those?).[112] • We've now almost reached the end of the year, but we couldn't close without a final update on Section 230. December marked the moment when President Trump vetoed the bipartisan NDAA bill to fund the military and other critical government services because Congress had not included a provision repealing Section 230 in it[113] (although Congress later overrode the veto). But in other end-of-year statutory hijinks, Congress did include the copyright-focused CASE Act and a felony anti-streaming law in the Omnibus spending bill.[114] Also on the copyright front, Senator Tillis proposed the "Digital Copyright Act" to replace the Digital Millennium Copyright Act, although this language still remains just a proposal.[115] And, finally, in another round of anti-tech fervor, the FTC and 48 states began an antitrust enforcement action against Facebook.[116] • And thus concludes our summary of some of the highlights (and lowlights) from the world of technology and law from 2020. Happily there were only 12 months in the year, even though it certainly felt like more. Stay tuned to see how long 2021 turns out to be and what sort of exciting tech law news we'll have to reflect back on next year. Stay well, *Green Bag Almanac* readers!

[111] https://ilr.law.uiowa.edu/print/volume-106/structural-sensor-surveillance/.
[112] https://www.reviewgeek.com/65327/donotpays-robot-lawyer-can-create-your-legal-contracts/.
[113] https://www.techdirt.com/articles/20201223/13392945940/apparently-trump-refuses-to-allow-government-to-do-anything-all-until-open-internet-is-destroyed.shtml.
[114] https://www.techdirt.com/articles/20201221/09573745928/congress-once-again-sells-out-to-hollywood-sneaks-case-act-felony-streaming-bill-into-government-funding-omnibus.shtml.
[115] https://www.techdirt.com/articles/20210306/07035646376/digital-copyright-act-we-told-senator-tillis-not-to-do-this-he-did-it-anyway-so-we-told-him-again.shtml.
[116] https://www.techdirt.com/articles/20201209/13320045855/open-season-ftc-48-attorneys-general-file-separate-antitrust-lawsuits-against-facebook.shtml.

FIVE RECOMMENDATIONS

Susan Phillips Read †

Guo v. Deutsche Bank Securities Inc. (In re Hanwei Guo)
965 F.3d 96 (2d Cir. 2020)
opinion for the court by Debra Ann Livingston,
joined by Michael H. Park and Stefan R. Underhill

The late Judith S. Kaye, Chief Judge of the New York Court of Appeals, referred to herself as a proud member of "The First Paragraph Club," consisting of those judges who most often summarize the issue, legal conclusion, and outcome in a succinct opening paragraph as a way to lead the reader into the writing and to make the law and the court's holding easier to grasp. Judge Livingston does that here in a three-sentence opening paragraph, and then follows up with guideposts as the writing progresses. She then bookends the writing's opening with a similarly concise paragraph that repeats the Court' s basic rationale and holding. This approach — stating the legal conclusion at the beginning, summing up as each major issue is resolved, and re-stating the legal conclusion at the end — makes for a very well-organized and understandable writing on an issue that has split the Circuits;

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† Associate Judge (ret.), New York Court of Appeals.

namely, whether U.S.C. § 1782 (a) authorizes federal courts to allow U.S.-style discovery in private international commercial arbitrations.

Guido v. Fielding
190 A.D.3d 49 (N.Y. Sup. Ct., App. Div., 1st Dept. 2020)
opinion for the court by Judith J. Gische,
joined by Jeffrey K. Oing, Anil C. Singh, and Manuel J. Mendez

In this writing, Justice Gische deals with a recurring evidentiary issue in medical malpractice actions, a staple of the New York state courts: What does it take to lay an adequate foundation for an expert's opinion based on habit testimony? First, Justice Gische spells out the difference between habit evidence and evidence of frequent conduct. Next, she describes the showing required to qualify as evidence of habit or routine practice. Then she narrows the focus to medical procedures, and gives examples where evidence of a medical routine was found to be admissible. Building on her exposition of habit evidence, Justice Gische points out the specific ways in which the doctor's deposition testimony in this case fell short of laying an adequate foundation for his expert to rely on. And finally, Justice Gische points out that even if the foundation had been adequate, summary judgment would still have been unwarranted. This is because evidence of habit only provides a basis for a jury to draw an inference and so cannot support judgment as a matter of law. What I like about this writing is the way in which Justice Gische creates a roadmap for trial judges to follow in the future. The role of an intermediate appellate court goes beyond error correction and encompasses guidance for the trial courts, which this writing certainly provides.

United States v. Peeples
962 F.3d 677 (2d Cir. 2020)
opinion for the court by Jose A. Cabranes
joined by John M. Walker Jr. and Robert D. Sack

To tell this tale of a hapless bank robber on the lam, Judge Cabranes employs a narrative and colloquial style at the beginning of the writing. There, he draws the reader in with a quick-paced rendition of the facts, leading to a summary of the reasons why the defendant sought vacatur of his judgment of conviction, the main questions presented by the appeal, and the court's conclusions. Judge Cabranes then launches into a formal and detailed discussion of the facts and the law and the court's conclusions. This approach would not be possible in many writings. But here it works beautifully because the facts are memorable, and are made even more so by the style of the writing.

Commonwealth v. Richards, 485 Mass. 896 (2020)
concurring opinion by Elspeth B. Cypher,
joined by Frank M. Gaziano and Scott L. Kafker

This is a murder case in which the defendant raised a new claim for the first time on appeal — that he was entitled to a reasonable provocation instruction based on what the victim, his wife, had told him about her affair and lack of affection for him. In a one-paragraph concurrence, Justice Cypher, writing for herself and two colleagues, agrees with the majority that this is not the right case to revisit whether sudden revelation of infidelity should continue to warrant a reasonable provocation instruction in a murder case in Massachusetts. But she "emphasize[s]" that it is time to "retire" this legal principle. Justice Cypher then puts together citations and parentheticals from three Massachusetts cases, one Ohio case, and one law review article that, taken together, summarize both the Massachusetts law on the subject and a rationale for overruling that law. What I like about this writing is the economy of expression and the careful selection and arrangement of apt quotations from authorities and secondary material. And the concurrence here (unlike many concurrences) achieves a useful purpose — to alert the bar to be on the lookout for a proper case for the court to decide the continued viability of the instruction.

Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer
961 F.3d 1062 (9th Cir. 2020)
opinion for the court by Jay S. Bybee
joined by Michael J. Melloy and N. Randy Smith

The plaintiffs in this First Amendment case are a horseshoeing school, its owner, and a prospective student who aspired to become a professional farrier. The statute at issue — California' s Private Postsecondary Education Act of 2009 ("PPEA") — imposed an examination requirement on the prospective student because he did not have a high school diploma or GED. He objected because he worked seven days a week and did not want to forego income to study for a test with no relevance to horseshoeing.

In a writing that tells the reader its destination in the beginning (this time in two paragraphs), Judge Bybee also hints that the writing's direction is true when he remarks at the outset that the PPEA would not similarly restrict enrollment in classes to learn how to fly an airplane, play golf, dance, or play contract bridge. The Court concludes that because the PPEA regulates the content of speech, the plaintiffs stated a First Amendment claim. The writing is a primer on relevant First Amendment principles, and ends by helpfully identifying the specific questions that the trial court needs to resolve on remand.

FIVE RECOMMENDATIONS


Femi Cadmus[†] *& Ariel A.E. Scotese*[*]

Renee Knake Jefferson and Hannah Brenner Johnson
Shortlisted Women in the Shadows of the Supreme Court
(New York University Press 2020)

The release of *Shortlisted* could not have been more timely and relevant in a year which witnessed the death of Ruth Bader Ginsburg, the second female Justice on the Supreme Court of the United States, and the confirmation of Amy Coney Barrett as the fifth female Justice. The book provides a behind-the-scenes empirical examination of the gendered portrayals of women shortlisted to the Supreme Court, casting a spotlight on media biases and stereotypes. The authors conducted extensive research in presidential archives and museums on nine extraordinary women who made presidential shortlists prior to the confirmation of the first female Supreme Court Justice, Sandra Day O'Connor, dating back to the 1930s. In their analysis, they note that in the few instances when women were considered for nomination to the Court, the shortlisting process ended up being a mere formality to project an

[†] Archibald C. and Frances Fulk Rufty Research Professor of Law, Associate Dean for Information Services and Technology, and Director of the J. Michael Goodson Library at Duke Law School. Editors' note: If you are reading this after June 30, Cadmus is now Law Librarian and Professor of Law at Yale Law School.
[*] Associate Director for User Services and Lecturer in Law at the University of Chicago Law School.

appearance of diversity, given those ultimately selected for nomination. The final chapter offers practical strategies for surmounting obstacles in a shortlisting process to women aspiring to any competitive leadership roles.

Yolanda Flores Niemann, Gabriella Gutiérrez y Muhs,
and Carmen G. González
Presumed Incompetent II: Race, Class, Power
and Resistance of Women in Academia
(Utah State University Press 2020)

In a year in which racial and social justice issues have risen to the forefront, *Presumed Incompetent II* is most prescient, providing candid and raw accounts of the challenging trajectories of women of color in the legal academy and academia at large. The sincere, personal experiences and accounts outlined in the book lay bare the biases, slights, and blatant discrimination endured by women of color. The authors of these compelling narratives do not simply recount their challenges but provide hope and strategies for successfully navigating the most impossible of contexts. Namely: persistence is key, allies can be found in the most unexpected places, and the importance of speaking up and advocating for oneself. This book is an essential read for anyone committed to cultivating true diversity and inclusion in the academic setting, particularly faculty and administrators.

William G. Thomas III
A Question of Freedom: the Families Who Challenged Slavery
from the Nation's Founding to the Civil War
(Yale University Press 2020)

A Question of Freedom focuses on a remarkable period in history, from 1787 to 1861, during which enslaved families in Prince Georges County, Maryland bravely filed hundreds of freedom lawsuits challenging the legitimacy of their enslavement. The author conducted extensive research, delving into historical documents which revealed concerted and well planned challenges in the courts by enslaved families, including the Butlers, Queens, and Mahoneys, and their lawyers, who ironically were sometimes slaveholders, including the young Francis Scott Key. The defendants were often prominent slaveholding families, and also included Jesuit priests who founded what is now Georgetown University, an institution which the author notes is still reckoning with the legacy of its ties to slavery. While an astoundingly successful lawsuit by Edward Queen became the precursor to over a thousand legal actions, future lawsuits were not assured certain victory. In 1813, *Queen v. Hepburn* failed

on appeal to the United States Supreme Court. The court's interpretation of the hearsay rule disqualified oral accounts from the enslaved and privileged slaveowners who had supporting documentation, effectively preserving and entrenching their slaveholding position. A *Question of Freedom* succeeds in both humanizing and bringing attention to the plight and extraordinary determination of the enslaved who bravely pursued freedom suits in the face of fierce resistance and threats of retribution from slaveowners.

Alejandro de la Fuente and Ariela Gross
Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana
(Cambridge University Press 2020)

Becoming Free, Becoming Black provides an in-depth analysis of the legal regimes of Cuba, Virginia, and Louisiana regarding slavery and demonstrates the critical role that the laws governing freedom played in ultimately defining race in these jurisdictions. The book examines the three jurisdictions from the early days of the colonies through the antebellum period and up to the eve of the Civil War in the United States. Examining the legal landscape in each jurisdiction, including statutes, case law, and census data, the authors discuss how elite slaveholders attempted to connect blackness with slavery and whiteness with citizenship and freedom. The book reveals that the presence of an established legal regime — one addressing the methods not tied to race by which a slave could become free — determined whether these attempts to define whiteness as citizenship and blackness as slavery were successful. Additionally, the presence of an established legal regime regarding freedom from slavery allowed for a flourishing population of free people of color, which could in turn provide crucial support and resources to slaves looking to become free. As our society continues to grapple with structural racism, this analysis of how blackness came to be defined in these jurisdictions and the role that the law of freedom played in that definition provides an interesting framework for analyzing issues of race and racism.

Mark Tushnet
Taking Back the Constitution: Activist Judges and the Next Age of American Law
(Yale University Press 2020)

Taking Back the Constitution examines how constitutional thought and the Supreme Court evolved from the New Deal/Great Society era to the Reagan Era of conservativism that persists today and what this evolution

means in the current political climate. Professor Tushnet reviews the Supreme Court's analysis of topics such as affirmative action, abortion, and campaign finance over time and demonstrates the role that discretion plays in judicial decision-making and how that discretion is impacted by other factors (including politics), regardless of an individual justice's method of constitutional interpretation and construction. He then examines the political crossroads in the United States and how we might expect the Supreme Court to act in this climate. Ultimately, the book argues that the response to an increasingly political court is to move away from judicial supremacy and towards popular constitutionalism, which has seen some success with the framing of issues such as gun control. *Taking Back the Constitution* is incredibly timely given the increased attention to the Supreme Court during the Obama and Trump presidencies. This interest, and in some cases deep concern over, the Supreme Court makes this book relevant not just to constitutional scholars but to anyone interested in learning more about the Supreme Court.

Richard Mullender, Matteo Nicolini, Thomas D.C. Bennett,
and Emilia Mickiewicz (editors)
Law and Imagination in Troubled Times:
A Legal and Literary Discourse
(Routledge 2020)

The law is not immune to the pressures of intense social, political, and economic change, and in those times it falls to legal practitioners and scholars to fit novel circumstances to the existing legal system and possibly change legal norms. This need for agility and creativity is where the idea of legal imagination becomes critical. *Law and Imagination in Troubled Times* is a collection of essays that discuss the role of imagination in the evolution of legal education, in judicial decision making, and legal scholarship, as well as how it can impact the future of legal thinking, particularly in moments of transition. The book's examination of the role of imagination in weathering change, and the space that philosophy, literature, and storytelling can occupy within the legal imagination, is an interesting study of this emerging interdisciplinary field. The book is challenging for those who are not familiar with the interdisciplinary field of law and philosophy, as most of the essays rely heavily on philosophical frameworks in their analysis. Regardless, this book is an interesting read and relevant given the dramatic changes we are seeing in the United States and the United Kingdom.

FIVE RECOMMENDATIONS

Harold E. Kahn[†]

Bolger v. Amazon.com, LLC
53 Cal. App. 5th 431 (2020)
opinion for the court by Patricia Guerrero
joined by Patricia D. Benke and Terry B. O'Rourke

The task of a common law court is to determine whether and how to apply existing judge-made law to new situations. This is not an easy assignment, particularly when there are no precedents and the new situation is one that occurs thousands, if not millions, of times every day. This was the task faced by the three-judge appellate panel in *Bolger*. Plaintiff appealed the trial court's grant of summary judgment in favor of Amazon on the plaintiff's product liability claims alleging that a defective laptop battery she purchased from Amazon's website caused her to suffer severe burns. In the trial court Amazon had successfully argued that it was not the seller of the battery, but merely a "provider of services by maintaining an online marketplace, warehousing and shipping goods and processing payments." In a unanimous decision by Justice Patricia Guerrero, the Court of Appeal reversed, holding that "the policies underlying the doctrine of strict products liability confirm that the doctrine should apply here." After a thorough review of the history of strict liability, Guerrero persuasively explained why each of the policies

[†] Judge, Superior Court of California, County of San Francisco .

supporting strict liability favored extending the doctrine to Amazon. Rejecting Amazon's arguments that it did not meet the dictionary definitions of seller or distributor, Guerrero eschewed labels and focused on the real-world role played by Amazon: "Whatever term we use to describe Amazon's role, be it 'retailer,' 'distributor,' or merely 'facilitator,' it was pivotal in bringing the product to the consumer." Guerrero summed up her strict liability holding: the "parties . . . recognize that the application of the doctrine of strict liability to Amazon under the circumstances here presents important issues that have not been fully addressed in prior precedents. But the novelty of these issues does not prevent us from applying the doctrine."

Jamison v. McClendon
476 F.Supp.3d 386 (S.D. Miss. 2020)
opinion for the court by Carlton W. Reeves

In the wake of George Floyd's horrific death, Judge Carlton Reeves issued an eloquent cri de coeur advocating the abolition of qualified immunity, the doctrine "invented" by the U.S. Supreme Court to "protect law enforcement officers from having to face any consequences for wrongdoing." In a masterful use of imagery, Reeves begins with a litany of situations where Blacks have suffered at the hands of police. Reeves then turns to the case before him. Clarence Jamison, a "Black man driving a Mercedes convertible," was "pulled over [in Pelahatchie, Mississippi] and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs. . . . Thankfully, Jamison left the stop with his life. Too many others have not." Reeves recounts the history of 42 U.S.C. § 1983, a Reconstruction-era statute providing for a federal claim against state officials for deprivation of constitutional rights. Despite its promise to remediate official misconduct, Section 1983 was moribund during the long Jim Crow era until "resuscitate[d]" by the Warren Court. But the Court "limited the scope and effectiveness of Section 1983" by engrafting qualified immunity onto the statute, notwithstanding the lack of any textual basis to do so. Reeves explains that case law has expanded qualified immunity to the point where it verges on "absolute immunity." Although Reeves finds that Jamison's Fourth Amendment rights were violated, he reluctantly concludes that the officer is shielded from liability based on qualified immunity because there was no precedent that the officer's conduct was unconstitutional "beyond dispute." In urging that qualified immunity be swept away as was "separate but equal," Reeves imagines a better America: "Those who violate the constitutional rights of our citizens must be held accountable. When

that day comes we will be one step closer to that more perfect Union."

Juliana v. United States
947 F.3d 1175 (9th Cir. 2020)
dissenting opinion by Josephine L. Staton

Gutsy. That is the first word that came to mind when I read Judge Josephine Staton's dissent to a decision that plaintiffs lacked standing to allege a constitutional claim requiring the federal government to remediate climate change. Surely Staton knew that she would be widely ridiculed for writing a pie-in-the-sky decision, and she was, often in scathing language. Nonetheless, Staton, a district judge sitting by assignment on a Ninth Circuit panel, was undaunted. For Staton, the stakes were too great for a federal court to take a pass. Staton starts by identifying what is at issue in this case: the continued existence of our planet. She writes: "the government accepts as fact that the United States has reached a tipping point crying out for a concerted response — yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses." Staton never lets up. In well-written and passionate prose packed with historical references, Staton argues that a "perpetuity principle" embedded in the Constitution precludes the "willful dissolution of the Republic." She asserts that "plaintiffs have a constitutional right to be free from irreversible and catastrophic climate change." Staton says that Article III provides for the remediation of that right by a court-ordered plan for a "perceptible reduction in the advance of climate change." She rejects the majority's reliance on the political question doctrine: "this action requires answers only to scientific questions, not political ones." Staton concludes: "Where is the hope in today's decision? . . . If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything in between, those remaining will ask: Why did so many do so little?"

People v. Triplett
48 Cal. App. 5th 655 (2020)
dissenting opinion by Goodwin H. Liu,
joined by Mariano-Florentino Cuéllar

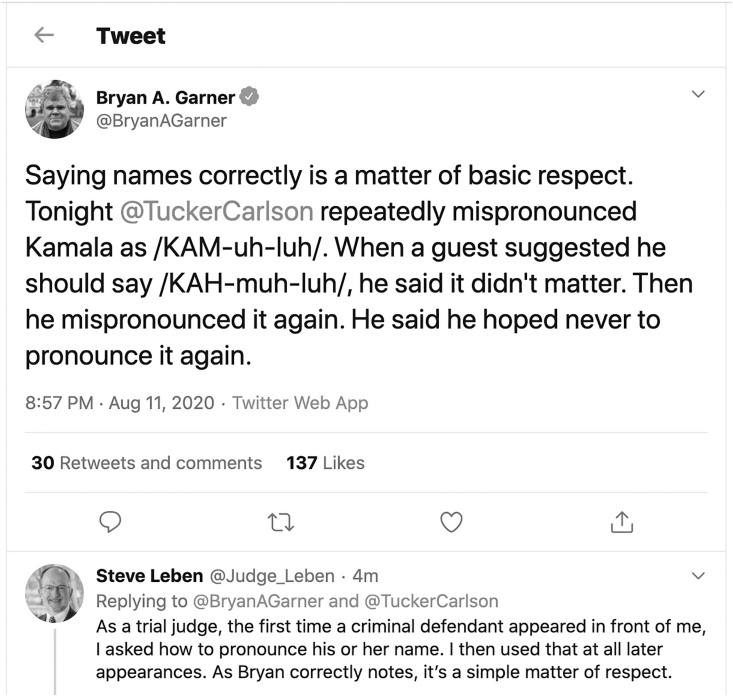
In a Los Angeles state court criminal trial a Black woman faced serious violence charges. There were only three Black prospective jurors. After two Black jurors were excused, the prosecutor exercised a peremptory challenge to Juror No. 16, leaving no Blacks. Notwithstanding No. 16's repeated state-

ments that she could be fair, the primary basis for the prosecutor's challenge, which the trial court accepted as "very valid race neutral," was No. 16's statement that, as a "Black woman [growing up] in L.A. with young Black brothers, I have been harassed many times" by police. After her conviction was affirmed by the Court of Appeal, the defendant sought review by the California Supreme Court, which was denied. Dissenting from that denial, Justice Goodwin Liu acknowledged that "our precedent may support" the prosecutor's challenge to No. 16. Yet Liu found the challenge "quite troubling" and urged his court to take a hard look at challenges "which allow prosecutors to strike Black jurors for reasons that systematically function as proxies for the jurors' race." Liu asked: "Is it truly race-neutral to strike a Black juror for saying that because of 'just growing up in L.A.,' she knew people who had been treated badly by the police or the courts, and that as '[a] Black woman in L.A. with young Black brothers,' she had experienced harassment by police?" His answer: "No great sociological inquiry is needed to understand the problematic nature of the strike at issue here. Countless studies show that Black Americans are disproportionately subject to police and court intervention, even when they are no more likely to commit offenses warranting such coercive action." Liu's plea: "It is time to reassess whether the law should permit the real-life experiences of our Black citizens to be devalued" by allowing those experiences to be grounds for exclusion from jury service.

Republican National Committee v. Democratic National Committee
140 S.Ct. 1208 (2020)
dissenting opinion by Ruth Bader Ginsburg,
joined by Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan

With Justice Ginsburg's passing after 40 years of issuing judicial decisions, I reviewed her 2020 output to determine if any was exemplary. The one that stood out was her dissent to a per curiam opinion issued the day before the election, staying an injunction requiring Wisconsin to count absentee ballots that were mailed and postmarked after the election day provided they were received within six days of election day. The dissent reads like a period piece. The period being April 2020, in the early stage of what Ginsburg called the "dramatically evolving COVID-19 pandemic." Ginsburg's dissent is animated by her view that the majority's decision "will result in massive disenfranchisement" because "tens of thousands of absentee voters, unlikely to receive their ballots in time to cast them, will be left quite literally without a vote." After citing statistics about Wisconsin's confirmed cases and deaths attributable to the virus, Ginsburg explains the circumstances that warranted

the lower court's injunction: "Because gathering at the polling place now poses dire health risks . . . at the encouragement of public officials . . . [a]bout one million more voters have requested absentee ballots in this election than in 2016 . . . resulting in a severe backlog of ballots requested but not promptly mailed to voters." Ginsburg says the majority's "suggestion that the current situation is not 'substantially different' from 'an ordinary election' boggles the mind." She closes by decrying the majority's characterization of the case as presenting a "narrow, technical question": "That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic . . . With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own."



SIX RECOMMENDATIONS

James C. Ho[†]

Bostock v. Clayton County
140 S. Ct. 1731 (2020)
dissenting opinion by Samuel A. Alito, Jr.
joined by Clarence Thomas

The *Almanac & Reader* has recognized virtually every member of the U.S. Supreme Court for exemplary writing — but never Justice Alito. That ends now. And it's the perfect year to do it, because this year offers not one but two exemplars.

Whether sexual orientation and gender identity discrimination constitutes a form of sex discrimination under Title VII of the 1964 Civil Rights Act is a question that divides respected jurists. According to Judge Posner, however, it's not a question that should divide textualists and originalists. In his view, judges should "acknowledge openly" that they're "flouting 'original meaning'" and just "update" Title VII to "satisfy modern needs and understandings." *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 352-353, 357 (7th Cir. 2017) (Posner, J., concurring).

After all, as Justice Scalia often said, "the good textualist is not a literalist." A literalist could say that anyone born by Caesarean section can't be President because they're not "natural born" citizens — but a textualist could not. Likewise, according to Justice Alito, only a literalist could say that an employer

[†] Judge, U.S. Court of Appeals for the Fifth Circuit.

who discriminates on the basis of sexual orientation or gender identity is engaged in sex discrimination — but a textualist could not. They might be "'homophobic' or 'transphobic,' but not sexist." 140 S. Ct. at 1765.

That a majority of the Supreme Court would reach the same result as Judge Posner was, if not widely predicted, at least eminently predictable. *See Kastl v. Maricopa County Community College District*, 325 F. App'x 492 (9th Cir. 2009). What troubled Justice Alito was not that some men might self-identify as women — but that an act of "legislation" might self-identify as "interpretation . . . in the name of high textualism." 140 S. Ct. at 1754, 1760-61. Put another way, Justice Alito and Judge Posner may disagree on how courts *should* interpret statutes. But they agree on what courts *are in fact doing* here. Justice Alito's most memorable passage on this point:

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated — the theory that courts should 'update' old statutes so that they better reflect the current values of society.

Id. at 1755-56. Agree with him or not, Justice Alito's "pirate ship" metaphor is reminiscent of Justice Scalia's "wolf" from *Morrison v. Olson* and "ghoul" from *Lamb's Chapel* — destined to join the legal lexicon as conversational short-hand, and promising to enliven debates over judicial methodology for a generation of lawyers and law students.

United States v. Sineneng-Smith
140 S. Ct. 1575 (2020)
opinion for a unanimous court by Ruth Bader Ginsburg

Some lawyers achieve greatness by becoming judges. Others become judges because they've already achieved greatness as lawyers. Like her dear friend Justice Scalia, Justice Ginsburg was a giant in the law before she ever took the bench. And like her friend, she reminds us of a bygone era when a lawyer could take bold stances in her legal career — and still be confirmed overwhelmingly by the United States Senate, even to our Nation's highest court.

Movies have been made about Justice Ginsburg's boldness in the substantive area of civil rights. But one of her greatest passions in the law was procedure — as she once said, "I'd write all the procedure decisions for the Court if I could."

And one of the procedural principles she was most passionate about was the principle of party presentation. She wrote about it no fewer than five times as a Justice — including in her very first term on the Court, in her concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), and in her subsequent opinions for the Court in *Arizona v. California*, 530 U.S. 392 (2000), *Greenlaw v. United States*, 554 U.S. 237 (2008), and *Wood v. Milyard*, 566 U.S. 463 (2012).

This past term, however, was the first time she articulated and enforced the principle on behalf of a unanimous Court. As she put it: "In both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." 140 S. Ct. at 1579 (cleaned up). This is not a mere technical matter of procedure, but an essential attribute of the judiciary's limited role in our adversarial system of justice: "Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Id.* (cleaned up). "Our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* (cleaned up).

Although there are always close calls at the margin, the principle of party presentation should be easy for dutiful judges to follow in the mine run of cases. Yet the unanimous Court needed to reaffirm those principles this past term in response to (you guessed it) the Ninth Circuit.

Edmo v. Corizon, Inc.
949 F.3d 489 (9th Cir. 2020)
opinion dissenting from denial of rehearing en banc by Patrick J. Bumatay

Speaking of the Ninth Circuit . . . a new member of that court has already written a series of opinions articulating a simple but important principle for faithful originalists who serve on lower courts: originalism to the maximum extent permitted by governing Supreme Court precedent. As Professor Josh Blackman put it, "it's tough for a lower-court judge to be a constitutional originalist. But it can be done."

Judge Bumatay has executed this task as dutifully as anyone on the federal circuits today. He put the point nicely in his solo dissent in *NLRB v. International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers*, 974 F.3d 1106 (9th Cir. 2020): "[O]ur duty [is] to apply the Constitution — not extend precedent." *Id.* at 1116.

But an even more powerful example is his dissent on behalf of five new appointees as well as two veteran jurists in *Edmo*. There he articulated why, in his view, his court erred when it established, for the first time, that prisoners have an Eighth Amendment right to receive taxpayer-funded sex-reassignment surgery. He reminded readers that the Cruel and Unusual Punishments Clause means what it says — it prohibits punishments that are not just "cruel" but also "unusual." That standard, he explained, cannot be met when there is "no longstanding practice" in any state across America, and where "medical standards . . . are innovative and evolving."

Because nothing in governing precedent requires such a claim to prevail, he was therefore free as a lower court originalist to decide the case as the Constitution as written dictates — rather than "stand[] alone" among the circuits in "finding that a difference of medical opinion in this debated area of treatment amounts to 'cruel and unusual' punishment" and endorsing a theory of the Eighth Amendment that does not "bear[] any resemblance to the original meaning of that phrase."

Keohane v. Florida Department of Corrections Secretary
981 F.3d 994 (11th Cir. 2020)
opinion concurring in denial of rehearing en banc by Kevin Newsom,
joined by Robert J. Luck

The Eleventh Circuit has addressed the same constitutional issue that the Ninth Circuit did in *Edmo*. But that's not why I am highlighting Judge Newsom's separate writing in *Keohane*. I do so because he opens with this effective response to harsh criticism from four of his colleagues:

> Before jumping into the merits, let me say this by way of introduction: More often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective. And so it is with today's dissental — which, rather than characterizing, I'll let speak for itself. Among other things, the dissental accuses me — as the author of the panel opinion — of "inaccurately purport[ing]" (and alternatively "claiming") "to apply the governing prior precedent" in *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010), "reimagin[ing]" *Thomas*'s holding, construing *Thomas* "as [I] pleased," "pretending" that *Thomas* sanctioned a standard of appellate review that it "demonstrably did not," "distort[ing] beyond recognition" this Court's prior-panel-precedent rule and "remold[ing]" it into an "unrecognizable and dangerous form," and now, in this opinion, of engaging in "distraction tactics."

> And there's so much more where that came from. The dissental saves its most biting criticism — and its most soaring rhetoric — for the seven judges who voted against rehearing. All of us, the dissental not so subtly implies, cast our votes simply because we "agree[d] . . . with the ultimate outcome" of the panel opinion. In declining to rehear the case, the dissental charges, we have blessed a "rogue interpretation of the prior-precedent rule," sanctioned a "critical threat to the stability and predictability of the law," and thereby unleashed "potentially devastating consequences."
>
> Strong words. Not a one of them true. Allow me to turn down the volume and provide a little perspective.

981 F.3d at 996-97 (certain citations removed).

From time to time, courts are called upon to resolve some of the most contentious disputes that divide our diverse and passionate country. Emotions can run high. As imperfect human beings, judges are not immune from getting carried away on occasion. On the other hand, there are times when sharp language may be called for. A judge who willfully ignores governing precedent, or an attorney who appeals to prejudice rather than reason, may very well warrant rebuke. But as Judge Newsom soberly explains in the balance of his opinion, good faith interpretation is not willful insubordination. And reasonable people can tell the difference.

Calvary Chapel Dayton Valley v. Sisolak
140 S. Ct. 2603 (2020)
dissenting opinion Samuel A. Alito, Jr.,
joined by Clarence Thomas and Brett M. Kavanaugh

I promised two noteworthy opinions by Justice Alito. Here's the second.

2020 will forever be known as the year of COVID-19. I'll never forget the month of March, when millions of Americans united — or at least tried to — behind a nationwide effort to shut down vast swaths of human activity, in the hope that 15 days would indeed "slow the spread." After all, we all wanted to beat the virus. We all wanted to do the right and safe thing — not just for ourselves, but for our fellow citizens.

But for many, that sense of national purpose was soon squandered, and much goodwill lost, as fears began to emerge that the burden would be borne by citizens not based on public health, but on public popularity. Justice Alito captured this sentiment well when he asked why COVID-19 meant that people could not gather for worship, but could for protest. This same sentiment appeared again in *South Bay United Pentecostal Church v. Newsom*, where Justice Alito and others expressed alarm that California would forbid

churchgoers, but not Hollywood entertainers, to sing. 141 S. Ct. 716, 719 & n.2 (2021) (statement of Gorsuch, J.).

In his *Calvary Chapel* dissent, Justice Alito observed that Nevada's COVID-19 enforcement policy "favored certain speakers over others":

> When large numbers of protesters openly violated provisions of the Directive, such as the rule against groups of more than 50 people, the Governor not only declined to enforce the directive but publicly supported and participated in a protest. He even shared a video of protesters standing shoulder to shoulder. The State's response to news that churches might violate the directive was quite different. The attorney general of Nevada is reported to have said, "You can't spit in the face of law and not expect law to respond."

140 S. Ct. at 2607.

Reasonable minds can and will debate which pandemic restrictions were truly necessary to public health, and which ultimately turned out to be overkill. Of course, new challenges bring uncertainty, and science is capable of change. But citizens may insist on good faith from our leaders. We live in a free society, not a police state. So the credibility of our public institutions is critical. And inconsistency breeds contempt.

Roman Catholic Diocese of Brooklyn v. Cuomo
141 S. Ct. 63 (2020)
dissenting opinion by Sonia Sotomayor,
joined by Elena Kagan

One of the television shows my wife and I binge-watched during the pandemic was *The Man in the High Castle*. The show chronicles the lives of characters in parallel universes — one in which Germany and Japan defeated the Allies in World War II, and one in which the Allies prevailed.

So let us imagine a world contrary to the one bemoaned by Justice Alito in *Calvary Chapel* and *South Bay United*. One in which public officials and health experts agree that restrictions on gatherings must apply equally to all — worshippers, protesters, and entertainers alike.

The *Roman Catholic Diocese of Brooklyn* case offers just that parallel universe. For the plaintiff here (unlike the plaintiffs in *Calvary Chapel* and *South Bay United*) did not complain that their parishioners were treated worse than protesters or entertainers. Justice Sotomayor — who, like Justice Alito, has not been recognized in these pages until now — penned a dissent that encapsulates well the case for permitting severe restrictions on worship, so long as it is done on an equal basis with equivalent secular activities:

> The Diocese attempts to get around *South Bay* and *Calvary Chapel* by disputing New York's conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. But the District Court rejected that argument as unsupported by the factual record. Undeterred, JUSTICE GORSUCH offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York's rules (*e.g.*, going to the liquor store or getting a bike repaired). But JUSTICE GORSUCH does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. See App. to Brief in Opposition in No. 20A87, pp. 46-51 (declaration of Debra S. Blog, Director of the Div. of Epidemiology, NY Dept. of Health); Brief for the American Medical Association et al. as Amicus Curiae 3-6 (Brief for AMA). Unlike religious services, which "have every one of th[ose] risk factors," Brief for AMA 6, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. *Id.*, at 7 ("Epidemiologists and physicians generally agree that religious services are among the riskiest activities"). Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily. . . .
>
> Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one. But those principles are not at stake today. The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives. Because New York's COVID-19 restrictions do just that, I respectfully dissent.

141 S. Ct. at 79, 81 (certain citations removed).

Translation: Religious worship is constitutionally protected. But under *Employment Division v. Smith*, 494 U.S. 872 (1990), religious exercise can be restricted severely, so long as it is done on equal terms as non-religious activity. Of course, that's precisely why civil rights leaders, scholars, and jurists have derided *Smith* as "the *Dred Scott* of First Amendment law" — but that is a debate that must wait for another day.

THREE RECOMMENDATIONS

G. Edward White[†]

Bruce A. Kimball and Daniel R. Coquillette
The Intellectual Sword: Harvard Law School, The Second Century
(The Belknap Press of Harvard University Press 2020)

This book is being singled out primarily because of the impossibility of its subject and the valiant efforts of its authors to cope with that impossibility. The prominence of Harvard among law schools in the United States, the visibility and notoriety of many of its faculty and students, and its penchant, ever since Roscoe Pound assumed its deanship in 1916, for internal and external controversy, makes the prospect of writing anything definitive, or even anything resembling an impartial treatment of its history, extremely formidable.

Kimball and Coquillette, with the considerable help of HLS itself, have taken up the challenge, and the result, when *The Intellectual Sword* is paired with their earlier volume, *On the Battlefield of Merit*, is the best-researched treatment of HLS's history from its founding through the 1980s. It is also arguably the most fair-minded treatment, the authors taking pains to point out in this volume, as they did in its predecessor, HLS's considerable failings as well as its impressive successes. The failures were mainly centered, in the authors' view, in the management of finances, a damaging, ultracompetitive student culture in which many students failed out and others were embarrassed or

[†] David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law.

humiliated in the course of their education, and an attitude toward women and minority students that ranged from indifference to outright hostility.

The most original insight in *The Intellectual Sword* is the authors' interesting effort to tie the emergence of a "Spartan" student culture at HLS to the school's poor management of its finances under Dean Ezra Thayer (1910-1915), in which the school became dependent on tuition revenues, requiring it to maintain a large student body. Since HLS's admission standards were not selective (it routinely accepted graduates of certain "high quality" colleges without regard to their grades or class ranks), it ended up with fairly large numbers of students who performed poorly. In order to maintain its image as a demanding and rigorous professional school, HLS began "flunking" as many as one-third of the students in a class. Deans Thayer and Pound approved of the practice, describing it as something akin to a Darwinian "survival of the fittest." The result was a student culture marked by anxiety, competitiveness, and a lack of community spirit, with professors and students seen as adversaries rather than mentors and disciples. Kimball and Coquillette are persistently critical of HLS's financial management, providing charts that seek to demonstrate that a heavy reliance on tuition revenues is typically bad fiscal policy for law schools.

One could wish that this book, and its predecessor, were better written, less repetitive, and less uneven in their use of secondary literature. But the two volumes should now be the starting place for anyone who wants to learn about the eventful and sometimes awkward history of HLS.

George L. Priest
The Rise of Law and Economics: An Intellectual History
(Routledge 2020)

More of a memoir than an intellectual history, Priest's book is written by someone well positioned to attempt it. Priest, who has been on the Yale law faculty since 1981, is a 1973 graduate of the University of Chicago Law School and was a Research Fellow in Chicago's Law and Economics Program from 1975 to 1977. In those capacities he was a student and disciple of Ronald Coase and Richard Posner, encountered Aaron Director, and began to attend the law and economics conferences for legal academics organized by Henry Manne. After coming to Yale he became a friend and colleague of Guido Calabresi. All told, Priest has been in close contact with all the modern founders of law and economics, and much of his book consists of profiles of those figures and summaries of their work.

Priest's other scholarship has been characterized by the vigorous application of propositions of economic theory to private law fields rather than much

attention to intellectual history. That emphasis shifts in *The Rise of Law and Economics*. Priest's first concern, in discussing the contributions of the founders of the field, is to set forth a particular scholar's approach and to compare it with other visible figures. In contrast to much of his other work, Priest seems far more interested in full descriptions of the scholarship of his subjects (including their starting theoretical premises) than in critiquing their positions and advancing alternative ones of his own. The result is an instructive and accessible overview of subtle differences in the founders' viewpoints, not only with respect to the anticipated policy consequences of their positions but with respect to where they were "coming from" as economic theorists.

There is also some high-level gossip in Priest's memoir. We learn that Coase fell out with colleagues in the Chicago Economics Department in the 1970s and subsequently with Posner in the 1990s; that none of the founding contributors to law and economics scholarship, including Coase, had advanced degrees in economics; and that Director was a trained economist who had no particular interest in law or legal problems. We also learn that two of the motivations for Director's being appointed to the Chicago law faculty, and Coase's subsequently being brought to Chicago on Director's urging, were the law school's interest in creating a four-year course of study that would allow students to earn BAs along with LLBs, and Director's desire to have the *Journal of Law and Economics*, which he had founded in 1958, serve as an organ for advancing market-based rather than regulatory approaches to social problems.

But the greatest value in *The Rise of Law and Economics* lies in its painstaking, and fair-minded, recreation of the scholarly assumptions and contributions of the movement's founders. Priest has largely abandoned his adversarial posture for what may end up being a work with a longer shelf-life than his earlier, visible efforts.

Wendell Bird

Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798

(Harvard University Press 2020)

Bird's book is based on a thorough canvas of prosecutions under the Alien and Sedition Acts of 1798. He makes two potentially important revisionist claims. One is that there were far more prosecutions under the Acts than have conventionally been supposed, and that many members of the Federalist party regarded such prosecutions as part of an arsenal for suppressing political dissent through criminalizing oppositionist expressions.

The other claim is that a far more robust understanding of the "liberties"

of speech and the press existed in early America than the conventional historiographical view suggests. That view characterizes freedom of speech and the press in the founding era as being confined to protection against "prior restraints," meaning administrative pre-clearance of expressions, and not extending to subsequent criminal punishment of speech critical of the government, whether true or false.

Both claims, if widely accepted, would turn the existing historiography of the Alien and Sedition Acts and free speech in early America on its head. The Alien and Sedition Acts have long been understood as partisan measures initiated, with some trepidation, by the beleaguered administration of John Adams, quickly repealed by the Thomas Jefferson administration, and only tentatively and sporadically enforced. The Blackstonian view of free speech as being confined to prior restraints has been thought consistent with founding-era cases involving civil and criminal libel, blasphemy, and obscenity, as well as the minimalist status of free speech jurisprudence that persisted through the first two decades of the twentieth century.

With respect to the first claim, Bird seems to have the goods. He demonstrates that the Alien and Sedition Acts were used to target opposition members of Congress, participants in domestic "rebellions," and Irish immigrants. Most tellingly, he supplies evidence of 51 prosecutions filed against 126 individuals under the Acts, and another 22 contemplated prosecutions between 1798 and 1800. Among the individuals singled out for prosecution, in addition to Republicans in Congress, were editors and printers of Republican newspapers, supporters of the French Revolution, and Albert Gallatin, Thomas Paine, and Jefferson. Anyone investigating the history of the Alien and Sedition Acts will need to reckon with Bird's demonstration that they were designed to play a considerable role in suppressing political dissent.

The second claim is more problematic. Bird argues that there was a broader understanding of freedom of expression in England prior to Blackstone's interpretation; that justices of the U.S. Supreme Court shared that understanding before the passage of the Alien and Sedition Acts; and that the view that the Acts were unconstitutional was widely advanced in Republican circles. He doesn't seek to support either of the first two propositions, making reference to other work he has done on the early history of free speech, and most of his sources for the third proposition are defendants prosecuted under the Acts or Republicans who felt that the Acts were being used for partisan purposes. No doubt the Acts were controversial, but whether opposition to them was based on a firm conviction of their unconstitutionality seems uncertain. Nonetheless Bird has identified some free speech issues in early America worthy of fuller investigation.

FOUR RECOMMENDATIONS

Charmiane G. Claxton[†]

Bostock v. Clayton County
140 S. Ct. 1731 (2020)
dissenting opinion by Samuel A. Alito, Jr.
joined by Clarence Thomas

I was once asked what U.S. Supreme Court opinions I disagreed with. My response was that in my position as a U.S. Magistrate Judge I do not disagree with any established Supreme Court precedent and that in any event, my agreement or disagreement is irrelevant. That answer applies to the opinions in *Bostock*. I have selected Justice Alito's dissent as exemplary not based on any opinion about the outcome but because I believe that it does what an opinion should do — it analyzes the matter before the court and provides clear guidance for judges, lawmakers, lawyers, and the general public.

A brief confession — in law school I hated reading dissents. After all, if you could not convince a majority of your colleagues, what do you have to say that I need to read? It is amazing what age will teach you. It is becoming more prevalent for dissenting opinions to serve as road maps for proponents of the losing side to use to perhaps come out on the winning side should the issue return to the Court.[1]

[†] Magistrate Judge, U.S. District Court for the Western District of Tennessee.
[1] *See* Jake Charles, *The Second Amendment Doctrine of Dissent*, Center for Firearms Law at Duke

The specific question posed by *Bostock* was whether Title VII of the Civil Rights Act of 1964's prohibition against employment discrimination on grounds of "race, color, religion, sex or national origin" included a prohibition based on "sexual orientation" or "gender identity." While the majority opinion took a more expansive view and ruled in the affirmative, Justice Alito uses his dissent to give a full throated objection to what he sees as legislation by the Court. The opinion is reminiscent of some of the late Justice Antonin Scalia's in-depth, educational opinions. It begins with a challenge to the majority opinion's self-classification as being grounded in textualism and goes on to provide its own definition of textualism and applies that definition to the relevant law in this case. The opinion then turns to an analysis of the legislative history of Title VII and how that history then relates to interpretation of the statute. The opinion ends with examples of the potential consequences that may flow from the majority opinion.

Justice Alito did not carry the day but his detailed dissent continues in the tradition of opinions that seek to educate practitioners regarding certain principles with the expectation that they will matter in future cases.

United States v. Blomquist
976 F.3d 755 (6th Cir. 2020)
opinion for the court by Amul R. Thapar
joined by Danny J. Boggs and Jane B. Stranch

Perhaps we will just have an annual spot dedicated to some polite resident of the Sixth Circuit that cannot help themselves but to invite law enforcement in to see their — fill in the blank — gun, drugs, what have you. This year's entrant,[2] Lee Edward Blomquist, operated a marijuana growing and distribution enterprise on his father's property in rural Michigan. Law enforcement officers were armed with a search warrant for Blomquist's father's property, including outbuildings, but not for a chicken coop and some greenhouses that were on a separate property that Blomquist leased. Officers approached Blomquist as he was exiting the chicken coop. He was handcuffed and advised of his rights, which he waived. It was Blomquist's belief that his

University, Second Thoughts blog (Mar. 5, 2020), sites.law.duke.edu/secondthoughts/2020/03/05/the-second-amendment-doctrine-of-dissent/; Allison Orr Larsen, *Perpetual Dissents*, 15 Geo. Mason L. Rev. 447, 466-68 (2008) (discussion of potential benefits of "perpetual dissents").

[2] Last year's entrant, William Dale Wooden, had his *pro se* petition for a writ of certiorari granted, although not on the suppression issue that we discussed but on the issue of the application of the armed career criminal enhancements at sentencing. The Court's order requesting a response from the United States got the attention of a private law firm that has taken up Wooden's case *pro bono*. Merits briefs are due May 3 (petitioner) and June 28 (respondent).

operation was perfectly legal and he was eager to show the officers his records. Officers asked if Blomquist would show them where the marijuana was being grown and Blomquist said sure. Officers asked if he would show them where he stored the processed marijuana and once again Blomquist said sure. The guided tour that Blomquist provided included taking officers to places on his leased property that were not covered by the search warrant.

Sadly for our intrepid and very cooperative entrepreneur, his operation was anything but legal. His prior federal drug felony conviction prevented him from distributing medical marijuana in Michigan, and he was storing more marijuana for distribution than the state law permitted distributors to possess, and he was selling marijuana to a drug dealer that did not have a medical marijuana card. So what do you do in this case? File your motion to suppress all of the evidence seized from the leased property on the basis that the search and seizure exceeded the scope of the warrant. The district court denied the motion and Blomquist pled guilty but reserved his right to appeal the denial of the motion.

The issues before the Sixth Circuit were whether Blomquist's "actions adequately demonstrated consent" and whether "other factors contaminated that consent." Spoiler alert — the answers are yes and no. There was no real doubt that Blomquist's actions demonstrated consent. Blomquist gave a guided tour of the property. As to the second issue, the court found that there was no "contamination" of Blomquist's consent. To the extent that he was detained, the court notes that the detention period was brief — long enough to give the *Miranda* warnings. After that, the officers removed Blomquist's handcuffs. The officers did not threaten Blomquist or use force against him. Blomquist had no characteristics which would make him particularly susceptible to duress or coercion. He was 46 years old, had a high school diploma, was trained as an electrician, and was described by the district court as being "a very intelligent individual." He also had a lengthy criminal history, including a conviction for growing marijuana plants on the same property 15 years earlier.

This is a concise opinion but clearly sets out the elements for evaluating whether there was consent in a warrantless search situation. The takeaway from the opinion is not that potential criminals should stop being cordial to visiting law enforcement officers but that they should not be surprised when all of the evidence that they have shown officers voluntarily is not suppressed.

IMDb.com Inc. v. Becerra
962 F.3d 1111 (9th Cir. 2020)
opinion for the court by Bridget S. Bade
joined by Johnnie B. Rawlinson and Mark J. Bennett

Back in 2016, after the California General Assembly had solved all of the major problems in the state, it took up the issue that was right behind poverty, crime, and homelessness — the publication of the ages and dates of birth of entertainment industry professionals. The target of this legislation was the Internet Movie Database website (www.imdb.com) that offers a wealth of information about movies, television shows, and video games free to the public. IMDb also offers IMDbPro, a subscription-based service for industry professionals. In an effort to reduce age discrimination in the entertainment industry, the Screen Actors Guild lobbied the General Assembly for a law requiring that ages and dates of birth be removed from IMDbPro. Assembly Bill 1687 would right this egregious wrong by requiring the website to remove the age or date of birth of a subscriber from both the subscription site and the public site.

Prior to the January 1, 2017 effective date of the statute, IMDb filed suit against the State under 42 U.S.C. § 1983 alleging violations of the First Amendment and the Commerce Clause of the U.S. Constitution, and of the Communications Decency Act, 47 U.S.C. § 230(f)(2). The district court granted IMDb's request for a preliminary injunction and later granted IMDb's motion for summary judgment — both based on IMDb's First Amendment facial challenge to the statute. The State appealed, arguing that the statute was merely regulating contractual obligations between IMDb and its subscribers. Next the State argued that strict scrutiny did not apply because the speech regulated was commercial, illegal, or implicated private matters. The Ninth Circuit held that the speech did not fall into any of those categories and therefore the statute is subject to strict scrutiny. Agreeing with the district court that reducing incidents of age discrimination constitutes a compelling governmental interest, the Ninth Circuit analyzed whether the statute constituted the least restrictive means and whether it was narrowly tailored to meet that goal. The statute failed on both counts.

This opinion walks through the issues in a clear and detailed manner. In a time when so many people are screaming from the ramparts for protection from mean words we are reminded that not every form of speech which causes upset can be remedied by legislation. Indeed, the blessing of our Constitution is that it protects us all from an overreaching government seeking to restrict speech based on content that it disapproves of without meeting a high threshold.

Rideg v. Berleth
401 Mont. 556 (2020)
opinion for the court by Dirk Sandefur
joined by James Shea, Beth Baker, Ingrid Gustafson, and Jim Rice

Two is company, three is a crowd

This is the story of Robert and Nadia Berleth (Tenants) and William Rideg (Landlord) and why close company can mean the end of a decent relationship. In 2018, Tenants moved to Montana from Texas, where Robert was an attorney. Landlord is also an attorney. The Tenants leased a 2.6-acre property from Landlord. The property includes a 4,200-square-foot house with a two-car garage and an apartment with a separate entrance. While Tenants did not intend to use the apartment or for it to be included in the lease, the lease agreement made no distinction regarding the extent of the leased grounds. Shortly after execution of the lease, Landlord notified Tenants by email of his intent to stay in the apartment two nights a week and that he could pay the monthly internet cost for the residence in exchange for his use of the apartment. Robert replied "works for me."

The fissures began to form early. When Tenants moved into the property in early May 2018, Landlord saw that they had two dogs — one more than permitted by the lease. Later that month, the well that served the property failed and caused a backup in the septic system. There was a nine-day period without running water during which Landlord delivered water to Tenants for household uses and for the hot tub. In August 2018, Robert shut off the water supply to the apartment, which forced Landlord to make repeated requests to reopen the spigot. Not long after that, Landlord accidentally damaged Tenants' SUV. Landlord accepted responsibility for the damage and agreed to submit it to his insurance company. By mid-August, the relationship was reaching the breaking point. Landlord saw damage to the bark on two aspen trees and presumed that Tenants had damaged them. Tenants made a trespass complaint to the sheriff's department against Landlord and Nadia unsuccessfully sought a temporary protective order. By August 20, Landlord had had enough and, through counsel, gave notice to Tenants of his intent to terminate the lease based on various breaches of the lease and triggered three-day and 14-day eviction periods. Tenants ignored the eviction notice and litigation ensued.

An expedited bench trial resulted in a judgment evicting Tenants and restoring possession to Landlord. An evidentiary hearing resulted in assessments of damages to each side for various harms, and refunds of rent and deposits. Tenants appealed. The Montana Supreme Court found the alleged

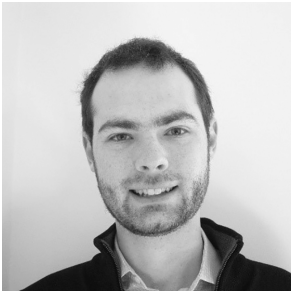
errors to be without merit. Although Tenants were represented by counsel at the trial court level, they were represented by Robert on appeal.[3] Robert's factual and legal inaccuracy in briefing before the court drew a pointed warning from the court and a reminder "to be more cognizant of his professional duties" before Montana courts.

ROSENBAUM, Circuit Judge, concurring:

I concur in the abrogation of the holding in *United States v. Sparks*, 806 F.3d 1323, 1341 n.15 (11th Cir. 2015), that a suspect who abandons her privacy or possessory interest in the object of a search or seizure and thus does not enjoy Fourth Amendment standing also lacks Article III standing. As the writer of the *Sparks* opinion, I regret my error and appreciate the Court's correction of our Circuit's jurisprudence.

[3] Thus triggering the admonition about the person representing themselves having a fool for a client.

FOUR RECOMMENDATIONS



Jed S. Rakoff[†] *& Lev Menand*[*]

John C. Coffee, Jr.
Corporate Crime and Punishment: The Crisis of Underenforcement
(Berrett-Koehler 2020)

For some years, John Coffee of the Columbia Law School, one of the country's leading experts on corporate and securities law, has been critical of the government's failure to effectively prosecute corporate crime. In this book, Coffee both propounds a general theory of why such criminality is rarely prosecuted in a meaningful way, and also offers some creative solutions to such underenforcement.

Corporate criminality, Coffee suggests, frequently results in huge financial losses unmatched by other economic crimes: witness the largely unprosecuted fraud in mortgage-backed securities that led to the Great Recession of 2007-2010. Worse yet, Coffee argues, corporate crime sometimes results in outright homicide and yet still goes substantially unprosecuted. For example, the government recognized as early as 2007 that Purdue Pharma, the manufacturer of the painkiller OxyContin, had, with full knowledge of the drug's highly addictive dangers, aggressively over-promoted it, causing tens of thousands of deaths from overdosing. Yet the responsible Purdue executives were allowed to plead to low-level misdemeanors carrying no prison time.

[†] U.S. District Judge, Southern District of New York.
[*] Academic Fellow and Lecturer in Law, Columbia Law School.

What is the reason for such underenforcement? Some have attributed it to "revolving door" bias on the part of the prosecutors making the final decisions, most of whom plan to ultimately return to the corporate law firms from which they came. But Coffee argues persuasively that modern corporations have become so convoluted in their structure and organization that they are impenetrable to the kinds of limited inquiries that typically underfunded government investigators can mount. Such companies are, in Coffee's words, "too big to investigate."

It would be easy, but unrealistic, to suggest that the solution is a major increase in government resources devoted to prosecuting corporate crime. This, Coffee recognizes, is unlikely to happen when there are so many other pressing demands on the public fisc. But he offers an ingenious alternative. While it is hard for the government to identify the high-level corporate executives who are responsible for major corporate crimes, it is easy to prosecute the company itself, at least under federal law, which imputes to the company the misconduct of even very low-level employees. In theory, the government can fashion a penalty for such corporate misconduct that would drive a company straight out of business. While prosecutors have chosen not to pursue such draconian penalties for fear of hurting innocent shareholders and employees, Coffee recommends they nonetheless regularly threaten such extreme penalties unless companies identify the highest-level executives responsible for such misconduct. If the government carried through on this threat even once, no other company would hesitate to offer up the names of the persons responsible for the crimes.

As this creative solution indicates, Coffee has a great ability to "think outside the box." And that is why his book is so worth reading.

Adam B. Cox and Cristina M. Rodriguez
The President and Immigration Law
(Oxford University Press 2020)

From time to time, questions of who can immigrate to this country, how, and on what terms rise in the national consciousness and grip our political imagination. The period of economic stagnation and widespread discontent that has followed the collapse of financial markets in 2008 has been one of those times, with overdue efforts to redress longstanding inequities in our immigration system clashing with nativist movements and opponents of more inclusive policies. Throughout this period, one figure has stood at the center of the conflict, driving immigration law and policy, and setting the national agenda: the American President.

In a major new book, Adam Cox and Christina Rodriguez assess the President's role as America's "immigration policy-maker-in-chief." Cox and Rodriguez reject narratives — first advanced by opponents of President Barack Obama's decision to defer action against children of undocumented immigrants and then embraced by opponents of President Donald Trump's exclusionary immigration policies — that this is something new. The Obama and Trump administrations have not departed from historical practice by aggrandizing the executive department at the expense of Congress. They have merely continued an established practice of presidents playing an outsized role in deciding who can come into the United States and who must leave. What changed is that we are only now starting to pay attention.

So, what accounts for the President's large role? Cox and Rodriguez identify a variety of factors, both practical and political. Among them: Congress's decision to develop a "deportation state" — an elaborate institutional infrastructure to identify, detain, and remove people who do not meet the legal requirements to live in this country; an intricate codebook of rules that renders far more people out of compliance than the executive could possibly prosecute; and Congress's willingness to defer to executive overreach when there is little political upside to legislative intervention.

Although Cox and Rodriguez defend the President's de facto dominance over immigration policy, they also think the current system is unwieldy and unjust. And the drastic swings in the country's immigration enforcement posture that they document speak for themselves, suggesting an inherent instability in a presidential model. Only Congress, Cox and Rodriguez conclude, can provide the sort of durable wholesale reforms that recent events suggest are urgently needed.

Stephanie Kelton
The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy
(Public Affairs 2020)

Every so often one of the most important law books of the year is written by an economist. Such was the case in 2014, when Thomas Piketty's *Capital in the Twenty-First Century* hit shelves, outlining an ambitious tax agenda to address mounting economic inequality. And such was the case again last year, when Stephanie Kelton, a leading exponent of "Modern Monetary Theory" ("MMT") and a former chief economist for the Senate Budget Committee, published a book that has already transformed how scholars, commentators, and public sector officials approach fiscal policy and government finance.

Kelton's chef-d'oeuvre is organized around debunking six myths: (1) that Congress should budget like a household or business, balancing cash in and cash out over time; (2) that federal budget deficits are evidence of overspending; (3) that such deficits will burden our children and grandchildren; (4) that they will "crowd out" private investment and undermine long-term economic growth; (5) that they will make the United States dependent upon foreign creditors like China, who hold large balances of securities issued by the U.S. Treasury Department; and (6) that programs like Social Security, Medicare, and Medicaid are propelling us toward a fiscal crisis. As Kelton sees it, our real deficits are child poverty, crumbling infrastructure, climbing inequality, stagnant wage growth, and accelerating climate change. These deficits stem from underinvestment and underspending and can only be solved by rethinking how we make economic policy in this country.

That rethink starts with ending our reliance on monetary policy, the Federal Reserve and, although Kelton does not mention it, the banking system, to stabilize the economy by targeting maximum employment and price stability. It requires instead turning to Congress and taxing and spending laws to achieve these goals. And Kelton has an idea about how Congress could succeed in its new role: by preprogramming the federal budget using so-called automatic stabilizers.

We already have a range of these stabilizers: programs like unemployment insurance that automatically increase the federal government's outlays during periods of economic stringency (and reduce them during periods of abundance). At the heart of Kelton's plan is adding a new stabilizer: a federal jobs guarantee, an idea she traces to Franklin D. Roosevelt's New Deal. But even if Kelton's guarantee never becomes law, her intervention has already had a major effect on policy, helping to bring about an unprecedented $1.9 trillion legislative spending plan signed into law by President Joe Biden on March 11, 2021. Biden's plan, and Kelton's approach to government finance more generally, suggests fundamental changes in how the American economy is governed. Given her training, framing, and focus, Kelton only hints at the legal and institutional stakes of her work. There is much to unpack. Agree or disagree, her book is bound to spark debate and spur inquiry for years to come.

John Fabian Witt
American Contagions: Epidemics and the Law from Smallpox to COVID-19
(Yale University Press 2020)

Unreasonable as it may seem, a great many American are opposed to taking a COVID-19 vaccine. Should they be legally forced to do so? To those in favor of such laws, at stake is preventing a real threat to the lives of others.

To those opposed, what is at stake is a person's right to control their own body, and more generally, their personal freedom.

In this short and fascinating new book, John Witt shows that this debate is nothing new in American history. For example, in the famous case of *Gibbons v. Ogden* (1824), the U.S. Supreme Court, per Chief Justice John Marshall, in extending federal supremacy over interstate commerce, noted, by way of an example of state laws that were themselves supreme, the vast power of the states to enact forcible health laws, such as, for example, forced quarantines. Two years later, in the case of *Brick Presbyterian Church v. Mayor of New York*, the courts of New York upheld a law denying churches in lower Manhattan their religious freedom to bury their dead in the church graveyards, on the ground that lower Manhattan had become a breeding place for disease. And in 1905, the U.S. Supreme Court, in *Jacobson v. Massachusetts*, upheld the criminal conviction of a man who opposed a mandatory smallpox vaccination requirement on the ground that the state lacked the authority to forcibly inject a dangerous substance into an unwilling citizen.

Ironically, it was this latter case that became the precedent most relied on by Justice Oliver Wendell Holmes in the infamous case of *Buck v. Bell* (1927), in which the Court upheld the forced sterilization of a supposedly "feeble-minded" woman. And the laws authorizing such sterilizations, while ostensibly grounded in the then-accepted "science" of eugenics, were enacted mainly in the South and applied mainly to poor people and persons of color.

As this latter example illustrates, the disputes over enforced immunization and the like have not only been about the perennial conflict between state power (which is near its greatest when public health is at stake) and individual liberties (which are also often at a high point where control of one's body is concerned). But additionally, as Witt demonstrates, many of the more severe health laws, such as quarantines, have often been applied in discriminatory fashion. In Witt's words, "American legal responses to epidemics have targeted the poor, people at the border, and nonwhites." But still, Witt shows, that doesn't always mean that such responses have not also protected the public health in general. In short, as this well-researched and beautifully-written book shows all too clearly, America's past responses to epidemics have been peculiarly American, with all the moral ambiguity that that suggests.

THREE RECOMMENDATIONS

Stephen Dillard†

Chiafalo v. Washington
140 S.Ct. 2316 (2020)
opinion for the court by Elena Kagan

In these divided times, it often seems as if liberals and conservatives can't agree on much of anything. But in the legal world, there is a nearly universal consensus that Justice Elena Kagan is an extraordinary, once-in-a-generation writer. Indeed, even those who disagree with Kagan's overarching judicial philosophy have a difficult time resisting her breezy, sparkling, and concise prose. And Kagan's considerable writing skills are on full display in *Chiafalo v. Washington*, in which she deftly explains why a state may "penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his state's popular vote" without running afoul of the federal Constitution. It is truly an enjoyable read and the perfect example of Kagan's uncanny ability to make even the most arcane legal issues accessible and engaging to everyday Americans.

Board of Comm'rs of Lowndes County v. Mayor & Council of City of Valdosta
309 Ga. 899, 848 S.E.2d 857 (2020)
opinion for the court by Nels S.D. Peterson

In his relatively short tenure on Georgia's appellate courts, Justice Nels Peterson has quickly established himself as one of the state's standout jurists.

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† Presiding Judge, Court of Appeals of Georgia.

This isn't surprising to anyone who has followed his remarkable career. After graduating from Harvard Law School, Peterson served as law clerk to one of the federal judiciary's most highly acclaimed writers — Judge William H. Pryor, Jr. Then, following a short stint in private practice and several highly placed government jobs, Peterson was selected by Attorney General Samuel Olens to be Georgia's first solicitor general. And just over two years later, he was appointed by Governor Nathan Deal — at the tender age of 37 — to the Court of Appeals of Georgia. But Peterson's stay at Georgia's intermediate appellate court — while memorable — was brief; and exactly one year later, Governor Deal appointed him to the Supreme Court of Georgia.

Since his elevation to Georgia's highest court, Peterson has written a slew of impressive and seminal majority opinions and numerous important concurrences and dissents. And this past year was no different. But one opinion stands out from the rest. In *Board of Commissioners of Lowndes County v. Mayor & Council of City of Valdosta*, Peterson tackles a difficult and novel question of sovereign immunity in a straightforward, engrossing, and scholarly manner.

Thomas v. Reeves
961 F.3d 800 (5th Cir. 2020)
concurring opinion by Don R. Willett

Judge Willett is a repeat player here at the *Green Bag*. He's just that good. Willett has a unique, winsome, and pleasingly unorthodox writing style, and his judicial opinions are often the talk of appellate lawyers on social-media platforms. One such opinion is Willett's concurrence in *Thomas v. Reeves*, in which he champions a "forthright, text-centric reading of 28 U.S.C. § 2284(a)." In his view, this statute requires a three-judge district court to "decide apportionment challenges — both statutory and constitutional — to statewide legislative bodies." And while Willett candidly acknowledges that the wording of § 2284 is "imprecise," he goes on to concisely explain why the statute's meaning — when considered "in light of blackletter syntactic and contextual canons" — can be discerned. This opinion is a textualist tour de force and chock-full of memorable quotes for statutory interpretation enthusiasts.

Credits

(See also the table of contents at the front of this book.)

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Almanac Excerpts

Selected works from the 2022 edition of the *Green Bag Almanac & Reader,*

AKA

The "Ethereal Version" of the

Green Bag Almanac

of Useful and Interesting Tidbits for Lawyers

&

Reader

of Exemplary Legal Writing From the Year Just Passed

2022

EDITED BY

Ross E. Davies & Cattleya M. Concepcion

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ALMANAC
OF USEFUL & INTERESTING TIDBITS

Last Year

Floral Treasures

When lilacs last in the dooryard bloom'd,
And the great star early dropp'd in the
western sky in the night,
I mourn'd, and yet shall mourn with ever-
returning spring.

Walt Whitman
When Lilacs Last in the Dooryard Bloom'd (1881)

Preface

An Efflorescence of Useful and Entertaining Scholarship

This is the 17th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

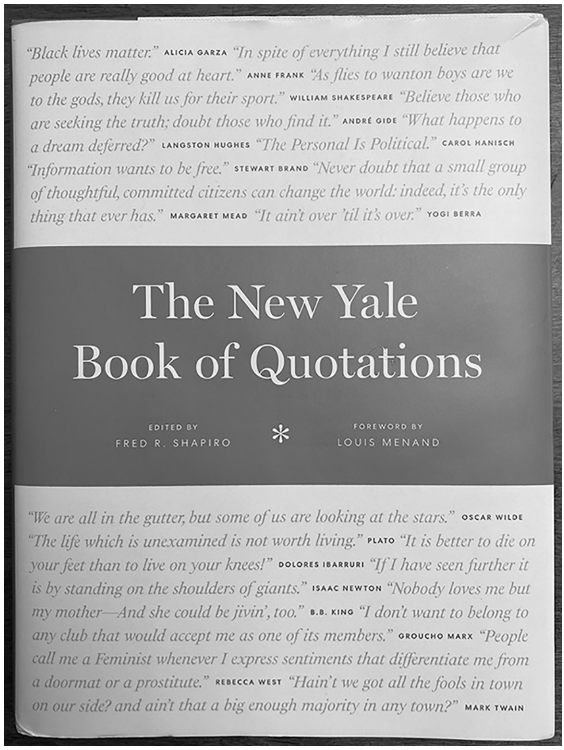
I.

The organizing theme for this year's *Almanac* is flowers and the law. We have a basketful of appropriate — and useful, and entertaining — new scholarship on that subject, ranging from floral features in the architecture and decoration of the U.S. Supreme Court Building, to the history of the regulation of street-side flower vendors, to the difficulties of imposing criminal penalties for the unlawful importation of wild orchids, to the fair use of flowers, and on and on. So, read on.

II.

We are pleased to welcome back exemplary legal writing recommenders Lee Epstein and Cedric Merlin Powell. Their returns are most welcome changes back to the way things used to be!

Our treatment of legal writing is different this year in one other significant respect. We usually select for full reproduction in these pages a handful of judicial opinions explaining decisions made in the conventional case-or-controversy context. In 2021, however, there were a number of especially interesting and important decisions and opinions by tribunals — public and private — acting outside that conventional context. So, we picked a couple of those works to reprint here, with one eye on current interest and one on posterity, since we do aspire to produce an annual sample-snapshot of the year in law that someone might pull off the shelf a century or two from now to get a sense of what the world of lawyers was like at this moment in time. These works may not be enjoyable reading, but they probably merit revisiting anyway, now and later.



III.

All the little flower quotes scattered throughout this volume are drawn from *The New Yale Book of Quotations*, the latest big project by the scholar the *Green Bag* calls "The King of Quotations" — Fred R. Shapiro, of the Lillian Goldman Library at Yale Law School.[1] For us, it was one of the publishing highlights of 2021. In addition, it was an entry in Shapiro's book that first brought to mind the possibility of including an extra short story at the end of this volume. And why not? We aspire, after all, to be entertaining as well as useful (attributes that are also both on display, by the way, in the *Book of Quotations*). We hope you enjoy every bit of it.

[1] Alas, while we've found entries for "green" and entries for "bag," so far we've had no luck finding any for "green bag." Fred R. Shapiro, ed., The New Yale Book of Quotations (2021). We'll know the *Green Bag* has truly arrived if we make it into his next edition.

IV.

One other feature of this *Almanac* involves flowers. Scattered throughout you will find images susceptible to that special kind of gilding performed by small hands (and sometimes large ones) holding crayons or colored pencils. The inspiration for this was a combination of an old memory (of the fun readers had with the pig-drawing exercise in the 2016 *Almanac*[2]) and a more recent one (of the joy kids and their parents got out of the law-themed balloons we sent to our Extravagant subscribers during the pandemic lockdown[3]). Enjoy! And if you or someone you know is especially pleased with a particular piece of colorizing, please feel free to email a scan or photograph of it to the *Green Bag* at editors@greenbag.org.

IV.

As ever, the value of our readers cannot be overstated. They contribute good work and generously subscribe, and also generously and gently flag our occasional missteps. Thanks to all!

In the 2021 *Almanac*, as in all its predecessors, we made enough missteps to look like the Scarecrow in *The Wizard of Oz*.

First, from Timothy Sandefur, we have this:

> On page 370 of the 2021 *Almanac*, footnote 2 includes the phrase, "It is hard to understate David Lloyd George's impact on British history." I believe Professor Jones meant to say that it would be hard to overstate his impact, since if a person's impact is immense, most brief descriptions of that impact will by definition tend to understate it.

Second, from an unnamed reader with truly formidable proofing skills, we have word that references to a couple of works in the table of contents employ "United States" where the running heads on those works employ "U.S." — without the excuse of a need for abbreviation in the running heads.

Third, we noticed that the "he" should be "be" on page 252, line 15.

Finally, on a cheerier note, we received a kind and complimentary letter from Professor R.H. Helmholz. He refers to "The Horse of the Law" tidbit (page 270) and recalls "the poster John Langbein kept outside his office as (I think) a joke."

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[2] *See Arthur Conan Doyle's Pig, and Yours: A Challenge*, 2016 Green Bag Alm. 537, 547.

[3] *See, e.g., Two New Treats*, 24 Green Bag 2d 2, 6 (2020); Leanne Kent, *Upliftingly Buoyant Balloons*, 24 Green Bag 2d 9 (2020); Christopher G. Bradley, *Impressively Knowledgeable Balloonists*, 24 Green Bag 2d 11 (2020).

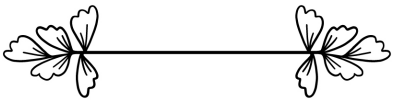
V.

Our goals remain the same, year after year: to present a fine, even inspiring, year's worth of exemplary legal writing — and to accompany that fine work with a useful and interesting (and sometimes entertaining) potpourri of distracting, thought-provoking oddments. Like the law itself, the works in this volume are wide-ranging in subject, form, and style. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the unkindnesses sometimes spoken about legal writing are not entirely accurate.

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by thanking and apologizing to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to O'Melveny & Myers LLP (for its steadfast support of our work, especially from Marjorie Inparaj and Greg Jacob), and to the super-literate Ira Brad Matetsky,[4] who never fails to make any work he touches better.

Finally, the *Green Bag* thanks you, our readers. Your continuing support for the *Green Bag* and your kind remarks about the *Almanac & Reader* are inspiring.

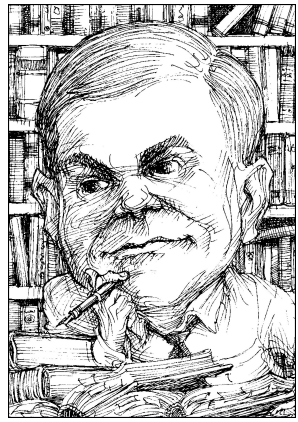
Ross E. Davies
October 31, 2022



Why is it no one ever sent me yet
One perfect limousine, do you suppose?
Ah no, it's always just my luck to get
One perfect rose.

Dorothy Parker
One Perfect Rose (1926)

[4] *Cf. Davies v. Mann*, 152 Eng. Rep. 588 (1882) (this is now the standard footnote that accompanies references to Ira's readings of *Green Bag* publications).



Bryan A. Garner†

THE YEAR 2021

IN LANGUAGE, GRAMMAR, AND WRITING

JANUARY

The *New York Times* reported that Dennis Baron, the noted linguist who wrote *What's Your Pronoun?* has expatiated on efforts to normalize a gender-neutral third-person pronoun. These efforts began as long ago as 1375. So many neologisms have been proposed that they fill a 60-page "chronology of gender-neutral and nonbinary pronouns." It's surprising to see that some current nominees, such as *ze*, *thon*, and *heer*, date from the mid-19th century. But as Baron points out, one pronoun has historical support: singular *they*, which came into use before the 1600s when plural *you* began pushing out *thou* and *thee*. No one today objects to *you* being both singular and plural, and singular *they* seems well on its way to universal acceptance. • The *Times* also reported on how the pandemic had influenced people's life-in-lockdown clothing — and the vocabulary to describe it. *Hate-wear* denotes clothes that are "neither stylish nor particularly comfortable, yet constantly in rotation,"

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† Bryan A. Garner is the author of dozens of books about words and their uses, including *Garner's Modern English Usage* (Oxford, 5th ed. 2022). He is editor in chief of *Black's Law Dictionary* (West, 11th ed. 2019) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 17th ed. 2017). He coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012).

reflecting the wearer's "stress and sadness." Examples included a sweater with holes and oversized sweatpants. *Esquire* coined *sadwear* or "comfort-blanket" clothing as a "collective term for clothes that make us feel better when we're sad, specifically born out of the existential ennui of lockdown." It recommended pajamas and hoodies generally, but added: "It might be a stupid hat or novelty jumper or even a pair of joggers that feel great, but are laughably unflattering" because clothes are "various sartorial sticking plasters [*bespoke band-aids*?] people can employ to alleviate the gloom." • Is the term *nitty-gritty* racist? The BBC said no. Although the phrase's origin is unknown, anti-racism campaigns have declared that it refers to the detritus in the bottom of transatlantic slave ships. But the phrase first appeared in the 1930s, and never in any slavery-related contexts. A language researcher opined, "It may have originated in the USA as an African-American expression, but that's as near as it gets to slavery." Even so, some BBC viewers continued to object. • The *Anchorage Daily News* reported that Alaska's Division of Motor Vehicles was investigating why Nazi-themed vanity plates such as "FUHRER" and "3REICH" had been issued over a decade ago. One person who reported the offensive plates noted, "Etymology doesn't change the racist and dangerous history in which the words Fuhrer and 3rd Reich came into popular English usage." A rabbi opined, "While much of this speech is protected under the 1st Amendment, I feel it is important that our leaders, and those of us who are privileged with a wide audience, work hard to ensure that speech is not used to repress or harm others." The DMV recalled the offensive license plates and issued replacements. When recalled plates weren't returned, the DMV informed police that they were now invalid. • Multiple news outlets reported that in Georgia, the defendants accused of murdering Ahmaud Arbery asked the court to forbid reference to Arbery as a "victim" because it would be prejudicial to them. The defendants asserted that the order was necessary, "to prevent the prosecution from ignoring its duty to prove beyond a reasonable doubt that crimes were actually committed . . . . Due process requires minimal injection of error or prejudice into these proceedings. Use of terms such as 'victim' allows the focus to shift to the accused rather than remain on the proof of every element of the crimes charged." The prosecution responded that the Georgia Supreme Court had already decided that it's not prejudicial to use the term *victim* in court — even repeatedly over a defendant's objections. The motion was denied. • Politicians are increasingly invoking George Orwell's surname to inflame supporters, said the *New York Times*. After a congressman promoted false claims of voter fraud, his forthcoming book was canceled by the publisher. Blaming attempts by "the Left" to silence him, he declaimed: "This could not be more Orwellian." When Twitter permanently suspended

Donald Trump's account for egregious and continuing violations of its terms of service, his son declared, "we are living in Orwell's *1984*." Someone unfamiliar with the book may not realize that one of its main themes is party leaders' manipulating vocabulary to control the populace. So is this imprecise invocation of Orwell's name itself Orwellian? Maybe. Is it ironic? Doubleplustrue. • The White House used a novel means to recruit eagle-eyed applicants for jobs in the U.S. Digital Service, "a technology unit housed within the Executive Office of the President of the United States." It embedded a message in the English and Spanish versions of Whitehouse.gov that could be found only by careful readers of the comment tags in the website's backend: "If you're reading this, we need your help building back better" and a link for applications. The Service reported quickly receiving a great many applications.

February

The *Independent* (U.K.) reported that a typographical error in a research report contributed to the deaths of 72 people in a high-rise fire. Part of the insulation used in the construction of Grenfell Tower had been tested for flammability, and the original handwritten report showed that flames reached 4 meters high in 5 minutes. But when the official report was prepared, the 5 was mistakenly changed to 10, which led to a domino-effect of errors and suggested that the insulation met legal safety requirements. Nobody doublechecked the original report against the official report until 15 years later, after the fire, which had burned much higher and faster than the report projected. • Some mistakes, however, are beneficial. The *Irish Examiner* reported that a spelling error led to the discovery of a massive bank fraud. A member of the Bank of Ireland's financial-crime unit noticed an odd pattern of activity in accounts held in six different names. On closer investigation, they discovered that utility bills from the same provider were posted to each account and all had the same peculiar spelling error. The misspelled word triggered an investigation that uncovered the theft of nearly €470,000 by two struck-off solicitors who'd manufactured the fake bills, as well as many other fake documents, to open accounts and obtain loans at multiple banks. Both were later sentenced to prison terms. • The *Mercury News* (Calif.) alerted readers to another benefit of misspelling: the chance to score free chicken sandwiches. To introduce a new menu offering, McDonald's offered early access to people who registered at a special website. Rival Popeyes recognized that the URL for that site could easily be misspelled. So it registered 50 variants that led to the Popeyes website, where the first 500 typos would win a free sandwich. On launch day, so many people spelled the URL correctly that McDonald's ran out of chicken sandwiches. But plenty remained at Popeyes. • During a

brief change in winter weather, when the gray skies lightened and the cold seemed less intense, the *Chicago Tribune* introduced readers to a word to describe it: *apricity*. Literally, it's "the warmth of sun in winter." The term first appeared in 1623 when, according to Merriam-Webster, Henry Cockeram "recorded (or possibly invented) it for his dictionary *The English Dictionary; or, An Interpreter of Hard English Words*." The *Tribune* lamented the word's obscurity and noted how useful it could be: "To fully appreciate apricity, you have to live in a place where the sunshine can vanish for weeks, where the air is far from warm for a good part of the year, where 39 degrees in February can feel so balmy you think, 'Hey, where are my shorts?'" • The *Mountaineer* (Waynesville, N.C.) sorrowfully reported that the pandemic had forced the local Kiwanis Club to cancel its annual charity fundraiser, the popular "No Sweat Spelling Bee." Normally, 40 or more teams would participate. Teams paid a $100 entry fee and reserved a $50 pot. If a team misspelled a word, they could dip into their pot, buy back the mistake, and stay in the competition. Between entry fees and word-buybacks for misspellings, the club often raised over $8,000. And nobody felt bad about misspelling a word because it was for a good cause. • Uncivil language has always been unwelcome in courtrooms and courthouses. The Supreme Court of Kansas suspended a county judge who dropped f-bombs and other curse words in the courtroom and chambers so often that a clerk kept a "swear journal." The judge also displayed bigotry by referring to Black litigants and witnesses as "boy" and frequently referred to women, including his own staff members, by anatomical vulgarities. The judge defended himself by saying that he had a lifelong habit of profanity due to his "salty" personality. Unimpressed, the Court found that he had "shown bias and the appearance of bias by his insulting and careless remarks, even while on the bench and presiding over hearings." His coarse language from the bench had "sullied the dignity and propriety of the judiciary." *Damn*. • The *New York Times* observed that a proposal to overhaul federal immigration law includes a directive to replace one word in the U.S. Code: *alien* would become *noncitizen*. President Biden had already instructed people working under him to use *noncitizen* where applicable until the law is changed. Advocates of the change have long argued that *alien* carries connotations of shame and dehumanization; critics object to the "euphemism . . . [as] intentionally designed to deceive the public and influence debate on emotion rather than fact." But since *alien* is defined as "a person who is not a citizen," the substitution of the less legalistic term can hardly be euphemistic or deceptive — and it's hard to imagine anyone reacting to the dry word *noncitizen* with half the emotion elicited by *alien*, which since the mid-'50s has reliably conjured, in the popular mind, images of little green men.

March

The *ABA Journal* applauded Supreme Court Justice Thomas's adopting "cleaned up" citations. Because opinions and briefs often quote decisions that in turn quote and cite previous decisions, quotations can become morasses of nested quotations and citations that cause the quotation's point to sink out of sight. Jack Metzler suggested a solution on Twitter in 2017: omit the extraneous material that doesn't affect the text, cite the source used, and add the parenthetical "cleaned up." All the federal district courts and about three-fourths of the federal courts of appeals use cleaned-up citations, but Thomas is the first to use it in a SCOTUS opinion, *Brownback v. King* (25 February 2021). Metzler observed: "Lawyers are both resistant to change and risk-averse, especially when it comes to the minutiae of citations. Yet (cleaned-up) went from an idea in a tweet to a unanimous Supreme Court opinion in less than four years." • Why did lawyers traditionally draft documents on animal-skin parchment — particularly sheepskin — rather than on paper? The *Telegraph* (London) reported that researchers from Cambridge, Exeter, and York universities now have an answer. Sheepskin is high in fat, which might have made it easier to detect fraudulent changes to legal documents. Parchment must be scraped to erase writing on it, and because of the fat content, layers within a sheepskin parchment could separate more easily, leaving a visible mark on the document where the change was made. If the researchers are right, using sheepskin was perhaps the first means to deter fraudsters from fleecing victims. • People commonly misspell *restaurateur* as "restauranteur," notes *Mental Floss*. So what's the story behind the *n* in restaurant and its absence from restaurateur? Both words are rooted in the French verb *restaurer* ("to restore"). *Restaurant* is the verb's present participle ("restoring") as well as a noun; a *restaurateur* is the noun for a person who restores something. The nouns originally had no close relationship. A *restaurateur* fixed broken things generally, or specialized, as with a doctor's assistant who set broken bones. A *restaurant* originally meant food and drink believed to have curative qualities, especially meat-based broths. The owners of shops serving these restorative dishes came to be called *restaurateurs* (essentially, "fixers of what ails you"); later, the shops were called by their product, *restaurants*. Most English speakers don't know that the root is *restaur-* and that the suffixes are *-ant* and *-ateur*. Instead they mistake *-eur* for a suffix and tack it on to *restaurant*. Even the educated make the error: in 1837, future U.K. prime minister Benjamin Disraeli used *restauranteur* in a letter — the first recorded misuse. • An English judge declared that using too many question marks in text messages was "unnecessarily aggressive," reported the *Telegraph*. A university lecturer was removed as a residence-hall warden for unprofessional behavior

toward his subordinates, who had complained that his insertion of "multiple punctuation marks" made his texts "intimidating" to them in both tone and manner. His behavior persisted despite warnings about the punctuation, which the judge agreed was "unhelpfully emotive." The removal was upheld. • The Garamond typeface is widely used for books and advertising logos. But the U.S. Court of Appeals for the District of Columbia discourages using Garamond for briefs because "the typeface can be more difficult to read." Why? The *ABA Journal* reported that Garamond is hard to read when enlarged on a computer screen, its italics are difficult to read, and its section symbol is "ugly." • Two judges on a panel of the U.S. Court of Appeals for the Fifth Circuit exchanged dueling quotations in dissenting and concurring opinions that may have contributed to the decision to grant an en banc rehearing. The dispute concerned whether a salaried employee was entitled to overtime pay under federal law. In the final part of his dissent, Judge Jacques L. Wiener wrote: "Finally, with utmost respect for my friend and colleague who authored the special concurrence, my only response is to quote Macbeth: 'full of sound and fury, signifying nothing.'" (The full quotation reads: "It is a tale / Told by an idiot, full of sound and fury, / Signifying nothing.") He added a footnote: "To be sure, the harshness of the full quotation is unwarranted, and, thus, I only quote what is appropriate." Judge James Ho, who also authored the majority opinion, responded in a special concurrence: "The dissent begins by expressing 'due respect' to the majority — and then ends with a well-known literary quote about idiots. . . . It concludes that my opinion in this case is worth 'nothing.' To some, statements like these may be reminiscent of the wisdom of Ricky Bobby. See *Talladega Nights: The Ballad of Ricky Bobby* (2006) ('What? I said "with all due respect!"'). To others, it may call to mind a recent observation by one of our respected colleagues: 'More often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective.' . . . As the adage goes, the loudest voice in the room is usually the weakest." A petition for rehearing was granted per curiam. • After a Harrisburg, Pennsylvania restaurant defaulted on a nearly $375,000 small-business loan and failed to persuade a federal district court to void the loan, it filed an appeal with the U.S. Court of Appeals for the Third Circuit. *PennLive* reported that the court dismissed the appeal because the restaurant's lawyer had cut and pasted part of the original complaint, left it mostly unedited, and filed it as a brief. In addition, when the appellees filed a motion for sanctions, the lawyer filed a cut-and-paste response. The court commented: "[E]ven the best lawyers make mistakes from time to time. So, we err on the side of leniency toward the bar in close cases. But the copy-and-paste jobs before us reflect a dereliction of duty, not an honest mistake."

April

The *Sydney Morning Herald* marked the 40th birthday of the *Macquarie Dictionary* with a look back at its creation. The first edition, the product of a decade's hard work, noted that an elk is not closely related to a mouse (*moose*) and that a bufflehead duck has white underpants (instead of *underparts*). Those typos were minor nuisances compared to the serious problems of representing Australian English: which pronunciations, broad or cultivated, should take precedence? Must *bushbaby* be hyphenated like *bush-bash*? Should a word such as *bushfire* precede or follow *bush lawyer*? Even in the third edition, tough questions were addressed, and the solutions drew criticism. Former prime minister Sue Butler wrote to the editor, "I am shocked to notice your plural for platypus. If you and your masters find platypodes, as in antipodes, too pedantic they should use platypuses as in syllabuses." But despite those difficulties, the *Macquarie* has inspired dozens of new books recording Aboriginal terms, and compiling Australian thesauruses, spelling guides, slang collections, and other linguistic tomes. • Katherine Barber, Canada's preeminent lexicographer (affectionately called the "Word Lady"), died aged 61. Many sources recounted her leadership in creating the first *Canadian Oxford Dictionary*, now considered the authority on Canadian English. In compiling the dictionary, Ms. Barber partly relied on the classic use of readers, who scoured everything from classical dictionaries to "trashy novels" and supermarket flyers for Canadianisms, and on hosting a radio segment in which she invited listeners to submit words for the dictionary. The project took six years and added more than 2,000 words and phrases used only in Canada. Some are used nationwide, such as *keener* for a particularly enthusiastic or zealous student. And some are regional, such as *parkade* for a parking garage in western Canada, or *bunny hug* for a hoodie in Saskatchewan. One of her associates noted: "When the dictionary came out, for some people it established for the first time that there was such a thing as a unique variety of English we can call Canadian." Thanks to her efforts, effused the *National Post* (Canada), the world can now understand that if you "find a man lounging on a chesterfield in his rented bachelor wearing only his gotchies while fortifying his Molson muscle with a jambuster washed down with slugs from a stubby," he's "on a sofa in a studio apartment wearing only underwear while expanding his beer belly with a jelly doughnut and a squat, brown bottle of beer." • The *New York Times* examined how a single, one-letter word divided the Supreme Court: *a*. Under a 1996 immigration statute, immigrants subject to deportation may apply to stay in the U.S. if, among other criteria, they can show they've been continuously present in the country for at least 10 years. But that continuous-

presence period ends when an immigrant receives "a notice to appear" for a deportation hearing that lists certain additional information. The issue was whether a notice had to contain all the information or whether the information could be provided piecemeal over time, in more than one notice. Writing for the majority, Justice Neil Gorsuch explained, "To an ordinary reader . . . 'a' notice would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required. . . . Someone who agrees to buy 'a car' would hardly expect to receive the chassis today, wheels next week, and an engine to follow." Justice Brett Kavanaugh dissented, saying the majority opinion "spawns a litany of absurdities." He opined: "Ordinary meaning and literal meaning are two different things. And judges interpreting statutes should follow ordinary meaning, not literal meaning." Although he conceded that the car dealership would not meet its obligation by shipping a car in pieces over time, "The word 'a' is not a one-size-fits-all word. . . . [I]t is common to submit 'a job application' by sending a résumé first and then references as they are available. When the final reference arrives, the applicant has submitted 'a job application.' Similarly, an author might submit chapters of a novel to an editor one at a time, as they are ready. Upon submission of the final chapter, the author undoubtedly has submitted 'a manuscript.'" But Justice Gorsuch responded: "If, in the process of discerning [statutory] meaning, we happen to consult grammar and dictionary definitions — along with statutory structure and history — we do so because the rules that govern language often inform how ordinary people understand the rules that govern them. . . . At one level, today's dispute may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power." • Across the Pond, *BBC News* reported that another errant vowel (this time, an *e*) stirred up strife over a battle in the Wars of the Roses. The Royal Mail issued stamps featuring scenes from the Wars, including one from the Battle of Edgecote Moor. But according to the Northhamptonshire Battlefields Society, there's no such place as Edgecote Moor; it's Edgcote. The Society said: "In the last two years, we have done a lot to raise its profile and correct these errors." The Royal Mail defended its choice: "The settlement of Edgcote is spelt without the 'e,' but references to the historic battle are split between the two spellings. On this occasion, we followed the advice of the experts we worked with." • An Ohio appellate court handed down a six-month suspension to a lawyer who filed a brief that was "inadequate, incoherent and unintelligible." Although the lawyer claimed it was an inadvertently filed draft and that the final version had accidentally not been saved, the court rejected the excuse. One judge observed that it was "52 pages of the most difficult reading I've ever probably

done in 12 years" with citations and abbreviations that made no sense, incomplete sentences, a confusing statement of facts, and unclear legal arguments.

MAY

The *Telegraph* (London) reported that the tweet "A FAMILECT is the distinct dialect you develop with your family, the pet names, the inside jokes, the deliberately mispronounced words" caused the word *familect* to trend. People shared coinages unique to their households, such as *disrevelled* (how one looks after a wild night on the town), *testiculating* (waving your hands around while talking bollocks), and *chish and fips* (fish and chips). Linguists explained that a domestic dialect is a delightful insider language that deepens one's sense of belonging. Words or phrases might even transcend a family and enter the language. At least the *Hobart Mercury* hopes so, describing the familect portmanteau *quanjutae* (quantity of juicy tastings) to describe a fancy party platter of mixed foods, such as vegetables, cheeses, charcuterie, pickles, quince paste, etc. It has reportedly spread throughout Tasmania. • In the *Philadelphia Inquirer*, the resident Angry Grammarian (AG) examined two questions placed on an upcoming ballot. The first question opened with *shall* and contained 69 words, extraneous adverbs, nested-adverb phrases, dangling participles, and unclear modifiers. As AG said, "Woe unto anyone who tries diagramming that monster." The second question was worse: "Shall the Pennsylvania Constitution be amended to change existing law so that: a disaster emergency declaration will expire automatically after 21 days, regardless of the severity of the emergency, unless the General Assembly takes action to extend the disaster emergency; the Governor may not declare a new disaster emergency to respond to the dangers facing the Commonwealth unless the General Assembly passes a concurrent resolution; the General Assembly enacts new laws for disaster management?" Besides the length (74 words), the poor use of semicolons, the nightmare thicket of adverbs, and the gallimaufry of subjects covered, it appears to be missing an *and* after the last semicolon, and never clearly states a question. But "research shows people are more likely to agree to any default option — regardless of whether they actually want or understand it." The voters said "yes" to both questions. Whether voters read or understood the questions remains unknown. • In the *New York Times*, John McWhorter reviewed the history of the N-word and its evolution from "neutral descriptor" to racial slur and ultimately an "unspeakable obscenity." He covered the etymology and changing uses and meanings from its first appearance in 16th-century written English to the present day, when the phrase *N-word* first appears. McWhorter uncovered other "polite substi-

tutes" over time, depicted how the slur was ingrained in colloquial speech yet veiled or unseen in early 20th-century literature and film, discussed its usage in casual speech and in the media by the 21st century, and explained the moment when *the N-word* entered the English language. McWhorter himself never shied from using the real word rather than the euphemism in this writing. • The Associated Press made a small yet substantial change in its stylebook. It eliminated a hyphen to change the spelling of *anti-Semite* and *anti-Semitism* to *antisemite* and *antisemitism*, which are closer to the original forms. In linguistics, the term *semitic* denotes a family of North African and Middle Eastern languages, including Aramaic, Hebrew, and Arabic. People who speak those languages are never called Semites, just as people who speak Romance languages such as French, Spanish, or Italian are never called Romantics. But in the 19th century, an anti-Jewish bigot invented the notion that Jews belonged to a racial group he dubbed "Semites," from which he coined the pseudoscientific term *Antisemitismus* as a "sophisticated" equivalent of *Judenhass* ("Jew-hatred"). When the term entered the English language in 1893, it somehow acquired a hyphen: *anti-Semitism*. By changing *anti-* into a prefix, it promoted the false notion that it means hostility toward "Semitism" and "Semites," thus sanitizing its meaning: hatred of Jews. Deleting the hyphen doesn't change the word's etymology or the racism it reflects. But it might make it easier to recognize the meaning of *antisemitism* as what it has always been. • The *Australian Magazine* reviewed last words, both memorable and disappointingly otherwise. On his deathbed, Voltaire is reputed to have been asked to denounce the devil, to which he replied, "This is no time to make new enemies." Humphrey Bogart, who predeceased Lauren Bacall, told her, "Goodbye, kid. Hurry back." Some people meet death with a joke or a smile. Groucho Marx said, "This is no way to live." A murderer facing a firing squad in 1960 asked for a bulletproof vest. And Margaret Sanger burst out, "A party! Let's have a party!" Some express relief, as did Churchill: "I am bored with it all." But sadly, just before he left the building, Elvis's last words were, "I'm going to the bathroom to read."

JUNE

The *Times* (London) reported that more than 30% of Brits correct their friends' and relatives' mispronunciations, and 10% correct total strangers'. Oliver Kamm suggested that readers who aren't parents or teachers correcting a child should stop. He argued: "There is an inevitable intolerant undercurrent to correcting people's pronunciation. There are many English dialects and many accents of the same dialect. None is more correct, pure, expressive,

grammatical or even aesthetically pleasing than any other. And linguistic fashions change." After all, no one today insists on pronouncing the initial *k* in *knee* or *knight* (except in a Monty Python film), although it was the norm in Chaucer's day. But Kamm's optimism that "nu-cu-lar" will become the predominant pronunciation of *nuclear* because "at least three US presidents have spoken the word this way" and it replaces a sequence of sounds that is unusual in English with one that's more common (on the pattern of *particular* or *secular*), is countered by the fact that the great majority of both Brits and Americans dislike it and are unlikely to adopt it anytime soon. • Syntax was key in the U.S. Supreme Court's interpretation of a phrase in a 1975 law that defines Indian tribes. In 2020, Congress allocated funds for COVID-relief to "tribal governments." When a portion was earmarked for Alaska Native corporations and for-profit businesses that serve tribal villages in Alaska, tribal governments in the lower 48 states sued, arguing that a phrase in the 1975 law limited the definition of Indian tribes to federally recognized groups. Justice Sonia Sotomayor disagreed with the interpretation and gave "an example with the same syntax" as the 1975 law. "A restaurant advertises '50 percent off any meat, vegetable or seafood dish, including ceviche, which is cooked.' Say a customer orders ceviche, a Peruvian specialty of raw fish marinated in citrus juice. Would she expect it to be cooked? No. Would she expect to pay full price for it? Again, no." Justice Gorsuch dissented, calling the ceviche example "a bit underdone." He quoted cookery articles while explaining: "Maybe the restaurant uses heat to cook its ceviche — many chefs 'lightly poach lobster, shrimp, octopus or mussels before using them in ceviche.' Maybe the restaurant meant to speak of ceviche as 'cooked' in the sense of 'fish . . . "cooked" by marinating it in an acidic dressing' like lime juice." Perhaps a gazpacho analogy would have been more defensible. • Bedtime stories aren't just for children anymore, said the *Sunday Times* (London). Millions of adults are subscribing to "nodcasts" designed to help adults unwind and fall asleep while listening to a calming story-based stream spoken in a pleasant voice. The stories range from excerpts of childhood favorite books such as *The Secret Garden* and *The Wind in the Willows* to recollections of long-ago and far-away childhoods to strange stories, such as one about a llama, a cat, and a dog negotiating a rent agreement. Some podcasts strive to be boring and avoid anything resembling a plot or characterization so the listener doesn't care about how it ends. One of the best in the genre, the *Times* noted, combines gentle music with excerpts from oceanic-shipping forecasts. • The Australian Senate began an inquiry into how alternative-protein products, such as "meat-free mince," "sausage made with plants," and "vegan bacon," should be labeled. The *Weekly Times* (Melbourne) noted that

the *Macquarie Dictionary*'s definition of *meat* includes "the flesh of animals used for food," "food in general," and "the edible part of anything, as a fruit or nut." And *milk* means the liquid from "the mammary glands of female mammals," as well as "any liquid resembling this," such as coconut milk. A linguistics professor said, "The point is, who gets to say what is the true nature of a word's meaning?" But a representative of the meat industry pointed out that Australian law defines red-meat products. For example, a sausage must contain "no less than 500g/kg of fat-free meat flesh." But "while our industry is bound to the definitions in the food code, plant-based proteins can label their products whatever they wish." It's a new twist on the old ad line "Where's the beef?" • The *Daily Mail* recounted the exposure of a literary fraud and its lingering consequences. T.J. Wise, a rare-book collector and dealer in the early 1900s, was considered an expert on authenticating rare books and detecting fraud. He was also a skilled forger of first editions that never existed, purportedly by Dickens, Tennyson, George Eliot, and Wordsworth, among others. His method was ingeniously simple: he printed a copy of a genuine work but changed the publication date, which implied it was a limited private edition made before the main printing. At first sight, it was very hard to prove as fake, as any other copies could be presumed to be hidden in private collections. But two other rare-book dealers began to ask questions when they noticed anachronisms in an 1868 George Eliot poem, such as a single letter in a font that appeared after 1880, an errant hyphen, and a misplaced comma. They spent years analyzing "rare books" authenticated by Wise and, in 1934, exposed dozens of 19th-century editions as fakes. Since then, nearly 100 of the forgeries have been found in major public and private collections, including in the British Museum. • Apostrophes made the news in two industries and in two hemispheres. The *Australian* summarized a "well-acted, amusingly-scripted, poorly-plotted, violent, vulgar and profane bit of fun, for those who like that sort of thing." The film was titled *The Hitman's Bodyguard's Wife*. Noting that the wife wants to have a baby, the reviewer mused: "It does make one wonder if there'll be an apostrophe in the third film . . . . The Hitman's Wife's Toddler's Bodyguard perhaps." And *Newsday* (N.Y.) said of Burger King's newly introduced sandwich, "The first interesting thing about the Ch'King is its name. Never in the history of punctuation has an apostrophe been forced to labor on, standing in for no fewer than five letters by my count, and that may well be a conservative estimate."

JULY

Many style guides advise that when referring to a physical or mental disability, person-first language is preferred (e.g., *a person with autism*; *a person who is*

blind). But that's not desirable, reports *Buzzfeed*, when a particular person prefers an identity-first term (e.g., *an autistic person*; *a blind person*). Disabled activists explained that although person-first phrasings are meant to and do separate the person from their condition, the perception may be that "if you have to put the word 'person' first to remind yourself that we're people, . . . you already didn't believe we were people." Identity-first terms are often preferred by disabled communities because "disability and personhood are not mutually exclusive." So which should the able-bodied use? "There's not necessarily a right answer to person-first versus identity-first. Individuals will feel strongly one way or another," said one advocate for the disabled. She added that "the divide might also be a generational one; an older person is more likely to use person-first language than a teenager or young adult is." • Pronouns and statutes were debated in Australia. The *Age* (Melbourne) described a law student's campaign to have the state of Victoria's statutes rewritten to eliminate *he* and replaced with *the person* or *they*. The student explained, "We can't expect to shift attitudes and beliefs if one of the most important texts within our society is gender-specific. It is important to recognise the power of language." Numerous senior legal, human-rights, and gender-equality figures in the state support inclusive language. After all, "a jurisdiction like Canada did it in 1985. They brought in new drafting legislation provisions, but they also said let's start revising our complete legislation and now it's all gender-neutral." Despite that, The *Australian* opposed the campaign: "We should be careful. One thing we should not do is enshrine bad English in the language of the law and that is what would happen if we were to substitute 'they' for 'he.' It's true that it's becoming more common for people to use 'they,' the plural form of the third person pronoun, as a substitute for 'he' or 'she,' but that doesn't mean it is appropriate. It should be a rough rule of thumb that if it ain't good English it ain't good law." • Nor is the language of the law entirely inclusive in the Great White North, said the *Toronto Star*. In some courts, judges are addressed as *My Lord* or *My Lady*, raising issues of classism and excluding nonbinary people on the bench. Some lawyers began asking to make *Your Honour* or *Judge* or *Justice* uniform nationwide, without gendered honorifics such as *Mister* or *Madame*. But courts are making more efforts to ask counsel, litigants, and other trial participants to identify their preferred pronouns at the start of proceedings, a change that few have criticized. Courtroom language is also beginning to remove other barriers. For example, announcements such as "all rise" are being modified to "All rise, if you're able to," so mobility-impaired people don't seem disrespected. A Toronto lawyer noted, "It's not just change for change's sake. This is about making the justice system accessible. The more you do away with these

unnecessary practices, the more the average person entering the justice system . . . . feels like this is the people's court." • In Scotland, the government asked its civil servants if they'd be willing to list their preferred pronouns with their email signatures to increase awareness of "gender identities and pronoun use across the organisation to create and foster an open culture that is supportive of the LGBTI+ community." Nearly 60% refused. The *Times* (London) reported that most opponents argued that it "could impact women's rights and result in sex discrimination." And the *Herald* (Glasgow) derided the proposal as a smokescreen for the government's avoidance and coverup of disproportionate COVID deaths in poor neighborhoods and care homes: "'Sir Farquhar, they're all dying of the Covid in there.' 'Let them use pronouns.'" Despite that, reported the *Daily Telegraph*, the government decided to encourage the addition of pronouns on a voluntary basis. • The *Press* (Christchurch) reported that New Zealand has produced a substantial number of notable and world-famous lexicographers. H.W. Williams published the earliest dictionary of the New Zealand language — Maori — in 1844, which is now in its 7th edition. Bruce Biggs, Sir Apirana Ngata, Patrick Ryan, and John Macalister have also contributed to recording Maori vocabulary, including terms now used in English. Dianne Bardsley has produced many dictionaries and thesauruses for use in New Zealand schools. Eric Partridge was born in New Zealand, although his family emigrated to Australia. His many books on slang, especially his *Dictionary of Slang and Unconventional English*, achieved widespread fame. Sidney J. Baker was also New Zealand-born and Australia-raised but published his seminal book *New Zealand Slang* before publishing about Australian usage. H.W. Orson spent his entire life and career in New Zealand, where he wrote three dictionaries of New Zealand English. R.W. Burchfield was also born and educated in New Zealand before winning a Rhodes scholarship to Oxford, where he studied under C.T. Onions and J.R.R. Tolkien, eventually becoming chief editor of the *Oxford English Dictionary*. The *Press* commented: "I doubt there's anything relevant in the water here, but we certainly have produced a notable set of people who have made words a large part of their lives." • In the *ABA Journal*, a law professor warned that some technological tools are being touted as something like lawyer-replacements. The maker of one such tool claims that it uses "natural language processing, machine learning, and artificial intelligence" to produce superior writing. Another says it will provide "all the arguments, legal standards and prepackaged research you need to get things done, faster than ever." Software may soon be able to research and write legal documents with minimal or no input. The professor urged teaching students to work constantly on strengthening their research, analysis, and writing abilities rather than delegat-

ing them to machines: "A computer program cannot solve a legal problem or persuade a judge; nor dictate how to effectively represent a client. In legal writing and analysis, the magic and power of our combined words come in their variation, style and strategy — and most importantly, from our own minds. No computer can emulate that." • The *Detroit Free Press* reported that many institutions, public and private, are making progress in adopting gender-neutral language and supporting self-identification. American automakers and a major U.S. bank have updated their bylaws, such as replacing "chairman" with *chair* and removing gender-specific pronouns. The U.S. House of Representatives modified wordings in its Code of Official Conduct to be less gender-specific by changing *chairman* to *chair*, *seaman* to *seafarer*, *father* and *mother* to *parent*, and *daughter* and *son* to *child*. The White House added gender-neutral pronouns to its website for users to select when contacting government agencies. Networking sites for professionals also made it possible for members to add pronouns to their profiles.

August

The *South China Morning Post* reported on an appeal that hinged on a missing comma in both the English and Chinese versions of a criminal statute. The Summary-Offences Ordinance prescribes the penalties for "any person who has in his possession any wrist restraint or other instrument or article manufactured for the purpose of physically restraining a person, any handcuffs or thumbcuffs, any offensive weapon, or any crowbar, picklock, skeleton-key or other instrument fit for unlawful purposes, with intent to use the same for any unlawful purposes." The defendant was arrested with 48 zip ties in his pockets while near a protest in Hong Kong. The defense pointed out the lack of punctuation, especially a serial comma after *skeleton-key*. Noting that the statute covered three categories of items — restraints, offensive weapons, and instruments for illegal entry — the defense argued that the missing comma suggested that *other instrument fit for unlawful purpose* fell within the offensive-weapons category, which doesn't include zip ties. (Those also couldn't be restraints because the definition specifically applied only to objects manufactured for that purpose.) The prosecution responded that *other instrument fit for unlawful purposes* was an additional, separate category unrelated to the items for break-ins, and could therefore include zip ties. The appeal was denied. • How do you pronounce *scone*? asked the *Dominion Post* (Wellington, N.Z.). Are you "Scone with the Wind" or in a "Game of Scones"? Some insist the latter is the posh way to say it; others urge the former is correct. Dr. Simon Overall, a linguist, says there's no "correct" pronunciation; it's just a

matter of preference. New Zealanders use both the *gone* and *cone* rhymes. A Cambridge University dialect study found that in Scotland and England, *gone* predominates, but in Ireland, it's *cone*. So when you're in a place where one pronunciation is preferred, how can you remember it? The *Dominion Post* declared: "You just have to attain a higher level of sconsciousness." • Workplace language can be a minefield. "With all due respect" is heard by 68% of men as respectful and 51% of women as disrespectful according to a survey by TollFreeForwarding.com. "Bless your heart" may not be sweet either, although 77% of men would take it that way. Women, especially in the South, understand it with a certain intonation as meaning "you're dumb." And in the workplace, when a woman says something needs "a few amends," 74% mean "it has a few typos" — but 44% of men hear "this is awful and needs redoing." The survey also found that 27% of men believe that flirtatious language at work is acceptable, but 93% of women said it's objectionable. • The *Sydney Morning Herald* reviewed Australia's first dictionary, complied by James Hardy Vaux, a.k.a. "Flash Jim," during a 7-year stay in the Newcastle penal settlement. He collected "flash" or "cant" language from his fellow inmates, as well as other terms, and presented a copy of his collection to the settlement's commandant. After returning to England in 1819, he published a fictionalized memoir that included his dictionary as an appendix. In that time, one could *cop the halter for kitten-rigging* (hang for stealing a pewter mug), engage in *pear-making* (joining the military to get an enlistment bounty and then absconding with it), *play the letter-racket* (use a forged reference to defraud charitable funds), or *pick up a flat* (rob someone). Many terms are still used in modern Aussie slang, including *cadge*, *snitch*, *ring-in*, *yarn*, *racket*, and *kid*. And people still *take a snooze*, wear *togs*, and go on a *lark*, just as they did 200 years ago. Flash Jim's biographer commented, "The Australian language appears to have begun as it intended to go on: as an inventive, informal, cheeky branch of English." Many might agree with the novelist who said, "I'd rather be shipwrecked with a good dictionary of Australian slang than with any other reference work." • A cellphone's emoji design and font size and style were factors in determining that a plaintiff had manufactured harassing text messages she claimed to have received. The *Cybersecurity Law & Strategy* newsletter described how experts examined an image purportedly showing the screen of an iPhone. Based on the types of operating system (OS) available for her particular model of phone, the experts determined that the OS couldn't display the fonts or emoji shown in the image, in addition to other indicators of fraud. The court dismissed the case with prejudice and imposed sanctions on the plaintiff.

SEPTEMBER

Yes, SCOTUS Justices make writing mistakes, declared the *National Law Journal*. And they've been publicly corrected on the Court's website since 2015. Many have been typos ("lassez faire" instead of *laissez faire*), some incorrect homophones ("palate" instead of *palette*), a few eyebrow-raising grammatical mistakes (pronoun errors), and occasionally even factual errors. In a dissent to *Brnovich v. Democratic National Committee*, Justice Elena Kagan covered the history of voting rights, specifically mentioning the 1965 protest at Selma, Alabama. But she mistakenly wrote that the protestors marched from Selma to Birmingham, Alabama, instead of to Montgomery. David Garrow, whose *Protest at Selma* was cited, noted that despite the surprising error, "whichever clerk wrote this must have read the entire shelf of books on the Voting Rights Act." • Linguists know that a pidgin language is substantially different from the standard language. But the U.S. Court of Appeals for the Third Circuit had to teach that to immigration officials who violated an asylum applicant's due-process rights by refusing to provide an interpreter for removal proceedings. The court noted that "despite persistent clues that he was less than fluent in 'standard' English, he was left to fend for himself in that language without an interpreter." The differences between pidgin and standard English are stark, as the court illustrated: The standard English sentence "If it were me, I would not let him come and visit the children" becomes in pidgin "If na mi, a no go gri meik I kam visit dat pikin dem." Oddly enough, language was a factor in the asylum request: the applicant feared persecution in part as a speaker of pidgin English because of discrimination against so-called Anglophones, his membership in a pro-Anglophone group, and government-directed violence against pro-Anglophones. • A study of misunderstood text messages, as described in the *Independent* (London), identified common problems with them. Nearly half of the respondents misunderstood jokes, didn't detect sarcasm, or spent "hours" puzzling over a text's wording or perceived tone because they couldn't tell whether the sender was annoyed or joking. Overanalyzers are typically young — half of adults under 25 experienced frustration, stress, or anxiety over text messages, compared to only one in ten adults over 55. Most respondents (80%) preferred face-to-face talks over written communications such as text messages because of better cues about meaning. • Writing in the *Boston Globe*, Barbara Wallraff mused on recreational neologizing to fill needs in the language. Why, for instance, doesn't American English have a simple way to refer to plastic bags caught in the branches of trees? (The Irish call them *witches' knickers*.) What do you call your child who's now an adult? Wallraff's readers favored *offsprung*.

How do you describe the moment just before you do something incredibly stupid, like drop a stack of mail — as well as the checks you were taking to the bank — into the mailbox? Reader suggestions were fitting: *déjà rue*, *dunderstruck*, and *instant regretification*. Perhaps sadly, none have ever made into mainstream usage. • It was once unquestionably prestigious to be a *white-shoe lawyer*. But the *American Lawyer* and the *ABA Journal* reported that the term is losing currency. Advocates for keeping it argue for its traditionally identifying top firms as an "evocative, meaningful phrase." Opponents of the term declare that it's antiquated, implies white-male privilege, and implies the exclusion of women and minorities. There's support for that viewpoint. In 1997, William Safire noted that the term originated from the shoes traditionally worn by men at Ivy League schools (which did not admit women), and was defined as applying to "the WASP upper-class elite" who "are thought of as being cautious and conservative." At least one white-shoe firm is consciously changing its image: "We now cover white shoes, cowboy boots, and high heels." Fittingly so. • Whistled languages have been recorded on every inhabited continent but were not recognized as more than just signals until the mid-20th century. The *Observer* (London) commented that they're used in rural areas and in places where the terrain makes long-distance communication both difficult and necessary, such as in forestland or mountains. Linguists describe the whistled languages as conveying short sentences having distinct words and syllables articulated as in speech. They believe that whistling could have been a precursor to vocalization while human vocal cords were still evolving. • Sources in Japan, Northern Ireland, Australia, and the U.S. reported on developments in defamation laws. Japan's justice minister was considering an amendment to the penal code to make criminal insult (the use of abusive language against a victim in a public setting, including the internet) punishable with a prison term. Noting that cyberbullying has led to suicides, the *Japan News* urged social-media providers to devise effective measures to deal with the problem. The *Belfast Telegraph* pointed out that Northern Ireland's defamation laws are inadequate for the internet and demanded reform to protect cyberbullying victims and to enable them to identify and prosecute perpetrators. But a proposed bill diminished existing protections because of Belfast's reputation as too plaintiff-friendly in defamation cases. In the U.S., the *Philadelphia Inquirer* observed that the Supreme Court was signaling a change in defamation laws, particularly the actual-malice standard, suggesting that it allows "the publication of falsehoods by means and on a scale previously unimaginable" and "allows grievous reputational injury to occur without monetary compensation or any other effective remedy."

October

The linguist Michael Hoey, who developed the "lexical priming" theory of language, died aged 73. He posited that people acquire language by long-term exposure to it because they mentally note and store word associations, and then reproduce them. They repeat the cycle by priming others. The principles of his work led computer scientists to use lexical priming in developing AI-based language-learning programs for machines. • It's a bird! It's a plane! It's a lawsuit? The *Texas Bar Journal* described the most unusual brief (probably ever) filed in a Texas court. The plaintiff, a comic-book shop, was suing a neighboring hotel from which hotel guests and visitors frequently launched projectiles ranging from bottles and cinder blocks to luggage racks and fire extinguishers at the shop, resulting in fires and other property damage. When the hotel claimed it didn't sufficiently understand the complaints filed against it even after the pleading was amended twice, the comic-book shop amended its pleading again in the form of a comic book. The complaint included cover art of the shop's owner facing a barrage of silverware and fire extinguishers. The illustrated panels of the book — complete with dialogue bubbles and sound effects — graphically showed the backstory and bases of the complaints. Perhaps foreseeing an appeal, it concluded: "To be continued!" • Dozens of Korean loanwords have entered English and are now included in the *Oxford English Dictionary*. New terms mentioned in the *Independent* (London) and the *Guardian* (London) included the prefix *K-*, denoting a noun related to South Korea and its pop culture, *hallyu* (literally "Korean wave"), *mukbang* (videos of people eating massive dishes of food), *aegyo* (cuteness or charm), and *skinship* (the affectionate emotional bond arising from close physical contact with another person). Although English is welcoming the influx of Korean terms, the *Times* (London) reported that the reverse isn't well received, at least not by older generations of Koreans. Although the young embrace Konglish (the intermixture of English and Korean) as slang, the government has pledged to reduce foreign words and idioms. The Korean Language Society, which promotes preserving linguistic culture, declared, "Hangul has been part of national pride and language and is a tool that distinguishes one culture from another. If people use more English loanwords, they naturally result in the use of less Korean vocabulary. If such a trend continues, it can pose a grave threat to our cultural identity and Korean language may be relegated to an inferior status." • As you'll recall, in January a Georgia state court refused to bar the word *victim* as prejudicial. But a Wisconsin state court accepted a similar argument and ruled that the people shot and killed or wounded by the defendant could be called *rioters*,

looters, or *arsonists*, but not *victims*. A commentator suggested that the judge was trying to strike a balance because the defendant claimed self-defense, and if the jury believed that the dead and wounded were engaged in rioting, looting, or arson, the jury might be swayed to accept the defense, while calling them *victims* could evoke too much sympathy for them. But he added that not allowing them to be called *victims* was also prejudicial because the criminal labels could sway the jury to decide they were bad people "somehow less deserving of protection from the law." The defendant was ultimately acquitted. • An anti-plagiarism statute that would ban essay mills was proposed in the U.K. Parliament. The *Financial Times* and the *Telegraph* explained that "essay mills" are businesses that advertise or in any way provide paid essay-writing services for high-school and university students, enabling students to cheat because plagiarism-detecting software may fail to detect the ghost-written materials. (The bill passed in 2022.) In Australia, legislation made it a federal offense "to provide or advertise cheating services in higher education." Penalties there included up to two years in jail and a fine up to $100,000. The *Australian Financial Review* reported that a federal regulator for educational quality and standards won an order enabling it to order telecommunications companies to block access to academic-cheating sites and essay mills. The *Straits Times* (Singapore) found that a growing percentage of students are paying services or fellow students to write papers or take exams for them. Most of the cheaters felt no guilt or felt that the cheating made no difference after they'd graduated. Multiple sources reported that the prime minister of Luxembourg was under fire for academic dishonesty after his 56-page master's-level thesis (submitted in 1999) was exposed as containing only 2 pages of original material; the rest was copied off the internet. Plagiarism was also reported in a nonacademic case involving a cookbook. A Michelin-star chef of Singaporean-Chinese descent published a cookbook of recipes and personal stories of her childhood in Singapore and her heritage. But another Singaporean chef identified at least 15 recipes and stories that were copied or paraphrased from her own out-of-print 2012 cookbook. The publisher of the new book quickly withdrew it. • The U.K.'s justice secretary appeared to fumble the meaning of *misogyny* when the BBC asked him about the drive to make misogyny a hate crime. He replied, "So I think insults, and of course misogyny, is absolutely wrong — whether it's a man against a woman or a woman against a man." Jeers were swiftly posted online. An MP said "Happy to lend you a dictionary #misogyny." One biting wit coined a new term: "misterogyny." The secretary tried to clarify: "Just criminalising insulting language — even if it's misogynistic — does not deal with the intimidation, the violence and the much higher level of offence and damage and harm that

we really ought to be laser-like focused in on." But because the secretary has said he's not a feminist and complained about the "raw deal" that men get, a (male) professional writer was having none of it: "I think what we're missing about the . . . #misogyny clip is that while he might well be genuinely ignorant, he's also trying to gaslight women and 'both sides' the issue. It's a proper Trump move — both in its bone-headed stupidity and in its malice."

November

The *New York Times* reported that makers of word games, especially crosswords, are increasingly using slang, vogue words, and colloquialisms collected from internet sources. Some standard English words and definitions are being dropped because of "more sophisticated conversation" around words that constructors might use in puzzles. For instance, *wife* was traditionally used with *husband*, which one puzzle creator said puts "the idea of same-sex spouses outside of the norm of puzzles." • Exceptional spelling mistakes in a texted letter led a forensic linguist to identify a murderer, reported *The Australian*. At first, the linguist doubted that her analysis could support an identification: "People tend to misspell words in pretty much the same way. So [it's] not really a very good way of distinguishing one author from other authors." But the letter's language was truly unusual, "written with visceral hatred." Using 58 pages of text messages sent between the suspect and the victim, some habitual but highly peculiar misspellings emerged. These could be tested against large corpora. Using the Birmingham Blog Corpus, a collection of about 630 million words extracted from the informal language of blogs, the linguist found, for example, that *ather* for *other* appeared just once, *gowing* for *going* seven times, and *meany* for *many* never appeared. Taken collectively, the consistent mistakes positively identified the suspect. "A lot of the time you just have to say to the court, I'm sorry, but it's just not possible to know for certain one way or the other. In this case, I was able to say I was extremely confident." The lesson here? Spell-check might help somone get away with murder. • Murder, she wrote. Or did she? mused the *New York Times* in recounting a long-standing real-life murder mystery in France. In 1991, a socialite was found dead with a nearby message written in her blood that appeared to accuse her gardener. But the message contained a grammatical error and misspelling that raised questions about who actually wrote it. In the original, it was "Omar m'a tuer" — not the correct "m'a tuée." Some have argued that a socialite wouldn't make such an elementary mistake. But investigators found other examples of similar grammatical errors in the victim's writings. And as a relative of the victim observed, "I'm not sure that in the moment

she was writing, she bore in mind all her grammar and French syntax." • The *Times* (London) suggested a curious book about Old English, *The Wordhord*, for the historical-word lover on your Christmas list. Some Anglo-Saxon words are easily recognized in modern English: *wulf* means "wolf," *befer* means "beaver," *butere* is "butter," and *cat* is, well, "cat." Many terms are unfamiliar yet poetic: *wafer-gange* ("weaver-walker") means a spider. A *hreathemus* ("adorned mouse") is a bat. When you drink too much, you might experience *heafod-swimme* ("head swimming"). You might have a *feond-scip* ("fiend-ship") with an enemy. But even if the Anglo-Saxon vocab is a bit esoteric, the rude 10th-century riddles are still sure to amuse: One refers to "a wondrous thing 'erect and tall' but 'shaggy underneath' brings 'joy to women' who 'grab hold of me' but which can also make them cry." The answer — obviously — is an onion. • The *Times* (London) also advised literary detectives of a cash prize offered to anyone who could decode Charles Dickens's antiquated shorthand and messy handwriting. When he died in 1870, he left ten manuscripts written in a modified 18th-century shorthand called brachygraphy, which resembles modern texting in using symbols, abbreviations, and acronyms to convey a message. An expert commented, "It looks simple but really is not. You read back the consonants and fill in the gaps. It is a little like playing Scrabble in your head." Dickens substituted for some symbols, tracking the changes in a notebook. But his poor handwriting carried over into poor shorthand, making it extraordinarily difficult to decipher. So far, only one of his coded works, "Sydney Smith," has been decoded — and only because a source for the story was found. • Writing in the *New York Times*, John McWhorter observed how languages spoken by immigrants begin to change with each generation, to the consternation of the elders. Spanglish, for instance, is Spanish sprinkled with English words and phrases and Spanish words with meanings influenced or altered by English. McWhorter notes that this is a natural process, as when the Normans infused the English language with French and Latin words. Other languages spoken in New York — including Ukrainian, Russian, and Chinese — are also fusing with English to produce generational dialects. McWhorter said, "The myriad ways people talk, and how these ways change, kaleidoscope-style, over time, as often as not while colliding and mixing and working it all out, is part of why people become linguists. It's exhilarating." Look at that sentence again: *ways* is the subject, and the verb, 25 words later, is . . . *is*. Not exhilarating. • Australian schools are reviving phonics for teaching children to read. To avoid pressure that can interfere with skill acquisition, the *Daily Telegraph* (Sydney) reported, students will not be required to reach a certain reading level each year but progress at their own pace. Previously, schools had used

the whole-word approach by which children learn words by sight. Phonics matches the sounds of spoken English with the letter or letters that symbolize the sound. In addition, more emphasis on handwriting will be added to the curriculum. The changes will initially be made to kindergarten through grade two, and then a higher grade will be added each year. • The *Washington Post* reported on John Koenig's *Dictionary of Obscure Sorrows*. The new lexicon is the product of 12 years' work, beginning as a website in 2009, and comprises nearly 300 pages of previously unnamed varieties of melancholy. In fact, you may already have heard one of Koenig's neologisms, *sonder*, defined as "the realization that each random passerby is living a life as vivid and complex as your own." Since that term's coinage in 2012, it has become "the namesake for, among other things, several studio albums, a hospitality company and eateries in California, Wisconsin and Kosovo." Many of the new words are amalgams of phonemes from various European languages, some wholly the products of Koenig's imagination. Others are existing words creatively repurposed, like *idlewild*, the original name of JFK International Airport, which Koenig appropriately defines as "feeling grateful to be stranded in a place where you can't do much of anything." Other entries describe once-rare experiences that have become all but universal since 2020: *kenopsia*, "the eerie, forlorn atmosphere of a place that's usually bustling with people but is now abandoned and quiet," or *solysium*, "a kind of delirium arising from spending too much time by yourself." Koenig writes in his prologue: "Words for obscure emotions remind us we have company in our most private moments."

December

In the midst of a new coronavirus variant, orthoepists agreed that there's no single correct English pronunciation of *omicron*. The *New York Times* offered /OH-muh-kron/ (from *Webster's Dictionary*), /AH-muh-kron/ (heard in America), /OH-mee-kron/ (as Prime Minister Boris Johnson of the U.K. pronounced it), and /OH-my-kron/. The *Oxford English Dictionary* records a variant that sounds like /oh-MIKE-ron/. The *Guardian* (London) noted that *omnicron* has appeared in both speech and writing, and pronunciations with the first syllable OH or AH are followed by /MY-kron/, /MEE-kron/, or even /MIK-ron/. And pronunciations that merge the first two syllables are heard: /OM-i-kron/. The *Herald* (Glasgow) declared that "I think most of us forget how stonkingly weird, random and eccentric English orthography can be." And never mind what the "correct" pronunciation should be: "The disease, after all, does not discriminate." However divided we may be over

pronouncing *omicron*, we can at least be grateful that the WHO sagely skipped the Greek letter *N*, saving us all from confusing discussions of the "new *nu* variant." • The *Times* (London) reported that the Supreme Court of the United Kingdom has decided to make style changes such as replacing Times New Roman with sans-serif Calibri for its published decisions to improve readability and make the Court's rulings more accessible to ordinary citizens. Lawyers were quick to express objections to what they regard a violation of their human "writes." A Queen's Counsel tweeted: "I have always regarded a serif font as easier to read than a sans font." And "a serif font is still regarded as more serious." Another barrister agreed and lodged further objections to the Court's aligning only to the left margin. A few welcomed the changes because they found opinions "much easier to read." One commented, "If you think your font will make your arguments appear serious, you're wrong." • A California appellate court described a petition for rehearing as "nine pages of text that more closely resembled a rant than a petition." The petition repeatedly insinuated that the appellate court's decision was politically motivated, that the court had consciously ignored the appellee's bad actions, and that the judicial system as a whole was unfair. When the lawyer was ordered to explain why he shouldn't be held in contempt, he "'doubled down' on his original position" both in his written response and at the hearing. The court held him in contempt and levied a fine. In lieu of jail time, the court decided to publish an opinion to address the appalling behavior of "a member of the bar who, after 52 years of practice, believes this is legitimate argument. We do not." In holding up the offender as an example to other lawyers who stoop to incivility, the court spoke bluntly: "This kind of over-the-top, anything-goes, devil-take-the-hindmost rhetoric has to stop." • Your handwriting, your message, and where you express it allowed people to analyze who you are, reported *The Press* (Christchurch, New Zealand). Despite a traffic tunnel having razor wire to bar climbers and a roof 12 meters above the ground, a lovestruck person managed to paint above the rim in crude black capitals: "I love u. Will u marry me. . . ." Presumably the writer was a young man because "the stunt sings of male bravado, the oldest story of romantic love, a young man seeking the hand of his beloved by performing a feat of daring." This led *The Press* to ask in return, "Should she accept? Is Mr. Graffito Mr. Right?" It analyzed his form and character, concluding he must have been physically fit and quite brave, though also foolhardy enough to hang head-down 12 meters over a busy road, and a vandal by night, yet also an old-fashioned romantic. His handwriting got top marks, as the letters were uniform and his spelling accurate, if one ignored the phonetic pronouns. He used the full stop correctly for one sentence but omitted the question mark and

added a superfluous ellipsis. "So should she marry him? Yes." • Multiple sources reported on the virulent objections to the addition, in the famous French dictionary *Le Petit Robert*'s online edition, of a gender-neutral pronoun: *iel*, a portmanteau of the masculine *il* ("he") and the feminine *elle* ("she"). The French education minister lashed out, "You must not manipulate the French language, whatever the cause." He blamed American "wokisme." The dictionary responded: "The mission of the *Robert* is to observe the evolution of a French language that is in motion and diverse, and take account of that. To define the words that describe the world is to aid better comprehension of it." A lawmaker disagreed: "These *Robert* lexicographers are introducing a word that barely exists in our country. That is militancy, that is not doing their jobs." • The *Toronto Star* described how an immigration official's typo caused trouble a year after an applicant first applied for permanent residence. He was given forms to file that misspelled his name and was told that the error couldn't be fixed in the computer. After nearly a year of repeatedly asking for it to be corrected and submitting the necessary document for correction, the applicant's permanent-residence card arrived — with his name misspelled. • As another year of the pandemic came to an end, the *New York Times* recorded new pandemic-related terms for weary workers returning to physical workplaces or settling in for the long remote winter and projected the effects on them. *Zoombies* would continue to propagate as overlong virtual meetings become "almost enough to make you wish the office would come back from the dead." Lunch would be *al desko dining* on meals dropped off outside office doors. Some would have to deal with *mask-issist* colleagues who lower their masks to cough. And everyone would remain concerned with *bookcase credibility*, making sure they had impressive tomes in the background for Zoom calls. • Among other solsticetide traditions, December heralds the word-of-the-year season — an attempt by various lexicographical bodies to sum up the year's collective human experience in a single word. This year, Dictionary.com chose a word few people have ever encountered: *allyship*, defined as "the status or role of a person who advocates and actively works for the inclusion of a marginalized or politicized group in all areas of society, not as a member of that group but in solidarity with its struggle and point of view and under its leadership." This choice marks the first time the site's annual pick was a new entry added that same year. Merriam-Webster chose *vaccine*. After choosing *pandemic* in 2020, the publisher said of this year's choice: "For many, the word symbolized a possible return to the lives we led before the pandemic. But it was also at the center of debates about personal choice, political affiliation, professional regulations, school safety, healthcare inequality, and so much more." And though *vaccine* was, of

course, not a new term, the editors did revise the definition to include the new way in which mRNA vaccines trigger the immune system. Among Merriam-Webster's ten also-rans for the annual distinction was *perseverance*, which happened to be Cambridge Dictionary's choice. While that might seem to be a nod to a quality we all cultivated in response to the pandemic and its prolonged exigencies, Cambridge's editors said that it had at least as much to do with NASA's Perseverance Rover, which landed on Mars February 18. "It made sense that lookups of 'perseverance' spiked at this time," said Wendalyn Nichols, the dictionary's publishing manager. "Cambridge Dictionary is the top website in the world for learners of English, and *perseverance* is not a common word for students of English to have in their vocabulary." As the dictionary summed up on its website, "This word captures the undaunted will of people across the world to never give up, despite the many challenges of 2021." Highlighting a wholly unrelated 2021 phenomenon, Collins Dictionary gave the nod to *NFT* ("nonfungible token"). And in a somewhat surprising move, the Oxford Dictionary Department chose the clipped form *vax*. "It goes back at least to the 1980s, but according to our corpus it was rarely used until this year," said Fiona McPherson, a senior editor. According to the *Oxford English Dictionary*, both three- and four-letter spellings are accepted (though the single-*x* spelling is more common). Functioning as both a noun and a verb, as well as an adjective (in such compounds as *anti-vax* and *double-vaxxed*), the word proved to be about as versatile as certain other four-letter words.

> An idealist is one who, on noticing that a rose smells better than a cabbage, concludes that it is also more nourishing.
>
> H.L. Mencken
> *A Little Book in C Major* (1916)



Rakesh Kilaru, Kendall Turner & Sarah L. Nash[†]

THE YEAR IN LAW

2020-2021

NOVEMBER 2020

November 2: Movie star Johnny Depp loses his libel lawsuit against *The Sun*, a British tabloid, for an article calling him a "wife beater" based on his treatment of Amber Heard, his former wife. Judge Andrew Nicol finds that "the great majority of alleged assaults of Ms. Heard by Mr. Depp have been proved to the civil standard."

November 3: Millions of Americans cast their votes for the President of the United States. While no victor is announced on election night, Joe Biden eventually is declared the winner of the election, winning the popular vote by roughly 7 million, but carrying the key states of Arizona, Georgia, and Wisconsin by fewer than 45,000 votes. • The Democratic Party also obtains control of the Senate by securing 50 overall Senate seats. Democrats retain control of the House of Representatives, but lose 13 seats off their previous total. • Oregon votes to decriminalize the possession of all illegal drugs and also legalizes the use of psilocybin (the active ingredient in psychedelic mushrooms) for mental-health treatment. • The U.S. Supreme Court grants review in *Fulton v. City of Philadelphia*, a case involving Catholic Social Services' challenge to a Philadelphia policy prohibiting CSS from participating

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as a foster program contractor because it refuses to place children with same-sex couples.

November 4: Donald Trump's presidential campaign organization files lawsuits in Pennsylvania, Michigan, and Georgia to try to flip the results of the 2020 election.

November 10: The Supreme Court hears oral argument in *California v. Texas*, the third major challenge to the constitutionality of the Affordable Care Act. For the third time (but his first time not as Solicitor General), Donald Verrilli argues in support of the Act.

November 12: The U.S. Court of Appeals for the First Circuit issues its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, upholding Harvard's undergraduate admissions program against a challenge that the school improperly accounted for race in making admissions decisions. • The Office of Professional Responsibility at the U.S. Department of Justice finds that former Secretary of Labor Alex Acosta used poor judgment, but did not commit misconduct, in handling a sexual-abuse investigation involving Jeffrey Epstein. Acosta approved a non-prosecution agreement, and then hid the agreement from Epstein's victims, when serving as U.S. Attorney for the Southern District of Florida.

November 15: Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York invalidates several Trump Administration rules narrowing the Deferred Action for Childhood Arrivals (DACA) program. The court finds that Acting Homeland Security Secretary Chad Wolf, who issued the memorandum narrowing the program, was not legally appointed to his role — the fifth court to so find.

November 17: Judge Robert Drain of the U.S. Bankruptcy Court for the Southern District of New York approves an $8.34 billion settlement between Purdue Pharma LP and the Department of Justice, in which Purdue agrees to plead guilty to several felonies regarding the marketing and distribution of OxyContin. Two dozen states had opposed the settlement.

November 23: Shortly after presiding over the confirmation hearings for Justice Amy Coney Barrett, Senator Dianne Feinstein (D-CA) announces she will step down as the lead Democrat on the Senate Judiciary Committee. Feinstein had faced public criticism for calling the controversial hearings "the best set of hearings that I've participated in."

November 25: Purdue Pharma LP formally pleads guilty to three federal felonies regarding the marketing and distribution of OxyContin. As part of the settlement, the Department of Justice agrees to treat billions of dollars in fines

and penalties as junior debt, effectively devaluing the previously-announced $8.34 billion settlement, but with the stated goal of leaving more money available for states and local governments who have also sued Purdue (see Nov. 17 entry).

November 26: President Trump announces he has pardoned former National Security Adviser Michael Flynn, who had previously pleaded guilty on several occasions to making false statements to the FBI before recanting those statements and having the Department of Justice move to dismiss the indictment against him. • In a 5-4 vote, the Supreme Court blocks New York from imposing strict COVID-19-related limits on attendance at religious services. The decision marks a departure from previous cases that deferred to state authorities in similar situations, with new Justice Amy Coney Barrett casting the deciding swing vote.

November 29: In an interview on Fox News, President Trump criticizes the FBI and Department of Justice for ignoring his claims of mass election fraud in the recent presidential election.

December 2020

December 1: Attorney General William Barr notifies Congress that he previously named John Durham, the U.S. Attorney for the District of Connecticut, as special counsel to investigate the origins of the FBI's 2016 probe into ties between the Trump campaign and Russia as well as Russian interference in the 2016 election. Barr made the appointment on October 19 but claimed the need to delay notice "given the proximity to the presidential election." • The U.S. Women's National Team and the U.S. Soccer Federation agree to a settlement of the working conditions portion of the players' 2019 gender-discrimination lawsuit, permitting the players to appeal the disposition of their pay discrimination claim. As part of the settlement, U.S. Soccer agrees to implement various policies related to travel and accommodations.

December 3: The Civil Rights Division of the Department of Justice sues Facebook Inc. for improperly hiring foreign professionals on H1-B visas for jobs that could have been filled by qualified American workers.

December 4: By a 228-164 vote, the U.S. House of Representatives votes to decriminalize marijuana at the federal level, leaving it to states to determine its legality. The vote is largely along party lines, with five Republicans joining the Democratic majority to pass the bill. • Pat Corcoran, the former manager for Chance the Rapper, sues Chance after being fired in the wake of a disappointing album release and concert tour. Corcoran claims he is owed mil-

lions in management commissions and unreimbursed expenses. The firing follows the release and promotion of "The Big Day," the first-ever official studio album released by Chance (his previous albums were either mixtapes or released on streaming services).

December 6: News breaks that President Biden plans to nominate California Attorney General Xavier Becerra to serve as Secretary of Health and Human Services. Becerra led a coalition of states and Washington DC seeking to defend the Affordable Care Act in the latest challenge to its constitutionality (see Nov. 10 entry).

December 8: Judge Emmet Sullivan of the U.S. District Court for the District of Columbia issues his opinion in *United States v. Flynn*, granting the government's motion to dismiss the indictment against Flynn but noting that the government's handling of the case was highly irregular. The opinion followed months of legal proceedings in which: (1) the government filed a motion to dismiss the indictment after Flynn had twice pleaded guilty; (2) Judge Sullivan appointed an amicus to help him decide whether he had the authority to deny that motion; (3) Flynn filed a mandamus petition seeking to have the U.S. Court of Appeals for the D.C. Circuit order Sullivan to grant the motion; (4) a D.C. Circuit panel granted mandamus; and (5) the en banc D.C. Circuit then denied mandamus, allowing Sullivan to consider the motion to dismiss. The opinion followed President Trump's pardon of Flynn several weeks earlier (see Nov. 26 entry).

December 9: The Federal Trade Commission and 46 states sue Facebook Inc., seeking to unwind its acquisitions of WhatsApp and Instagram, based on claims that the social media company has bought out any competitors that might challenge its monopoly. In public statements following the lawsuit, Facebook officials note that the FTC did not act to stop these acquisitions when reviewing them years earlier. • The Civil Rights Division of the Department of Justice sues the State of Alabama for failing to protect male prisoners from violence and sexual abuse, including assaults by staff. Alabama's prisons have one of the highest homicide rates of any U.S. correctional system.

December 12: The Supreme Court issues a short per curiam order rejecting Texas's effort to void millions of votes cast in the 2020 presidential election in Georgia, Michigan, Pennsylvania, and Wisconsin, on the theory that those states violated their own laws and thus the U.S. Constitution by altering voting procedures shortly before the election. President Trump had tried to intervene in the case. The Court's order states that Texas lacks legal standing to contest the manner in which other states carry out their elections. Justices

Clarence Thomas and Samuel Alito separately note that they believe states are allowed to file such suits, but take no position on the merits.

December 14: In a 4-3 vote, the Wisconsin Supreme Court rejects the Trump campaign's effort to invalidate 220,000 votes in the 2020 Presidential election, including votes cast by people who are "indefinitely confined." The majority opinion, written by Justice Brian Hagedorn — former legal counsel to Republican Governor Scott Walker — calls the confinement challenge "meritless on its face," and rejects other challenges as untimely.

December 16: The Supreme Court grants review in *NCAA v. Alston*, presenting the question whether the NCAA's limits on institutional compensation for student-athletes violate federal antitrust laws. The rulings below granted a limited injunction allowing football and basketball players to receive certain additional education-related benefits, including in-kind items like laptops and musical instruments, and cash payments tied to education. • A coalition of ten states, led by Texas Attorney General Ken Paxton, files a lawsuit against Google, accusing it of enlisting Facebook in a scheme to dominate online advertising. Google's code name for the program is allegedly "Jedi Blue."

December 17: Thirty-eight attorneys general from states, territories, and Washington, DC file an antitrust lawsuit against Google in the U.S. District Court for the District of Columbia, arguing that the company maintains monopoly power over internet searches by precluding customers from using competing search engines and forcing businesses to use its search engine rather than others. • In a 7-2 vote, the Supreme Court denies Danville Christian Academy's request for an exemption from a public-health order closing all K-12 campuses across Kentucky, but notes that the order is about to expire and that Danville can sue again if restrictions persist. Justices Alito and Neil Gorsuch dissent from the order.

December 21: Days before leaving office, Attorney General Barr announces that he will not appoint a special counsel to investigate allegations of criminal conduct by Hunter Biden, or of election fraud in the 2020 presidential election. Barr notes that any investigations into those matters are being conducted professionally and responsibly. • A group of nine states, led by Texas, files a lawsuit seeking to declare the DACA program unlawful. The program has been in litigation for almost a decade, including lawsuits successfully challenging President Trump's efforts to rescind the policy.

December 22: The Department of Justice files a lawsuit against Walmart for allegedly fueling the opioid epidemic by not sufficiently screening prescriptions despite warnings from pharmacists. • Sixteen Republican attorneys general join

an amicus brief supporting the National Rifle Association's lawsuit against New York Attorney General Letitia James, who filed her own lawsuit seeking to have the NRA dissolved. The NRA's lawsuit claims that James's actions are politically motivated and violate the First Amendment. • President Trump issues 15 pardons and five commutations. The pardons include George Papadopoulos, his former campaign adviser who helped trigger Robert Mueller's investigation, as well as four military contractors accused of killing over a dozen Iraqi civilians while working for Blackwater USA.

December 24: President Trump issues 26 more pardons, including ones for his former campaign chairman Paul Manafort, his longtime advisor Robert Stone, and his son-in-law's father Charles Kushner. • Jeffrey Rosen, the former Deputy Attorney General, takes over as Acting Attorney General in the wake of William Barr's departure from the Department of Justice.

December 29: Federal prosecutors announce they will not bring charges against two police officers involved in the shooting of Tamir Rice, a 12-year-old Cleveland boy killed in 2014 while playing with a toy gun. The City of Cleveland had previously agreed to pay $6 million to Rice's family, and one of the officers was fired (though not for the shooting) and the other suspended for ten days. • The Trump campaign announces that it is going to ask the Supreme Court to overturn President-Elect Biden's victory in the State of Wisconsin, claiming that Wisconsin presided over a "failed" election and that the state legislature should independently appoint presidential electors.

December 30: Samuel Little, viewed by some as the most prolific serial killer in U.S. history, dies. Little, 80, had nearly 60 confirmed victims at the time of his death, and had confessed to killing a total of 93 between 1970 and 2005.

December 31: In his year-end report on the federal judiciary, Chief Justice John Roberts chronicles the judiciary's efforts to respond to the COVID-19 pandemic, drawing a parallel to the influenza outbreaks that marked the first Supreme Court Term in 1790. The report also shows a marked drop in district court caseloads, but a relatively stable number of federal appellate filings. • Richard Thornburg, who served as U.S. Attorney General during both the Reagan and George H.W. Bush Administrations — and as Governor of Pennsylvania in the intervening years — dies at 88.

JANUARY 2021

January 6: A mob of rioters protesting Joe Biden's election as President — and Congress's certification thereof — storms the U.S. Capitol, overcoming the minimal police presence. Rioters destroy property, climb the Capitol's

facades, and assault police officers, all while claiming that the election is being stolen from President Trump.

January 7: In the aftermath of the violent attack on the Capitol, Facebook indefinitely blocks President Trump from posting. Facebook CEO Mark Zuckerberg criticizes Trump for "[h]is decision to use his platform to condone rather than condemn the actions of his supporters at the Capitol building" (see preceding entry). • President-elect Biden announces that he will nominate Judge Merrick Garland to serve as Attorney General, Lisa Monaco to serve as Deputy Attorney General, Vanita Gupta to serve as Associate Attorney General, and Kristen Clarke to serve as the head of the Civil Rights Division.

January 8: In further response to the Capitol attack, Google suspends Parler, a right-wing social media network, from its app store. Apple threatens to do the same. • Twitter also permanently bans President Trump's personal account, citing the risk of further incitement of violence (see preceding entry).

January 9: Federal prosecutors unseal charges against several individuals who stormed the Capitol, including a man named Richard "Bigo" Barnett, who bragged in an interview that he got blood on Nancy Pelosi's desk and left her a note saying, "Nancy, Bigo was here, you Bitch" (see preceding entry).

January 11: The Supreme Court rejects requests to expedite consideration of various challenges to the 2020 presidential election — including cases seeking to overturn President-elect Biden's victories in Georgia, Michigan, Pennsylvania, and Wisconsin — ensuring that the Court will not hear the cases before the presidential inauguration on January 20. • Parler sues Amazon for cutting off web services to the company, arguing the decision is motivated by political animus (see Jan. 8 entry) . • Facebook announces it will remove all content mentioning the phrase "stop the steal," a commonly-used phrase by supporters of President Trump's effort to overturn the 2020 presidential election (see Jan. 7 entry).

January 12: Judge Peter A. Cahill in Hennepin County, Minnesota, rules that Derek Chauvin will stand trial alone. Chauvin is one of several officers charged with murder in the killing of George Floyd, who died after officers kneeled on his neck despite Floyd's pleas that he could not breathe.

January 13: For the second time during his presidency, the House votes to impeach President Trump for encouraging a mob to storm the Capitol on January 6. Ten Republicans join the Democratic majority, including Liz Cheney (R-WY), the third-ranking Republican in the House.

January 15: The Supreme Court denies a last-minute appeal by Corey Johnson to stay his execution. Among other claims, Johnson alleged that he has COVID-19 and that the infection could lead to exceptional pain based on the use of pentobarbital in the execution. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissent from the ruling. • The NRA files for bankruptcy in response to a suit by New York Attorney General James seeking to dissolve the organization. The NRA announces it will attempt to restructure itself as a Texas nonprofit (see Dec. 22 entry).

January 17: Phil Spector, a music producer, songwriter, and musician, dies at 81. Spector was famous both for his many hit songs and for his conviction for murdering actress Lana Clarkson at his home in 2003.

January 20: Joe Biden is inaugurated as the 46th President of the United States. • On President Trump's last day in office, the Department of Justice issues a memo seeking to curtail the impact of the Supreme Court's ruling that Title VII prohibits discrimination against LGBT people. • President Trump also issues 143 pardons and commutations, including ones for his former chief strategist, Steve Bannon, and rapper Lil Wayne. • Tyson Foods Inc. announces it will pay $221.5 million to settle price-fixing claims in the chicken industry.

January 21: The White House confirms that President Biden will retain Christopher Wray as the Director of the FBI.

January 22: The Senate confirms Lloyd Austin as Secretary of Defense. Austin is a retired Army general who is the first-ever Black man to occupy that post. The vote is 93-2 in favor of confirmation. • The State of Texas sues the Biden Administration to try to enjoin the Administration's decision to pause most deportations for 100 days.

January 25: The Supreme Court orders the dismissal of a pair of cases alleging that President Trump was violating the Constitution's emoluments clauses by enriching himself while in office. • Dominion Voting Systems sues Rudy Giuliani for defamation based on his claims that Dominion rigged the 2020 election for President Biden. The complaint, filed in the U.S. District Court for the District of Columbia, seeks over $1.3 billion in damages.

January 26: In closed-door testimony at a Congressional hearing, U.S. Capitol Police Chief Yogananda D. Pittman states that her organization knew the January 6 Capitol rally had a "strong potential for violence," but nevertheless failed to sufficiently prepare (see Jan. 6 entry).

January 27: Ty Garbin, one of six men charged with a plot to kidnap Michigan governor Gretchen Whitmer, pleads guilty to conspiracy. Among the details

in the plea agreement is that Garbin and five others built a "shoot house" to resemble Whitmer's home to prepare to assault it with firearms.

FEBRUARY 2021

February 1: The Department of Justice asks the Supreme Court to cancel oral arguments in cases challenging former President Trump's effort to build a wall along the southern U.S. border and the "Remain in Mexico" asylum program, in light of first-day policies announced by the Biden Administration.

February 3: Bayer AG announces a $2 billion proposal to try to resolve litigation over whether its popular herbicide Roundup causes Non-Hodgkin's Lymphoma. The company had previously paid a reported $9.6 billion to settle existing Roundup cases and attempted to resolve future claims by establishing a panel of independent experts whose conclusions would bind future litigants. • The Supreme Court issues its decision in *Germany v. Philipp*, holding that Holocaust victims and their descendants cannot seek compensation in U.S. courts for property seized by Nazi Germany and Hungary, because international law does not support claims by citizens against their own government. Chief Justice Roberts writes the Court's unanimous opinion. • Consulting company McKinsey & Co. announces a $573 million settlement with 47 states and the District of Columbia over its advice to Purdue Pharma LP and other drug manufacturers regarding opioid sales and marketing. It is the first nationwide settlement in the sprawling litigation over the opioid epidemic.

February 4: Smartmatic USA Corp, a manufacturer of voting machines, sues Fox News, Lou Dobbs, Maria Bartiromo, and Jeanine Pirro (among others), arguing they all made misleading statements about the company's products in the aftermath of the 2020 presidential election.

February 5: Fox announces it will cancel "Lou Dobbs Tonight" after the host is named as one of several defendants in a $2.7 billion defamation lawsuit by Smartmatic USA Corp. (see preceding entry).

February 9: The second impeachment trial of former President Trump begins in the Senate. Much of the day's proceedings focus on the question whether a former President can be tried by the Senate, and in a 56-44 vote, the Senate votes that a President can so be tried.

February 10: Chinese corporation Huawei Technologies Co. files a challenge to its designation by the Federal Communication Commission (FCC) as a national security threat, which jeopardizes the company's ability to do business in the United States. • The Department of Justice sends a letter to the Supreme Court announcing a change of position in the latest challenge to the

constitutionality of the Affordable Care Act. Unsurprisingly, the new Administration takes the position that the law as a whole is constitutional (see Nov. 7 entry). • The second day of former President Trump's impeachment trial involves testimony about the events of January 6, as well as evidence allegedly showing that President Trump planned the attack over the preceding weeks.

February 11: The third day of former President Trump's impeachment trial focuses on commentary by the rioters themselves, who cited his support as a reason for the attack. The Democratic managers also attempt to make the case that former President Trump should be precluded from holding office again.

February 12: Lou Dobbs, joined by Maria Bartiromo and Jeanine Pirro, file a motion to dismiss Smartmatic USA's defamation lawsuit, arguing they were simply relaying newsworthy statements by President Trump — an activity claimed to be protected by the First Amendment (see Feb. 5 entry). • The fourth day of former President Trump's impeachment trial involves the defense presentation, which involves claims that the impeachment trial is a "witch hunt," that President Trump's use of terms like "fight" were standard political discourse, and that he disdains political violence.

February 13: The Senate hears closing arguments in the impeachment trial of former President Trump, and shortly thereafter votes to acquit. The final vote is 57 guilty, 43 not guilty — ten votes short of the 67 required to convict.

February 17: Epic Games Inc., the developer of the popular game "Fortnite," sues Apple in the European Union — the latest front in its legal fight against the app store policies of Apple and Google. • As part of its efforts to combat COVID-19 fraud, the Department of Homeland Security announces that federal agents have seized approximately 10 million counterfeit N95 masks made in China.

February 19: Gordon Caplan, the former co-chair of Willkie Farr & Gallagher LLP, avoids disbarment following his conviction for paying $75,000 to rig his daughter's college-admissions test score. Caplan instead receives a two-year license suspension.

February 22: Dominion Voting Systems sues Mike Lindell, CEO of MyPillow, for defamation in the U.S. District Court for the District of Columbia. Dominion alleges that Lindell, a prominent supporter of former President Trump, made false claims about the integrity of Dominion's voting machines (see Jan. 25 entry). • In unsigned orders, the Supreme Court rejects several challenges by former President Trump. The Court denies review of appeals seeking to challenge election procedures in states President Biden won, as well as Trump's latest effort to preclude the Manhattan District Attorney from enforcing a subpoena for his tax returns and financial records. • At his

confirmation hearing to serve as Attorney General, Judge Garland states that his first priority will be to pursue the investigation of the January 6 Capitol riots (see Jan. 6 entry).

February 23: Emma Coronel, the wife of imprisoned drug kingpin Joaquin "El Chapo" Guzman, is arrested for allegedly helping her husband both to run his drug empire and to attempt to escape from prison in Mexico.

February 24: A judge in France files preliminary charges of rape and sexual assault against actor Gerard Depardieu. The ruling amounts to a finding that there is enough evidence to continue to investigate Depardieu for an alleged rape in 2018. • Judge Drew B. Tipton of the U.S. District Court for the Southern District of Texas enters a preliminary injunction against the Biden Administration's 100-day pause on deportations, concluding that it amounts to a "pause on government functions" rather than a lawful exercise of prosecutorial discretion.

February 25: ByteDance Ltd. agrees to pay $92 million to settle a class action lawsuit alleging it unlawfully harvested personal information of minors from the popular video sharing app TikTok. • The House of Representatives passes the Equality Act by a 224-206 vote. The bill formally bans discrimination on the basis of sexual orientation or gender identity. Three Republicans support the bill.

February 28: New York Governor Andrew Cuomo apologizes for some interactions with staffers, saying that he acknowledges "some of the things I said have been misinterpreted as an unwanted flirtation." The statement follows the second allegation of sexual harassment from one of his former aides.

March 2021

March 1: Brazos Electric Power Cooperative, the largest power company in Texas, files for bankruptcy following an historic cold snap that caused week-long blackouts and left at least 4.3 million people without power across the state.

March 8: Twelve states file a lawsuit against President Biden alleging that the executive branch attempted to assume legislative power when it issued an executive order defining the social costs of greenhouse gases.

March 11: President Biden signs the American Rescue Plan Act of 2021 (ARPA). Providing for approximately $1.9 trillion in federal spending, ARPA contains a number of economic assistance programs, including continued direct payments to Americans, extended jobless benefits, funding for coronavirus testing and vaccine distribution, and infusions of cash to state and local

governments. It is one of the largest economic stimulus plans in U.S. history.

March 16: Utah signs HB 308 into law, which blocks the government from requiring COVID-19 vaccination.

March 17: Twenty-one states file a lawsuit against President Biden and his administration alleging that the permit revocation of the Keystone XL pipeline was a regulation of interstate and international commerce and, therefore, subject to congressional, not executive, authority.

March 18: A state court judge rules that former Michigan Governor Rick Snyder will face a criminal trial in Flint, Michigan, where his decisions allegedly contributed to the lead exposure of approximately 100,000 residents.

March 19: Spain legalizes euthanasia for persons with serious and incurable or debilitating diseases.

March 24: Virginia passes a law abolishing capital punishment, making it the 23rd state to do so and the first southern state to do so in U.S. history. The bill reduces the commonwealth's two death sentences to life without parole.

March 25: Georgia enacts SB 202, which criminalizes passing out water to voters waiting in line at the polls. The law also grants the State Board of Elections new powers to remove professional election officials and take over election administration in specific jurisdictions.

March 26: Dominion Voting Systems files a $1.6 billion defamation lawsuit against Fox News, alleging that Fox, in an effort to boost faltering ratings, falsely claimed that Dominion had rigged the 2020 election (see Jan. 25 and Feb. 22 entries).

March 31: New York legalizes recreational use of marijuana, making it the 15th state to fully legalize the drug.

APRIL 2021

April 1: The Supreme Court issues its opinion in *Florida v. Georgia*, dismissing Florida's claim that Georgia was unreasonably consuming water for irrigation, agriculture and development. According to the Court's unanimous opinion, "Considering the record as a whole, Florida has not shown that it is 'highly probable' that Georgia's alleged overconsumption played more than a trivial role in the collapse of Florida's oyster fisheries." • The Supreme Court also issues its unanimous decision in *Facebook, Inc. v. Duguid*, holding that text messages are distinct from phone calls and thus Facebook's texts did not violate the Telephone Consumer Protection Act of 1991. • In an unexpected per curiam opinion, the Supreme Court rules, 9-0, that regardless what the

Constitution permits as to the use of race in college admissions, it affirmatively requires "significant" representation of social media influencers in each incoming class. The Court expresses its expectation that such policies will not be needed in 25 years, whether because social media becomes ubiquitous or its increasing frequency of use prompts the end of the world. In response, the CEO of Twitter announces a "student rate" of $5/month to get a verified blue check mark.[1]

April 5: In *Biden v. Knight First Amendment Institute*, the Supreme Court dismisses as moot claims against former President Donald Trump for blocking critics from following his Twitter account. Justice Thomas concurs, writing that the Court "will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms." • The National Rifle Association attempts to intervene in lawsuits filed in a California federal court alleging that environmental groups failed to show harm from the Trump Administration's decision to strip endangered species protections from gray wolves.

April 6: Arkansas passes a law banning gender-affirming treatments and surgery for transgender youth, after lawmakers override Governor Asa Hutchinson's veto.

April 7: A lawsuit is filed in California federal court alleging that the U.S. Environmental Protection Agency (EPA) is failing to protect people and the environment from ozone air pollution generated by oil and natural gas industries in Los Angeles and Chicago, among other localities.

April 8: New Mexico enacts a new requirement for employers to provide workers with paid sick leave, with the mandate set to go into effect in July 2022.

April 9: President Biden issues an executive order forming the Presidential Commission on the Supreme Court of the United States, a bipartisan group of experts on the Court and the Court reform debate. • Amazon workers in Bessemer, Alabama vote against unionization. Ten days later the union leading the recognition campaign challenges the election results, claiming that Amazon intimidated workers leading up to the election.

April 10: Maryland lawmakers override Governor Larry Hogan's veto of the Juvenile Restoration Act, making Maryland the 25th state to eliminate juvenile life without parole as a sentencing option.

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[1] April Fools!

April 11: Kentucky enacts a new law restricting no-knock warrants, approximately one year after Breonna Taylor was fatally shot in her Louisville, Kentucky apartment. Several of Taylor's family members stand behind Governor Andy Beshear during the bill signing ceremony.

April 21: Oklahoma passes HB 1674, establishing that a driver who "unintentionally" causes injury or death by hitting a protester with their car will not be criminally or civilly liable if they reasonably believe they are "fleeing from a riot."

April 20: Former Minneapolis police officer Derek Chauvin is found guilty of murder and manslaughter in the death of George Floyd (see Jan. 12 entry). • Florida passes a new law, HB 1, defining a "riot" as when someone "willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in injury to another person; damage to property; or imminent danger of injury to another person or damage to property." Governor Ron DeSantis celebrates the law as the broadest and toughest anti-riot bill in the country and promises to have "a ton of bricks rain down on" those who violate it.

April 22: The Supreme Court issues its decision in *Jones v. Mississippi*, holding that judges do not have to uphold the prior standard — showing that a young person is "permanently incorrigible" — before sentencing them to life in prison. The Court's decision is 6-3 and reverses a trend towards prison reform.

April 22-23: The United States hosts a virtual climate summit and President Biden pledges to halve emissions of greenhouse gases by 2030 and double climate aid to developing nations. Attendees of the virtual event include corporate executives, union leaders, Pope Francis, and Bill Gates.

April 27: President Biden issues an executive order announcing he will require federal contractors to pay workers at least a $15 minimum wage in the near term.

April 29: Montana approves a bill to bar private and public employers from requiring workers to be vaccinated against COVID-19 as a condition of employment.

April 30: Florida enacts SB 90, which makes several changes to Florida election law, including making voter registration more difficult, modifying rules for observers in ways that could disrupt election administration, and restricting the ability to provide snacks and water to voters waiting in line.

MAY 2021

May 14: President Biden rescinds several executive actions put in place by his predecessor, including one targeting social media companies that former President Trump ordered after Twitter fact-checked his tweets.

May 17: The Supreme Court grants certiorari in *Dobbs v. Jackson Women's Health Organization*, a case involving Mississippi's ban on abortions after the 15th week of pregnancy. The grant foreshadowed a threat to the Court's 1973 decision in *Roe v. Wade*.

May 18: During a Senate committee hearing, Republicans raise concerns about paying for a national paid leave mandate, while Democrats predict it would boost the economy and women's workforce participation.

May 19: Tennessee passes a law requiring businesses to post signs stating: "This facility maintains a policy of allowing the use of restrooms by either biological sex, regardless of the designation on the restroom." • SB 8 (aka the "Heartbeat Act") is signed into law by Texas Governor Greg Abbott. The law bans abortions once cardiac activity has been detected and makes no exceptions for rape or incest. The law's effective date is September 1, 2021.

May 20: Iowa passes a law that forbids public and private schools from requiring face coverings for students, staff or visitors.

May 24: The Supreme Court issues its opinion in *Guam v. United States*, holding that Guam is free to pursue claims against the U.S. Navy for environmental damage due to the Navy's alleged dumping of hazardous waste.

May 25: Amy Cooper, the woman at the center of the viral confrontation between Cooper and a Black birdwatcher in Central Park, files a lawsuit against her former employer alleging she was wrongfully terminated following the incident.

May 26: Kim Kardashian West is sued in Los Angeles Superior Court by seven workers accusing her of wage theft, retaliation, and violation of child labor laws.

May 28: The Equal Employment Opportunity Commission (EEOC) announces that employers may offer bonuses and other incentives to encourage employees to get the COVID-19 vaccine.

JUNE 2021

June 1: A California judge orders Bank of America to change its practices after thousands of unemployed California customers receiving public benefits

complain that when their prepaid debit cards were hacked, the bank made matters worse by treating them like "criminals."

June 2: The Vatican updates the criminal section of its Code of Canon Law, changing Catholic Church law to explicitly criminalize the sexual abuse of adults by priests who abuse their authority. • In an attempt to curb unrealistic beauty standards, Norway passes new regulations requiring influencers and advertisers to label retouched photos on social media.

June 7: The Supreme Court issues its unanimous decision in *Sanchez v. Mayorkas*, holding that immigrants who enter the country illegally cannot obtain green cards, even if they already hold temporary protected status. • Texas forbids businesses from requiring customers to produce a COVID-19 vaccine passport proving they have been vaccinated.

June 8: A Simmons University graduate student who sued her professor after a video of her using the bathroom during a Zoom class went viral agrees to drop the case. • The New Jersey Supreme Court rules that the state's Attorney General had the authority to adopt two directives requiring the release of the names of law enforcement officers who receives major discipline for their own misconduct.

June 9: El Salvador becomes first country to accept Bitcoin as national currency.

June 12: Missouri passes the "Second Amendment Preservation Act," which provides that law enforcement officers will face fines if they infringe citizens' Second Amendment rights. The law fines law enforcement agencies $50,000 every time an officer deprives a citizen of the right to bear arms.

June 16: Texas passes the "Star Spangled Banner Protection Act," which requires professional sports teams with contracts with the State of Texas to play the national anthem before every game.

June 17: The Supreme Court decides *Nestlé USA, Inc. v. Doe*, holding 8-1 that the Alien Tort Statute — a law giving federal courts jurisdiction to hear suits filed by non-U.S. citizens for torts committed in violation of international law — does not confer jurisdiction over claims against U.S. corporations stemming from overseas injury if the only domestic conduct consists of "general corporate activity." The case was brought by individuals in Mali who alleged they had been trafficked into slavery as children to work on cocoa farms. Justice Alito dissents. • In *California v. Texas*, the Supreme Court rejects a challenge to the Affordable Care Act, preserving the healthcare law for the third time since its 2010 enactment. The Court rules 7-2 that the states and individuals bringing the case lacked the authority to do so (see Nov. 10 and Feb. 10 entries).

June 18: Maine lawmakers approve a bill similar to the controversial California labor law known as the Private Attorneys General Act. The bill is vetoed by Governor Janet Mills less than a month later (July 12). The bill would have allowed an allegedly aggrieved employee to file a private lawsuit for alleged employment violations on behalf of the Maine Attorney General.

June 21: The Supreme Court issues its opinion in *National Collegiate Athletic Association v. Alston*, unanimously holding that the NCAA may not prohibit student athletes from being paid moderate education-related expenses (see Dec 16 entry). • A consumer advocacy group files suit against Smithfield Foods Inc. for allegedly fueling fears of a meat shortage during the pandemic to boost demand and prices for its products.

June 23: The Supreme Court issues its opinion in *Mahanoy Area School District v. B.L.*, holding that a public school violated a student's First Amendment rights when it suspended her from the cheerleading team after she posted a Snapchat criticizing her coaches' decision not to add her to the team's varsity squad. "Sometimes it is necessary to protect the superfluous in order to preserve the necessary," writes the Court. The decision is 8-1, with Justice Thomas dissenting. • A new Connecticut law requires employers to provide workers with two hours of unpaid time off to vote.

June 24: The Supreme Court issues its decision in *Cedar Point Nursery v. Hassid*, holding, by a 6-3 vote, unconstitutional a California regulation that allowed unions to recruit, protest, and organize on farm property. • An appeals court suspends Rudy Giuliani from practicing law in New York due to false statements he made while trying to overturn former President Trump's loss in the 2020 presidential election.

June 28: Judge James Boasberg of the U.S. District Court for the District of Columbia dismisses antitrust suits against Facebook by the FTC and several state attorneys general. Judge Boasberg finds that the FTC failed to explain what social networking is or how it determined that Facebook monopolizes that market. Boasberg allows the FTC to re-plead its case, but dismisses outright the claims by state attorneys general (see Dec. 9 entry).

June 29: New Mexico legalizes recreational marijuana.

June 30: Bill Cosby's sexual assault conviction is overturned on due process grounds by the Supreme Court of Pennsylvania and he is released from prison after serving three years of a three-to-ten-year sentence.

JULY 2021

July 1: The Supreme Court releases its last two opinions from October Term 2020, *Brnovich v. Democratic National Committee* and *Americans for Prosperity Foundation v. Bonta*. This is the first time in 25 years that the Court has issued a merits opinion in July; the last time was the 1996 decision *Winstar v. United States*. In *Brnovich*, the Court votes 6-3 to uphold Arizona's voting law. In *Americans for Prosperity*, the Court votes 5-4 to strike down California's donor-disclosure rule. • The Department of Justice issues a moratorium on scheduling federal executions. Attorney General Garland explains that "serious concerns have been raised about the continued use of the death penalty across the country, including arbitrariness in its application, disparate impact on people of color, and the troubling number of exonerations in capital and other serious cases." • The Anti-Police-Terror Project uploads a video to YouTube showing an Oakland California police officer playing a Taylor Swift song on his phone in a bid to prevent activists who were filming him from uploading the video to YouTube. The video platform regularly removes videos that break music copyright rules.

July 2: Boy Scouts of America reaches a $850 million settlement with more than 60,000 men who sued the institution for sexual abuse.

July 7: More than 30 states sue Google for allegedly engaging in anticompetitive practices in the Google Play Store.

July 8: Washington, DC suspends Rudy Giuliani's law license, four weeks after New York took a similar action against him.

July 19: The Supreme Court issues an order ending its COVID-era automatic extensions of time to file certain documents, and its suspension of its usual requirement to file hard-copy versions of most documents. • Paul Hodgkins, a Florida crane operator who walked onto the Senate floor during the January 6 attack on the U.S. Capitol, is sentenced to eight months in federal prison, followed by two years of supervised release. His sentencing is the first felony case stemming from the January 6 attack. • President Biden transfers a detainee out of Guantánamo for the first time in his administration.

July 21: Harvey Weinstein pleads not guilty to rape and sexual assault charges in Los Angeles county court. He is already serving a 23-year prison sentence for rape and sexual abuse in New York. • A federal judge temporarily prevents Arkansas's ban on gender-confirming treatments for transgender youth from going into effect.

July 22: Mississippi files its opening brief in the Supreme Court in *Dobbs v. Jackson Women's Health Organization*. In it, the state tells the Court that *Roe v.*

Wade was "egregiously wrong" and should be overturned, allowing Mississippi's ban on abortion at 15 weeks to go into effect (see May 17 entry).

July 27: Britney Spears's lawyer files to have her father removed from controlling her finances. • The House select committee investigating the January 6 attack at the Capitol holds its first hearing. Members of the Capitol Police and DC's Metropolitan Police Department testify.

August 2021

August 5: Mexico sues U.S. gun manufacturers, alleging that their negligent and illegal commercial practices contribute to and facilitate the trafficking of guns to Mexico. • Plaintiffs opposed to the expansion of an oil pipeline across northern Minnesota file a complaint in tribal court seeking to stop the state from allowing the pipeline operator to use five billion gallons of water for its construction.

August 8: Nike announces that it has settled its trademark-infringement lawsuit against a Brooklyn company that made "Satan Shoes" in collaboration with the rapper Lil Nas X. The shoes were black and red, devil-themed, and sold out at $1,018 a pair. They purportedly contained a drop of human blood in the midsole and only 666 pairs were made.

August 9: Florida Governor Ron DeSantis, says the state's Board of Education may withhold pay from school leaders who implement mask mandates for students.

August 11: President Biden announces he is nominating Elizabeth Prelogar to serve as the U.S. Solicitor General. • Biden nominates Damian Williams to lead the U.S. Attorney's Office for the Southern District of New York. Upon confirmation, Williams will become the first Black man to lead the prestigious office.

August 12: Justice Barrett, who is Circuit Justice for the Seventh Circuit and therefore responsible in the first instance for dealing with emergency motions from Indiana, denies without comment a request from a group of Indiana University students to block the school's requirement that students be vaccinated against the COVID-19 virus in *Klaassen v. Trustees of Indiana University*. • In *Chrysafis v. Marks*, a divided Supreme Court grants a request from a group of New York landlords to lift part of a state moratorium on residential evictions put in place at the beginning of the COVID-19 pandemic.

August 18: R. Kelly's federal trial for sexual exploitation of a child, bribery, kidnapping, forced labor, and sexual trafficking across state lines begins.

August 20: An Alameda County, California judge strikes down Proposition 22

— the state's ballot measure that exempted Uber and other companies from a state law requiring that their drivers be classified as employees eligible for benefits and job protections. Uber, Lyft, and other app-based services had spent $200 million in their campaign for passage of Proposition 22, making it the most expensive ballot measure in California's history.

August 24: The Supreme Court refuses to block a lower-court order requiring the Biden Administration to reinstate the Trump Administration's "remain in Mexico" policy. Justices Breyer, Sotomayor, and Kagan dissent, indicating they would have granted the government's request and put the district court's order on hold. • New York Governor Andrew Cuomo steps down, and Lieutenant Governor Kathy Hochul assumes the top state post, becoming the state's first woman chief executive (see Feb. 28 entry).

August 25: The cover of a 1991 Nirvana album, *Nevermind*, depicts a four-month-old naked baby in a swimming pool. That baby, now a 30-year-old man, sues Nirvana for child exploitation and pornography.

August 26: The Supreme Court blocks the Biden Administration from enforcing the latest federal moratorium on evictions, imposed because of the COVID-19 pandemic. Justices Breyer, Sotomayor, and Kagan dissent from the unsigned, eight-page opinion.

August 30: The FBI reports that there were 7,759 reported hate crimes in the United States in 2020 — the most in 12 years.

August 31: The Supreme Court of Virginia upholds a lower-court ruling that ordered reinstatement of a northern Virginia gym teacher who refused to refer to transgender students by their pronouns, claiming that his religious beliefs precluded him from doing so. • Jury selection begins in the criminal fraud trial of Elizabeth Holmes. Federal prosecutors charged Holmes and her former business partner and ex-boyfriend, Ramesh "Sunny" Balwani, with defrauding investors and patients of their blood-testing company Theranos.

SEPTEMBER 2021

September 1: Roughly 24 hours after a Texas law that bans abortion starting around six weeks into a pregnancy goes into effect, the Supreme Court rejects a request to block enforcement of the law. The Court's ruling in the case, *Whole Woman's Health v. Jackson*, is 5-4, with Chief Justice Roberts joining Justices Breyer, Sotomayor, and Kagan in dissent.

September 3: Jacob Chansley, the "QAnon Shaman," pleads guilty to felony charges in connection with his participation in the January 6 attack on the Capitol.

September 7: Mexico's Supreme Court rules that it is unconstitutional to punish abortion as a crime.

September 8: The Supreme Court agrees to postpone the execution of John Ramirez, a Texas state prisoner who was sentenced to death for the murder of a convenience-store clerk. Ramirez had asked to have his pastor put his hands on Ramirez's body and pray aloud during the execution, and Texas refused to grant that request. Ramirez then sought relief in federal court, arguing (as he ultimately did before the Supreme Court) that denying his request would violate his constitutional rights and a federal law guaranteeing religious rights for inmates. • The Supreme Court announces it will return to in-person oral arguments for the October 2021 Term. The Court also announces that arguments will remain closed to the public, and that live audio will continue to be available via its website. • Virginia removes a 12-ton statute of Confederate General Robert E. Lee from display in the state's capital city of Richmond.

September 10: A woman who claims to have been sexually assaulted by the Prince Andrew serves him with legal papers in a U.S. civil suit.

September 15: The U.S. Senate holds a hearing on the FBI's investigation of Larry Nassar, a former Olympics team doctor convicted of multiple cases of sexual assault. Gymnasts testify that the FBI repeatedly failed to protect them from Nassar.

September 16: The International Criminal Court authorizes an investigation into Philippine President Rodrigo Duerte, whose anti-drug war is alleged to be a cover for his government to murder thousands of civilians.

September 21: The Supreme Court announces that the fall's in-person oral arguments — the return of which the Court announced on September 8 — will follow a different format than previous in-person oral arguments. In addition to the customary 30-minute free-for-all, the Court will leave time at the end of the 30 minutes for each Justice to ask questions in order of seniority. The ordered questioning was adopted for virtual arguments during the pandemic. • Dr. Alan Braid — a doctor in San Antonio, Texas, who said he performed abortions in deliberate defiance of a new Texas law banning abortion at the sixth week of pregnancy — is sued by two people in Texas state court.

September 23: A grand jury returns an indictment for a former Louisiana police trooper who beat a Black motorist 18 times with a flashlight. The indictment charges the trooper with one count of deprivation of rights under color of law.

September 24: The Kunsten Museum of Modern Art opens its exhibition, *Work It Out*, for which the artist Jens Haaning agreed to provide two works in exchange for $84,000. At the deadline for his submissions, he submitted two blank canvases, titled "Take the Money and Run." He conceded it was a breach of contract, but claimed that "breach of contract is part of the work" and the "work is that I have taken their money."

September 27: The Supreme Court holds its annual "long conference," during which it considers whether to grant review in over a thousand cases. This conference marks the unofficial end of the Court's summer recess. Cases scheduled to be considered at the long conference generally have the lowest chances of obtaining review by the Court. • After a seven-week trial, a jury finds R. Kelly guilty of multiple offenses — including sexual exploitation of a child, bribery, racketeering, and sex trafficking — involving five victims (see Aug. 18 entry). • John Hinckley, who shot President Ronald Reagan in 1981, wins unconditional release. A jury found Hinckley not guilty by reason of insanity in 1982, and he was committed to hospital care for more than three decades.

September 28: The Supreme Court refuses to block the execution of Rick Rhoades, a Texas inmate who was sentenced to death for stabbing two brothers to death in 1991. Shortly after the Court hands down its one-sentence ruling with no dissents, Texas executes Rhoades by lethal injection. • A Maryland judge sentences the gunman who killed five people in the *Capital Gazette* newsroom in 2018 to five life sentences without parole, along with other prison time. • The game maker Activision Blizzard — which makes popular games such as *Call of Duty*, *World of Warcraft*, and *Candy Crush* — reaches an $18 million settlement with the EEOC over allegations by female employees at the company of sexual harassment and discrimination.

September 29: The Senate Judiciary Committee holds a hearing on the Supreme Court's "shadow docket." This colloquial term is used to describe the Court's proceedings that occur outside its typical process for merits cases. The typical process is for a party to seek the Court's review after a final decision from a federal court of appeals or a state court of last resort; once the Court agrees to hear the case, the parties file lengthy briefs and present oral argument. Cases in the "shadow docket" come before the Court in an emergency posture — such as on a motion for a preliminary injunction. These cases are typically decided without full briefing or oral argument, and often result in short, unsigned orders from the Court.

September 30: Justice Alito gives a talk at the University of Notre Dame called "The Emergency Docket." In it, he criticizes the term "the shadow

docket" for giving a "sinister" cast for what he views as a standard part of the Supreme Court's process. • A judge grants Britney Spears's request to remove her father as her conservator. • After serving 15 years in prison for the fire-related deaths of five children in suburban Detroit, Juwan Deering is released and all charges against him are dismissed. Michigan state prosecutors admitted that they had not disclosed evidence favorable to the defense and there was insufficient evidence to tie Deering to the fire.

October 2021

October 1: Justice Sotomayor turns down a request from some public-school employees to block New York City's mandate that all such employees be vaccinated. Sotomayor does not call for a response from the City or refer the case to the full Court before denying the request. • The Supreme Court holds an investiture ceremony for Justice Barrett. Although Barrett had been sworn in almost a year earlier, the investiture was postponed because of the pandemic. Justice Brett Kavanaugh is unable to attend the investiture because he tested positive for COVID-19.

October 4: The Supreme Court hears arguments in *Mississippi v. Tennessee* and *Wooden v. United States* on the first day of its new Term.

October 5: The Supreme Court refuses to block the execution of Ernest Johnson, a Missouri man who was convicted of killing three people in 1994. His attorneys had long argued that Johnson was intellectually disabled and that executing him was unconstitutional under the Supreme Court's 2002 ruling in *Atkins v. Virginia*. Shortly after the Court issued its two-sentence order declining to consider Johnson's claims, Missouri executes Johnson by lethal injection.

October 13: The Supreme Court hears oral argument in *United States v. Tsarnaev*, a case about the death-penalty verdict for one of the Boston Marathon bombers. After a federal court of appeals overturned Tsarnaev's death sentence, the Trump Administration asked the Supreme Court to hear the case. The Biden Administration continued to pursue it, even though the Biden Administration said it would work to abolish federal executions. • The estate of Henrietta Lacks sues Thermo Fisher Scientific, which sells a commercial line of tissue developed from Lacks's cancer cells in 1951. The suit accuses the company of unjust enrichment because the company continued to profit from the tissue, even after learning that Lacks never gave her permission for her cells to be taken or used.

October 16: The Department of Justice says it will ask the Supreme Court to bar enforcement of Texas's ban on abortion starting at the sixth week of pregnancy. The Department sued Texas over the law, SB8, in September (see May 19 entry). • More than a dozen women sue Liberty University, claiming that its code of conduct — which allegedly emphasizes sexual purity and punishes women for reporting sexual violence — put them at risk for being victims of sexual offenses.

October 18: Former President Trump sues the National Archives and the House select committee investigating the January 6 attack on the Capitol to try to stop documents related to the attack from being turned over to the committee. • The Supreme Court rules in favor of police officers in *Rivas-Villegas v. Cortesluna* and *City of Tahlequah, Oklahoma v. Bond*, two cases involving qualified immunity, a legal doctrine that protects government officials accused of violating constitutional rights.

October 19: Justice Breyer rebuffs a request from Maine healthcare workers to block the state's vaccine mandate in light of their religious objections. Breyer did not ask for a response to the workers' request or refer it to the full Court. • The House committee investigating the January 6 attack on the Capitol unanimously approves a criminal contempt report against Steve Bannon, for defying a subpoena from the committee.

October 20: Nikolas Cruz pleads guilty to killing 17 people in 2018 at Marjory Stoneman Douglas High School in Parkland, Florida. • A group of educators and civil rights groups file a legal challenge to Oklahoma House Bill 1775, a law limiting public-school teaching about race and gender.

October 21: The Supreme Court declines to halt the execution of Willie Smith III, an Alabama prisoner convicted of a 1991 kidnapping and murder. He had argued that Alabama prison officials were depriving him of any meaningful choice in his method of execution. After the Court denies review of Smith's case, Alabama executes him by lethal injection. • On a film set near Santa Fe, New Mexico, Alec Baldwin fires a prop gun that was loaded with live ammunition, killing cinematographer Halyna Hutchins.

October 22: The Supreme Court schedules argument for November 1 in two cases challenging the Texas law that bans abortion after the sixth week of pregnancy. This accelerates the usual review process. But the Court leaves the ban in place pending argument, over a dissent by Justice Sotomayor.

October 25: Jury selection begins in the civil trial against two defendants involved in the deadly Unite the Right rally in Charlottesville, Virginia in the summer of 2017. • Federal prosecutors charge a Georgia man with fraud for allegedly spending $57,789 in coronavirus relief aid on a Pokémon card.

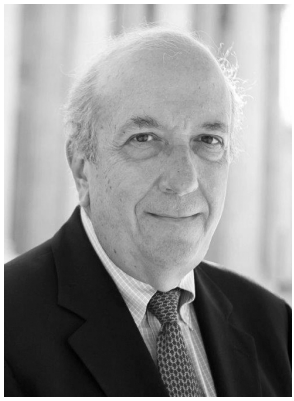
• Amazon warehouse workers in New York take their first official step toward unionization, submitting signatures from thousands of workers to a local labor office, asking it to authorize a union vote.

October 26: A consumer sues Kellogg's, claiming that its strawberry Pop-Tarts are deceptively marketed because they contain just as much apple and pear as strawberry.

October 28: The Supreme Court allows Oklahoma to execute John Marion Grant by lethal injection. The Tenth Circuit had ordered a stay of execution, but the Supreme Court lifts the stay by a 5-3 vote, with Justices Breyer, Sotomayor, and Kagan dissenting and Justice Gorsuch recused. • The Senate votes 53-36 to confirm Elizabeth Prelogar to serve as the U.S. Solicitor General. She is the second woman to hold the job on a permanent basis. The first was Justice Kagan, for whom Prelogar clerked. • The families of nine people who died in a mass shooting at the Emanuel AME Church in Charleston, South Carolina, reach an $88 million settlement with the Department of Justice. The families had sued the Department, saying that the FBI's negligence allowed Dylann Roof to buy the gun he used in the attack even though federal law barred him from possessing a firearm.

October 29: The Albany, New York sheriff files a complaint charging Andrew Cuomo, New York's former governor, with a misdemeanor count of forcible touching. The complaint was subsequently dismissed.

> Letting a hundred flowers blossom and a hundred schools of thought contend is the policy for promoting progress in the arts and the sciences and a flourishing socialist culture in our land.
>
> Mao Tse-tung
> speech, Beijing (Feb. 27, 1957)



Tony Mauro[†]

A YEAR IN THE LIFE OF THE SUPREME COURT

2021

A summary of developments involving the Supreme Court of the United States in 2021, most of which are unlikely to be memorialized in the United States Reports.

Jim Duff Moves to Supreme Court Historical Society: James Duff has labored in the Third Branch of government for 45 years, working with two chief justices (Warren Burger and William Rehnquist) and serving twice as director of the Administrative Office of the U.S. Courts, from 2006 to 2011, and then from 2015 to 2020. Chief Justice John Roberts Jr., who appointed Duff to the administrative post twice, announced Duff's retirement on January 5 at age 67. "Jim Duff has provided invaluable service to the judiciary," Roberts said in a statement. "As much as I appreciate his many contributions, I understand his desire to begin a new phase of his life. On behalf of the judiciary, I thank Jim for his leadership." Soon after the announcement of his retirement, Duff took another Supreme Court-related position, this time as executive director of the Supreme Court Historical Society. He succeeded David Pride, who

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retired after serving as the society's executive director for 35 years. In a statement, Duff said, "I believe the society's mission of increasing public knowledge about the Supreme Court, its history, and the importance of its independence, as well as that of our entire Judicial Branch, is crucial to the future of our country."

How SCOTUS Got 'Cleaned Up': Jack Metzler, an attorney at the Federal Trade Commission, was very happy on February 25 when the Supreme Court handed down the unanimous decision in *Brownback v. King*, a Federal Tort Claims Act case. But it was not because he had any stake in the ruling one way or the other. Rather, he was happy to learn that the high court used the phrase "(cleaned up)" for the first time in its history. It was four years ago that Metzler coined the term as a way to make citations in briefs and opinions readable and tolerable, without the annoying underbrush of brackets, ellipses, parentheses and quotation marks that usually accompany citations that quote previous writings and the like. "The court's holding is the words that are used, not the punctuation," said Metzler, who promoted the phrase persistently on Twitter. His campaign to propagate the phrase eventually caught on, and it found its way into all federal circuit courts. "We should welcome any effort to make judicial opinions more readable and accessible to every American citizen," said Judge James Ho of the U.S. Court of Appeals for the Fifth Circuit, who has used the phrase. "To paraphrase my friends at the *Green Bag*, citations should not look like goulash." Metzler's latest tally found that the phrase was used more than 5,000 times by lawyers and judges alike. But until February, it never made it to the holy grail of the Supreme Court.

A Presidential Commission: On April 9, President Joe Biden issued an executive order forming the Presidential Commission on the Supreme Court of the United States, a bipartisan group of experts on the court and court reform. In addition to legal and other scholars, the 34-member commission included practitioners who have appeared before the court and former federal judges, as well as advocates for the reform of democratic institutions and of the administration of justice. The goal of the commission was to analyze "the principal arguments in the contemporary public debate for and against Supreme Court reform." The most controversial reforms under discussion were enlarging the court above the current nine justices, and limiting the tenure of justices to 18 years, instead of lifetime tenure "during good behavior," as the Constitution states it. The commission submitted its 288-page report in December, disappointing liberals and conservatives alike by sidestepping some of the biggest reform proposals. A group of lawyers who argue before the court wrote

to the commission, approving of some proposals, such as embracing live audio coverage of oral arguments and opinion announcements. But the letter, written by Mayer Brown partner Kenneth Geller, and Latham & Watkins retired partner Maureen Mahoney, stated that "we believe the Supreme Court itself is best situated to evaluate whether changes should be made to its internal rules or operations. Any changes imposed on the Court that would call into question or jeopardize the crucial protections of an independent judiciary, or subject the Court to an escalating or conflicting series of changes as political parties changed power, could gravely damage the Court to the detriment not only of practitioners but the nation as a whole."

Oyez! A new Marshal of the Court: On May 31, Gail Curley was appointed as the court's new marshal, succeeding Pamela Talkin, who retired in July 2020. Curley began her service on June 21 but wasn't seen in the courtroom until the First Monday in October. The position of marshal is best known for "crying the court," a quaint phrase that means in plain language that she announces the justices' arrival on the bench when the court is in session. But the marshal's job is much more than shouting, and crying the court was not even part of a marshal's job until 1962, when the longstanding position of court crier was phased out. By statute (28 U.S. Code § 672) the marshal has an array of duties, ranging from paying the salaries of the justices to attending all court sessions. The marshal directs the Supreme Court Police, whose 163 officers provide security for the justices, the Supreme Court building and grounds, and other court employees. (In May 2022, Curley was assigned the extraordinary task of investigating the source of a leak of a draft opinion that had not yet been made public.)

Hopwood Joins the Supreme Court bar: Shon Hopwood's storied legal career, from breaking the law to learning the law and then teaching the law, reached a new height in 2021: he became a member of the U.S. Supreme Court bar. Joined by veteran court advocate Kannon Shanmugam, Hopwood filed a cert petition in June in *Bryant v. United States*, a criminal case involving the "compassionate release" component of the amended First Step Act of 2018, an issue close to Hopwood's heart. "If it gets granted, I will probably argue the case," Hopwood said in an interview. (Ultimately, the petition was denied review.) That Hopwood is even considering arguing at the high court is remarkable. After bank robberies in Nebraska that he committed in the late 1990s, Hopwood was sentenced to 12 years in federal prison. He became a jailhouse lawyer, helping other inmates with appeals. Hopwood went on to earn a law degree at the University of Washington School of Law, and was a Gates Public Service Law Scholar. Hopwood clerked for Judge Janice Rogers

Brown of the U.S. Court of Appeals for the D.C. Circuit in 2014 and became a member of the Washington state bar. Most recently, Hopwood has been teaching at Georgetown University Law Center and advocating for the First Step Act. Former solicitor general Seth Waxman and Georgetown law professor Steven Goldblatt were sponsors for Hopwood's admission to the Supreme Court bar. As with other federal courts, the application for joining the bar included questions such as "have you been convicted of a crime, other than a minor traffic violation." He was admitted to the bar quickly nonetheless. The application was processed through the Supreme Court clerk's office, and Hopwood said he did not know whether justices signed off on it.

Thomas Speaks First: In early October, Justice Clarence Thomas asked the first question of 10 of the 11 lawyers who rose to the lectern for oral arguments. The new arrangement raised eyebrows, mainly because Thomas was notoriously silent during oral arguments for decades, until last term. That is when the court heard telephonic arguments because of the pandemic and allotted time to each justice to ask questions, rather than the previous custom of free-for-all interruption of lawyers and fellow justices. Thomas used that orderly space to ask a slew of questions, and he jumped in again for October arguments, this time going first. Whether Thomas asked his colleagues to give him first shots can't be known, but it does seem the justices concertedly stepped back from asking questions before Thomas. Thomas is also the most senior justice of the court, apart from Chief Justice Roberts.

Will Opinion Announcements Resume? Supreme Court justices have announced their opinions from the bench "since the first decision of the Supreme Court in 1792," according to Bernard Schwartz, the legendary late Supreme Court scholar. That long tradition indicated that the justices viewed announcements as one of their public roles. They are especially meaningful when justices announce their dissents from the bench. But that tradition fell away when the pandemic struck in 2020. The justices worked from home, and the public was not allowed into the court building, so an oration summarizing a court decision or separate opinion from the bench was obsolete. Instead, opinions were just posted on the court's website. But the justices returned to the courtroom when the current term began on October 4, as did the social-distanced lawyers involved in cases, credentialed journalists, law clerks and a few others. Arguably the justices could have resumed tradition and announced opinion summaries when opinions of the term were ready to be handed down. But that did not occur. Full opinions, not including opinion summaries, were again posted online, without announcements from the bench.

Supreme Court's Unofficial Barber: Diego D'Ambrosio, the longtime barber who for decades cut the hair of Supreme Court justices, judges, ambassadors, politicians, priests, journalists like me, and anyone else who came into his Dupont Circle salon, died on October 22 at age 87. Diego was a joyous Italian, a barber of civility, so to speak, who always welcomed his customers with a warm greeting. Justice Samuel Alito Jr. said of D'Ambrosio's passing, "I was a regular customer of Diego's for the past 15 years, and I always looked forward to seeing him. He was a cheerful, friendly, kind, and generous man and a true Washington institution … . Like many, many others, I will miss him. May he rest in peace." D'Ambrosio also cut the hair of Chief Justice William Rehnquist, and they became friends. D'Ambrosio once told me, "He would come every two weeks or three weeks for a haircut and greet me in Italian: 'Buon giorno, Diego. Come stai?' I'm not a lawyer, but sometimes he would ask me for advice. He would say, 'I'm in your chair now, Diego, but if you were in my chair, what would you do?'"

A Harlan Supreme Court? In an October 24 essay in *Politico*, Sarah Isgur wrote that it was time for naming the Supreme Court building. "The building's lack of identity can sometimes seem to mirror the opaqueness of the institution itself. Both the edifice, and the court it houses, need a story to help Americans make sense of them," said Isgur, a Harvard Law School grad who clerked on the U.S. Court of Appeals for the Fifth Circuit and was a Justice Department spokeswoman during the Trump administration. She wanted to name the building after Justice John Marshall Harlan, who served at the court from 1877 to 1911. (He is not to be confused with his grandson, John Marshall Harlan II, who was a justice from 1955 to 1971.) The pinnacle of Harlan's story was his role as the sole dissenter in *Plessy v. Ferguson*, the infamous 1896 race ruling that approved the infamous concept of separate but equal. But as Isgur acknowledged, Harlan did not always embrace racial equality. Harlan had opposed "both Lincoln's Emancipation Proclamation and the 13th Amendment before becoming the greatest defender of racial equality in court history," she wrote. But still, Isgur said, the court should be named after Harlan not in spite of those failings "but because of [them]. He, of all the justices in U.S. history, shows how an intense and unfaltering faith in the Constitution can chart a path to enlightenment."

General Prelogar Arrives: There was some suspense at the Supreme Court on November 1 when new Solicitor General Elizabeth Prelogar took to the lectern for her first appearance: Would she be called General Prelogar? The answer came swiftly, when Roberts began the oral argument: "We'll hear argument next in Case 21-588, *United States v. Texas*. General Prelogar."

Roberts had a slight emphasis on "General." Why was that an issue? After all, women can be generals just like men. But as University of Texas law professor Steve Vladeck put it in a tweet that day, "The Solicitor General is not a 'General.' The word 'General' in the title is an adjective, and adjectives aren't honorifics." That provoked some stern discussion. "Don't care. Going to call her GENERAL Prelogar 'til the wheels fall off," wrote Melissa Murray, professor at New York University School of Law. As with almost anything Supreme Court-related, there's a precedent for this. In May 2009, soon after Elena Kagan was confirmed as U.S. solicitor general, the first woman to hold that position, I interviewed her and asked her, "How do you like being addressed as "General Kagan"? Whimsically, she responded, "A few more weeks, and I'll be expecting everyone to salute me." More seriously, Kagan said she had the option of being called or not called "general." Kagan said, "I know, for example, that Attorney General [Janet] Reno disliked being called 'general.' But my thought basically was: The justices have been calling men SGs 'general' for years and years and years; the first woman SG should be called the same thing." Prelogar, the second female solicitor general in history, did the same.

Warren Burger's Biography in the Making: The late Chief Justice Warren Burger died in 1995 at the age of 87, after a consequential career as a conservative head of the nation's highest court and as the man who helped improve the modern-day judiciary — federal and state — during his 17 years as chief. When chief justices die, they tend to be honored with a biography chronicling their lives and legacies, and a law school library collection of their papers and memorabilia. But as reported by me and *The National Law Journal* in August, for Burger, both of those honorifics have been problematic, making him a less-known legal figure than might be expected. Burger's designated biographer, Tim Flanigan, has been working on the book sporadically for 25 years, with no end in sight. Meanwhile, Burger's papers won't be made public until 2031 at the earliest. The only outsider who can view the papers is Flanigan, and he says he has not visited the library in 10 years. Some of Burger's former clerks and admirers are not happy. "From our perspective, it's just appalling," says historian Clare Cushman, referring to the tardiness of the book project. "There have only been 17 chief justices, and they all have biographies" except for Burger, she said. Cushman is director of publications at the Supreme Court Historical Society, which Burger founded in 1974. (In September 2022, it was announced that Todd Peppers, a Supreme Court scholar, has joined Flanigan to undertake the project, with the goal of finishing the Burger biography in five years or so.)

Chief Justice's Year-End Assessment: As usual, Chief Justice Roberts issued his year-end report on the federal judiciary on December 31. This time he focused on needed improvements at a time when the federal judiciary was being criticized. "I would like to highlight three topics that have been flagged by Congress and the press over the past year. They will receive focused attention from the Judicial Conference and its committees in the coming months," Roberts wrote. With stern words, he expressed concern about a *Wall Street Journal* report indicating that between 2010 and 2018, 131 federal judges participated in 685 matters involving companies in which they or their families owned shares of stock. "Let me be crystal clear: the Judiciary takes this matter seriously. We expect judges to adhere to the highest standards, and those judges violated an ethics rule … . Individually, judges must be scrupulously attentive to both the letter and spirit of our rules, as most are." His second topic was "the continuing concern over inappropriate behavior in the judicial workplace." Roberts said, "inappropriate workplace conduct is not pervasive within the Judiciary. Nevertheless, new protections could help ensure that every court employee enjoys a workplace free from incivility and disrespect." His third topic of concern was "an arcane but important matter of judicial administration: judicial assignment and venue for patent cases in federal trial court. Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case."

The rose is red, the violet's blue,
The honey's sweet, and so are you.

Gammer Gurton's Garland (1784)

Catherine Gellis & Wendy Everette[†]

THE YEAR IN LAW & TECHNOLOGY

2021

We're here live. We're not cats. Welcome to a review of the state of Law and Technology in 2021, the year we continued to rely on video conferencing and remote work technologies. Several of the changes our technical and legal world went through last year brought some delights — lawyers in cat filters! — but many brought sober reminders of the fragility of our institutions — legal, digital, and otherwise. Join us as we revisit a year we are probably very happy to have now reside in the past.

JANUARY

The year started off with a disclosure that the SolarWinds vulnerability[1] had affected the PACER court records system, potentially allowing malicious parties to access sealed court records.[2] In the wake of the disclosure, courts

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[1] https://www.cisecurity.org/solarwinds.

[2] https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

modified how they accepted certain highly sensitive files, stating "highly sensitive court documents (HSDs) filed with federal courts will be accepted for filing in paper form or via a secure electronic device, such as a thumb drive, and stored in a secure stand-alone computer system." • This month also brought MIT's 6th annual "Independent Activities Period" (a between-semesters period where mini courses are often offered) Computational Law Course,[3] with over 90 people completing the course this year.[4] The class offered lectures in topics like "Computational Law and Standards," "Computational Law and Property Ownership," and legal data analytics.

FEBRUARY

"I'm here live. I'm not a cat." A remote court session in Presidio County, Texas, delighted the Internet when an attorney appeared in the guise of a fluffy white kitten with sad eyes.[5] Before finding a way to disable the video filter, the attorney offered "I'm prepared to go forward with it," capturing the can-do spirit of attorneys and courts still working out how remote court sessions could be run. • Beyond video filters, remote court sessions brought changes in how attorneys attended and discussed, in real time, ongoing hearings. From Sean Marotta, an observation about remote hearings and lawyerly camaraderie: "One thing I will miss when appellate arguments return to the real world is the real-time IM commentary among the non-arguing attorneys on the case."[6] • When technology wasn't turning lawyers into cats, it got us back to Mars, with a new rover safely landing to run more tests on our neighboring planet.[7] Also back on Earth, all technology, including lights and basic HVAC technology, got stymied when the state of Texas ran out of electricity.[8] • Meanwhile, Laura Moy's *A Taxonomy of Police Technology's Racial Inequity Problems*[9] appeared in the *Illinois Law Review*. The article provides a new taxonomy for policy makers "that parses the ways in which police technology may aggravate inequity as five distinct problems: police technology may (1) replicate inequity in policing, (2) mask inequity in policing, (3) transfer inequity from elsewhere to policing, (4) exacerbate inequitable policing harms, and/or (5) compromise oversight of inequity in policing." • Then

[3] https://mitmedialab.github.io/2021-MIT-IAP-Computational-Law-Course/.
[4] https://twitter.com/bryangwilson/status/1347611522932072448.
[5] https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.
[6] https://twitter.com/smmarotta/status/1357437521622351872.
[7] https://www.techdirt.com/2021/02/22/what-landing-mars-again-can-teach-us-again/.
[8] https://en.wikipedia.org/wiki/2021_Texas_power_crisis.
[9] https://illinoislawreview.org/print/vol-2021-no-1/a-taxonomy-of-police-technologys-racial-inequity-problems/.

again, who needs police surveillance when people can do it themselves? Journalist Kashmir Hill wrote in the *New York Times* about what it was like to stalk her husband (with his permission, if not awareness) by stashing air tags and similar devices on his person.[10] • The Cl0p ransomware group broke into law firm Jones Day's systems and leaked stolen data, including confidential client communications.[11] The leak was met with observations that "effective cybersecurity [is] vital for law firms to fulfill their role as custodians of clients' legal information."[12]

MARCH

Oh the things we can no longer write
Thanks to the Ninth Circuit and copyright
In a case about Dr. Seuss
The plaintiff won, no more fair use!

In particular, the Ninth Circuit overturned a district court decision that a mash-up involving the Dr. Seuss and Star Trek imagery was not fair use.[13] • Digital Government agency 18F released a technical analysis of PACER and proposed replacement solutions.[14] It offered a blunt assessment of an aging system that is vital to the operations of our judicial system: "CM/ECF is not sustainable. System complexity is leading to long development and installation timelines, long training periods for new staff, a negatively impacted experience for users, high costs, and security risks. The foundational technology is dated and will be hard to maintain into the future." • Returning to Zoom Court, the downside of virtual court appearances that can be streamed online surfaced this month. A group of Internet users started collating and sharing "Crazy Zoom Court Videos" on Reddit[15], causing some of the most distressing moments of some peoples' lives to be streamed.[16] While some commentators likened the Zoom court sessions to broadcasting trials over television, others pointed out that live chats that often accompany the streaming can be toxic, and the phenomenon of videos being shared widely online could compound the trauma for some defendants. • In other law review news, the *Akron Law Review* released a symposium issue on *Covid &*

[10] https://www.nytimes.com/2022/02/11/technology/airtags-gps-surveillance.html.
[11] https://www.databreaches.net/threat-actors-claim-to-have-stolen-jones-day-files-law-firm-remains-quiet/.
[12] https://www.advintel.io/post/breach-of-trust-how-threat-actors-leverage-confidential-information-against-law-firms.
[13] https://www.techdirt.com/2021/03/10/culture-youll-cancel-thanks-to-ninth-circuit-copyright/.
[14] https://aboutblaw.com/XFW.
[15] https://www.reddit.com/r/ZoomCourt/.
[16] https://www.vice.com/en/article/z3va9x/zoom-court-videos-are-making-peoples-darkest-hours-go-viral.

The Practice of Law: Impacts of Legal Tech.[17] The topics covered included artificial intelligence and the practice of law as well as remote/hybrid law clinics. • How well-supported are your claims in your legal writing? Clearbrief, which aims to give you an answer to that question by using software to analyze your claims and find supporting evidence in the record or in case law, raised a seed round this month.[18]

APRIL

April saw even more-high profile skirmishes about copyright fair use, with the Second Circuit finding that Andy Warhol's famous prints of Prince was not,[19] but the Supreme Court finding that Google's use of Java in Android was.[20] • The FBI and DOJ were involved in an effort this month to tamp down a large-scale attack against Microsoft Exchange Servers. These servers, which provide email and calendaring services to companies, are often hosted by companies "locally," that is, within their own office space or their own data centers instead of in a "cloud" run by Amazon Web Services or Microsoft directly. A vulnerability was discovered and exploited on a large scale by malicious parties, who automated their ability to detect unpatched Exchange servers connected to the Internet. The FBI took a previously unprecedented step of proactively connecting to the exploited servers and patching them remotely, rather than relying on the Exchange administrators to patch their own machines. The DOJ notes that this step was taken because, while many patched their infected servers, "others appeared unable to do so, and hundreds of such web shells persisted unmitigated."[21] The warrant[22] was partially unsealed when the FBI operation concluded. • It's not The Year in Law & Technology without a redaction fail, and this year Google provided. Documents filed by Google attorneys in an antitrust lawsuit were not properly redacted when first uploaded.[23] We remind our readers again to ensure that they use PDF software with a "redact" tool and to track which versions of documents should be uploaded to court systems under seal.

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[17] https://ideaexchange.uakron.edu/akronlawreview/vol54/iss4/.
[18] https://clearbrief.com/blog/press_release.
[19] https://www.techdirt.com/2021/04/12/look-heres-some-more-culture-being-canceled-now-thanks-to-second-circuit/.
[20] https://www.techdirt.com/2021/04/05/supreme-court-sides-with-google-decade-long-fight-over-api-copyright-googles-copying-java-api-is-fair-use/.
[21] https://www.justice.gov/opa/pr/justice-department-announces-court-authorized-effort-disrupt-exploitation-microsoft-exchange.
[22] https://www.justice.gov/opa/press-release/file/1386631/download.
[23] https://twitter.com/FreeLawProject/status/1381655337963425792.

MAY

What is "link rot" and why does it affect newspapers and Supreme Court opinions? Link rot is a term for web hypertext links that break over time, as archives move and publications go out of print. Court opinions and newspaper articles often include URLs in them, and over time, many of the sites that hosted those linked pages have gone offline. At Harvard, Jonathan Zittrain led a team that studied broken links in *New York Times* articles[24] and found that 6% of links from 2018 and 72% from 1998 were now broken. He noted that in 2014 he, Kendra Albert, and Laurence Lessig documented the number of broken links in Supreme Court opinions and found that 50% of the links embedded in the court's opinions since 1996 (the first year that a URL appeared in an opinion) had broken.[25] • A computer attack against the Alaska Court System this month caused the court system to take down its public website and electronic records system for a period of time.[26] The courts did not receive a ransom demand[27] but did hire security contractors to assist with an investigation. Systems were down for over a week, during which time many deadlines were extended.[28] • May also saw the Facebook Oversight Board return its verdict about suspending Donald Trump from Facebook. In general: probably ok, but with some caveats.[29] But unhappy that some platforms were removing some of his favorite politicians, in May Florida Governor Ron DeSantis signed into law SB7072, which sought to restrict social media platforms' ability to decide what user generated content could appear on their services,[30] unless, however — and we promise we are not making this up — the offending social media platform also happened to own a theme park somewhere in the state.[31] In fact, it was a tough month for social media, with the Ninth Circuit also ruling against Snap in *Lemmon v. Snap*, a decision that seemed to ignore Section 230, and the speech issues

[24] https://twitter.com/zittrain/status/1395750908349325315.
[25] https://twitter.com/zittrain/status/1395761678055260162.
[26] https://apnews.com/article/alaska-technology-courts-government-and-politics-e9094a1cf900effcbe6f64db7a7b8e66.
[27] https://apnews.com/article/alaska-courts-79195506ac19f12520cb28cd774e58b6.
[28] https://www.adn.com/alaska-news/crime-courts/2021/05/11/alaska-court-system-starts-bringing-back-some-online-services-after-cyberattack/.
[29] https://www.techdirt.com/2021/05/05/oversight-boards-decision-facebooks-trump-ban-is-just-not-that-important/.
[30] https://www.techdirt.com/2021/05/24/florida-man-signs-blatantly-corrupt-unconstitutional-social-media-bill-cementing-florida-as-tech-laughing-stock/.
[31] https://www.techdirt.com/2022/02/03/how-disney-got-that-theme-park-exemption-ron-desantis-unconstitutional-social-media-bill/.

implicated, by finding that Snap could potentially have liability for the harms resulting from users employing its speed filter.[32]

JUNE

In June we were told by the Supreme Court that we may "fuck this cheer" — or, rather, students could express such sentiments out of school without fear of being punished by their schools.[33] Also this month the Supreme Court spoke to the reach of the Computer Fraud and Abuse Act, finding that it did not support charges as aggressively as the government wanted.[34] • Meanwhile, if you were wondering what happened to that SB7072 "theme park" law that Florida passed in May, it was enjoined by a federal district court in June for being an unconstitutional violation of the First Amendment in NetChoice v. Moody.[35] Also on the social media regulation front, the GAO came out with a report that the 2018 Amendments to Section 230 of the Fight Online Sex Trafficking Act (FOSTA) had not met any of the objectives supporters of the law had originally touted, which matters especially given the chilling cost to online speech FOSTA has led to, with apparently no upside.[36] • When should defendants be forced to unlock digital devices? Orin Kerr highlighted a case this month out of Florida, *State v. Garcia*.[37] In the defense's brief, attorneys highlighted the extensive amount of data available through unlocked phones, arguing that "expansion of governmental powers to compel disclosures of personally-held information" such as passwords leads to "endless stores of personal information on a person's smartphone" and an "unlimited digital record of the intricate details of a person's life."[38] • Legal automation is a topic we've visited several times over the years, and we're here this month with an interesting outcome of one firm's automation work. Keller Lenkner built their own computer system to recruit and work with members of the public who might have arbitration

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[32] https://www.techdirt.com/2021/06/08/why-ninth-circuits-decision-lemmon-v-snap-is-wrong-section-230-bad-online-speech/.

[33] https://www.techdirt.com/2021/06/24/fuck-this-cheer-particular-says-supreme-court-decision-upholding-students-free-speech-rights/.

[34] https://www.techdirt.com/2021/06/04/supreme-court-finally-limits-widely-abused-computer-hacking-law-just-bit/.

[35] https://www.techdirt.com/2021/06/30/as-expected-judge-grants-injunction-blocking-floridas-unconstitutional-social-media-law/.

[36] https://www.techdirt.com/2021/06/23/as-everyone-rushes-to-change-section-230-new-gao-report-points-out-that-fosta-hasnt-lived-up-to-any-promises/.

[37] https://twitter.com/OrinKerr/status/1405021455218188291.

[38] https://efactssc-public.flcourts.org/casedocuments/2020/1419/2020-1419_brief_141036_answer20brief2dmerits.pdf.

claims against companies like DoorDash or Amazon. As a result of the thousands of arbitration claims filed through these automated systems, Amazon reversed course on mandatory arbitration and allowed individual or class action lawsuits again, likely in large part due to stating that they would pay any arbitration filing fees.[39] • Returning to Zoom in the courtroom, a *Seattle Times* opinion piece called out the struggles of remote hearings.[40] The author highlighted "maddening technical glitches," and the inability of a remote jury to observe "physical cues and a rapport between parties that a juror can only fully observe and appreciate in person." At the same time, remote juries have opened up jury service to people physically unable to travel to a courthouse, and as such may be more democratic.

JULY

We've previously learned that animals cannot hold copyrights. But can robots and AI be creators? Ed Walters highlighted an "[i]nteresting ruling in Australia — court holds that AI/machines may be an inventor (not just a creative instrument) in patent law."[41] The Australian federal court found that "an inventor as recognised under the act can be an artificial intelligence system or device."[42] • This month also featured Fastcase's 11th Annual Fastcase 50. Congratulations to the honorees, the "smartest, most courageous, innovators, techies, visionaries, and leaders" of law & technology in 2021.[43] Among the honorees are Haley Altman, who created "Doxly, a tech startup built to organize attorneys' legal transactions," and Miriam Childs, Director, Law Library of Louisiana, Louisiana Supreme Court and developer of programs for Black Law Librarians Special Interest Section of the American Association of Law Librarians (AALL). • Returning again to Zoom court, how do courts protect the identity of confidential informants when the court is in remote session? An Illinois court explored how one might be able to mask a person's identity using video filters, finding, "In an age where an attorney can appear in a Zoom court hearing as a cat, the State and defendants can certainly work together to provide the information necessary for a

[39] https://arstechnica.com/tech-policy/2021/06/after-75000-echo-arbitration-demands-amazon-now-lets-you-sue-it/.
[40] https://www.seattletimes.com/opinion/what-gets-lost-when-zoom-takes-over-the-courtroom/.
[41] https://www.theguardian.com/technology/2021/jul/30/im-sorry-dave-im-afraid-i-invented-that-australian-court-finds-ai-systems-can-be-recognised-under-patent-law.
[42] Id.
[43] https://www.fastcase.com/fastcase50/?class=2021.

full defense without revealing a CI's physical appearance and, thus, identity" through the use of video filters or other masking technologies.[44]

AUGUST

Have you noticed that emojis look different after software updates? Apple and other software providers often subtly update the look of their emojis over time. This shift has been used in a court case, where emoji version variations helped to flag fabricated evidence.[45] In *Rossbach v. Montefiore Medical Center*, the heart eyes face emoji was used to date a screenshot of a supposed text messaging exchange. The court's conclusion? "This image is a fabrication."[46] • Also in the courts: the gig economy, and this month a state appeals court in California took a look at a challenge to Proposition 22. The underlying issue in this case was that a law earlier passed by the state legislature, AB5 effectively would have ended gig workers (and others) ever being considered independent contractors, regardless of whether deeming them regular employees actually made sense or helped them. Proposition 22 was intended to return to the previous status quo, and passed. But then the appeals court, in a ruling that half made sense and half seemed to take a few leaps of logic, decided that it violated the California constitution and some of its provisions about labor law and what parts of the government get to speak to its parameters.[47]

SEPTEMBER

Would your AI like to get a patent? Tough luck, said a US judge this month. Also, tough luck, said another US judge at the very end of August, for anyone who doesn't have cable and who would like to use the non-profit Locast service to essentially rent rabbit ears to pick up the over-the-air programming they were otherwise entitled to watch. Despite the copyright statute authorizing such services, this judge decided that Locast did not qualify, which led to it shutting down completely in September, shortly after the ruling.[48] • In March 2020, a Wisconsin teenager came down with a res-

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[44] https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=Z12TJ9_kD4AkzzvkJN7dmeOmYtxc_DofT1nAdJaB_Z80OOphLzsU_V4-UzdCD6ip0.

[45] https://blog.ericgoldman.org/archives/2021/08/emoji-version-variations-help-identify-fabricated-evidence-rossbach-v-montefiore-medical.htm.

[46] https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3502&context=historical.

[47] https://www.techdirt.com/2021/08/23/understanding-california-ruling-that-said-prop-22-gig-worker-ballot-initiative-was-unconstitutional/.

[48] https://www.techdirt.com/2021/10/08/locast-shuts-down-as-yet-again-bad-interpretation-copyright-law-makes-world-worse/.

piratory illness and posted on her Instagram that she had contracted Covid-19. The County Health Department became alarmed and sought to force her to remove the Instagram post, sending the local sheriff to threaten the teenager with a disorderly conduct charge. The teenager sued for declaratory judgment that her First Amendment rights had been violated.[49] This month, the U.S. District Court for the Eastern District of Wisconsin found for the teenager. • Meanwhile, Texas Governor Greg Abbott decided that Florida Governor DeSantis shouldn't have all the fun trying to regulate Internet platforms, so he signed his own Texas version (and used social media to stream his signing).[50] This was after he had already signed SB8, a bill that this month led to a sea change at the United States Supreme Court when it elected to use the shadow docket to abandon precedent and refuse to enjoin a law that at that point clearly violated it.[51] • Do you click and file, or does it take your firm a long time to assemble and sign off on legal documents? Legal innovation has so far focused primarily on two areas, improving research and providing aids for the content of legal filings, and automation of the related workflows. This update came to us from the workflow automation side, as Lawyaw was acquired by Clio this month.[52] Lawyaw's team joined Clio to work on automation around document flows like collecting digital signatures and generating standardized documents to "streamlin[e] the creation of important court forms and legal documents."

OCTOBER

Legal analytics firm Trellis Research[53] completed a Series A funding round this month.[54] The firm offers state trial court data in a searchable database, as well as extensive analytics and research tools for litigators. • If you press the control key and the "u" key on your keyboard while reading a webpage to view the HTML source of the page, have you committed a Computer Fraud and Abuse Act ("CFAA") violation? A reporter found Social Security Numbers of some educators in the page source of a state department of education webpage.[55] When he reported it, the Missouri state government threatened

[49] https://blog.ericgoldman.org/archives/2021/09/law-enforcements-efforts-to-scrub-covid-misinformation-online-violated-the-first-amendment-cohoon-v-konrath.htm.
[50] https://www.techdirt.com/2021/09/09/texas-gov-greg-abbott-announces-twitter-livestreaming-facebook-his-signing-bill-that-removes-1st-amendment-rights-both/.
[51] https://www.techdirt.com/2021/09/22/night-united-states-supreme-court-cancelled-law/.
[52] https://www.clio.com/about/press/lawyawacquisition/.
[53] https://trellis.law/.
[54] https://www.crunchbase.com/funding_round/trellis-research-series-a--46ccec03.
[55] https://techcrunch.com/2021/10/15/f12-isnt-hacking-missouri-governor-threatens-to-prosecute-local-journalist-for-finding-exposed-state-data/.

the reporter and his newspaper with a CFAA charge.[56] The newspaper defended viewing the HTML page source as a non-malicious activity, stating, "A hacker is someone who subverts computer security with malicious or criminal intent. Here, there was no breach of any firewall or security and certainly no malicious intent." The local prosecutor declined to press charges.[57]

NOVEMBER

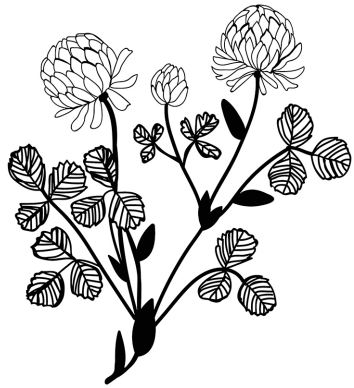
Yet more activity in legal tech fundraising this month, as Everlaw closed a Series D fundraising round.[58] Everlaw is an eDiscovery platform for ingestion of discovery material, search, classification, and investigations that had recently expanded their legal holds technology. • Heading back to remote court hearings, Sarah Sherman-Stokes (@sshermanstokes) shares another instance where a video conferencing software hiccup interfered with a hearing, "in case anyone was curious how virtual #immigration court for #immigrant #detainees is going, this week i saw a judge threaten to order someone deported b/c he was being "noncooperative" & "extremely difficult" by "refusing to answer" her questions. [R]eader: HIS VIDEO FROZE."[59] Her students noticed that the detainee hadn't blinked in more than 2 minutes, indicating that the video was suffering from lag, and brought this to the attention of the judge, who had not noticed due to the small size of the video display.[60]

DECEMBER

Northwestern's *Journal of Technology and Intellectual Property* put out a symposium issue this month on a favorite topic for us, "Law + Computation: An Algorithm for the Rule of Law and Justice."[61] The issue featured articles on Artificial Intelligence as Evidence, Syntax for Machine Readable Legislation, and Law, Inventorship, and Artificial Intelligence. • Is change in the legal industry brought by technology and software slow and steady, or are big jumps more common? Richard Tromans wrote in *Artificial Lawyer* this month that change can be "variegated and asynchronous" with large leaps in particular areas when "the right conditions and drivers come along."[62] He

[56] https://futurism.com/the-byte/governor-journalist-hacker-html.
[57] https://www.malwarebytes.com/blog/news/2022/02/journalist-wont-be-indicted-for-hacking-for-viewing-a-state-websites-html.
[58] https://www.everlaw.com/blog/2021/11/02/everlaw-secures-202-million-series-d-round-of-funding/.
[59] https://twitter.com/sshermanstokes/status/1461344803749339137.
[60] https://twitter.com/sshermanstokes/status/1461344805280260100.
[61] https://jtip.law.northwestern.edu/issues/?vol=vol%2019%20-%20issue%201.
[62] https://www.artificiallawyer.com/2021/12/13/legal-market-change-isnt-always-incremental/.

pointed to advances in natural language processing ("NLP") which have drastically improved legal research tools in the last five years. While the technical changes are more under the hood for most users of legal research tools, users might have noticed that software had improved to "just find[] stuff that we need." • But if the stuff you want to find is in an ebook — a form in which books are increasingly found — it's iffy whether you'll be able to find it at a library. So the state of Maryland this month tried passing a law requiring them to be licensed to libraries on reasonable terms, although the legislation was since blocked by a court.[63] • And what else could better close out the year than the viral story of Jeans and Jorts, two cats whose workplace saga told on Reddit has taught us that, yes, we can all get along, and, no, you should not put butter on your cat.[64]



Ring-a-ring o' roses,
A pocket full of posies,
A-tishoo! A-tishoo!
We all fall down.

Kate Greenaway
Mother Goose (1881)

[63] https://www.techdirt.com/2022/03/03/unfortunate-not-surprising-court-blocks-marylands-library-ebook-law/.
[64] https://www.upworthy.com/the-epic-saga-of-workplace-cats-jean-and-jorts.

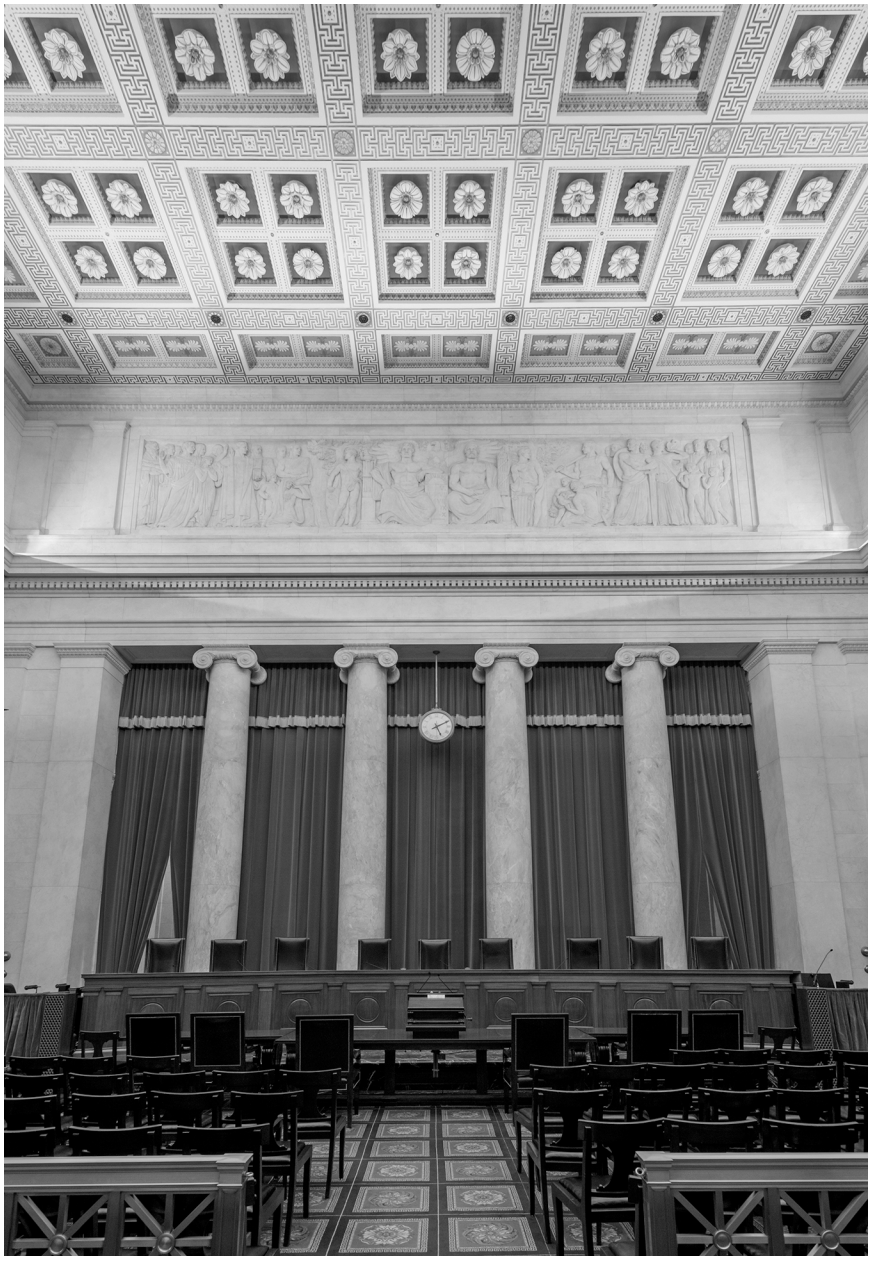


Image 1: The Courtroom of the Supreme Court of the United States. Fred Schilling, Collection of the Supreme Court of the United States.

Flowers in the Architecture

Floral Motifs in the Supreme Court Building

Matthew Hofstedt[†]

Many a spectator waiting for oral argument to begin in the Courtroom of the United States Supreme Court has gazed up at the coffered ceiling and noticed the decorative rosettes — some people may even count them to pass the time (hint: there are 100 in the main grid, not counting the smaller ones). (Image 1) An astute observer will have already noticed similar rosettes in the ceiling of the monumental Great Hall that leads to the Courtroom. In both instances, and elsewhere in the building, the use of floral designs within the coffers is part of the architectural detail that evokes the classical buildings of ancient Greece and Rome. In addition to these more generic rosettes, a few sculpted flowers convey specific meanings within a larger sculptural group.

The Supreme Court Building's architect, Cass Gilbert, was well versed in a wide range of architectural styles, and his drafting team created rosettes based on classical designs for each ceiling. The architectural modeling firm of John Donnelly & Sons turned the approved drawings into three-dimensional models to create molds to produce multiple plaster rosettes of the same pattern. In each room with a coffered ceiling, therefore, a fixed number of rosettes repeat. In the Courtroom ceiling, for example, there are only four unique designs that appear in the main section. While some rosettes found in the building do represent specific types of flora, there is not any documentation suggesting the Courtroom rosettes represent any specific flowers.

The rosettes do serve a practical purpose by providing texture to the ceiling to absorb sound, but what draws attention to them and brings the ceiling of each room alive is the decorative painting and gilding applied to the beams and coffers. The Bid Specifications for the Court's Decorative Painting, issued in January 1934, gave these instructions,

> Careful study should be made of the marble work, the woodwork and the lighting (both natural and artificial) of the rooms and spaces to be decorated to the end that harmonious effects be produced and violent

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[†] Associate Curator, Supreme Court of the United States.

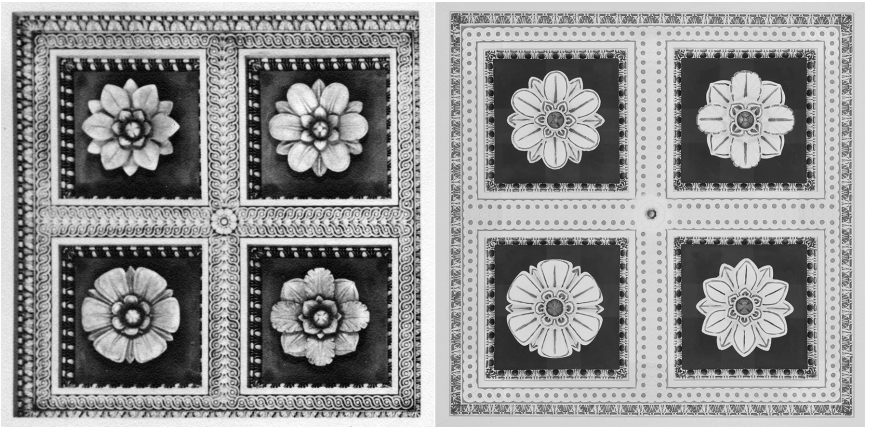


Image 2: Comparison of original Paris & Wiley rosettes (left) with those in the current Courtroom. Collection of the Supreme Court of the United States.

> contrasts avoided. Especially is this desired in the Supreme Court Room where excessive coloration may well be avoided. In the Main Hall, the two Conference Rooms, the Reading Room and the Alcoves of the Main Library richer coloration in the style of the 16th Century Italian Renaissance would not be inappropriate, and the moldings, arrises, capitals and carvings could be treated with dulled gilding in the manner of that style. In short, quiet, rich harmony and dignity rather than gaiety and brilliancy should be the basis of the designs.[1]

The competition awarded four separate contracts, with the New York decorative painting firm of Paris & Wiley winning the bids for the Great Hall and Courtroom ceilings. Their winning designs used darker hues and burnished gilding that were in keeping with the direction outlined in the specifications, bringing a patina of age to the ceilings. (Image 2) The other contracts went to the more colorful designs of Angelo Magnanti (the East Conference Room); Mack, Jenney and Tyler (the West Conference Room); and Ezra Winter (the Library Main Reading Room).

Within weeks of the building's opening in October 1935, however, the Justices were complaining about poor lighting on the Bench. The original Courtroom featured one large pendant light fixture that proved inadequate (Image 3), and the Architect of the Capitol, David Lynn, immediately

[1] January 20, 1934, Specifications for Decorative Painting, Supreme Court Building, Office of the Curator, Supreme Court of the United States.

Image 3: The original pendant light hangs over the Courtroom, late 1935. Leet Brothers, Papers of John R. Rockart, Office of the Curator, Collection of the Supreme Court of the United States.

sought solutions. After undertaking several studies, including covering the original ceiling with white cloth hiding all the rosettes, Lynn decided to repaint the ceiling to a lighter scheme to reflect more light.[2] In late spring 1936, he contacted Paris & Wiley to discuss the plan but the firm disagreed with his recommendation,

> We would advise discarding the scheme of new decoration as shown in the old ivory panels hanging on the ceiling. Without offering any criticism, the execution of such a scheme would prove ineffectual and at variance with the decoration of the room originally conceived by Cass Gilbert. In addition, it would entail an unnecessary expense and prove a costly piece of work. Various members of this organization have visited the courtroom and have reached an accord as to the proper decoration of the room, details of which we would be pleased to submit at a conference. Our fee for such a conference would be $500.00.[3]

Gilbert had died during the summer of 1934, but Paris & Wiley believed they could alter their design to remain true to the architect's vision for the Courtroom. Lynn was consulting with the other two architects who had completed the Supreme Court Building project, Cass Gilbert, Jr., and John R. Rockart. Not only were the two at odds over how to improve the Courtroom lighting, they were also battling over control of the Gilbert architectural firm. (Rockart ultimately brought a lawsuit that settled out of court and he departed the firm.)

Without the late Gilbert's strong direction that may have convinced Lynn to retain a modified Paris & Wiley scheme, the Architect of the Capitol went ahead with the plans to repaint the ceiling. Over the summer of 1936, Ezra Winter and his team painted a lighter scheme as captured by a newspaper account,

> In the court room proper it looks like a cross-word puzzle. The place is full of scaffolding. The beautiful columns are draped in canvas and every piece of valuable decoration has been shrouded except the ceiling. High up on these scaffolds, Mr. Ezra Winter, an eminent New York artist, is at work painting it over.
>
> When the $10,000,000 edifice was completed in the name of Justice to house nine men who came nearer smacking the New Deal flat

[2] "Supreme Court Decides for Light Against Beauty", *New York Herald Tribune*, February 3, 1936.
[3] Paris & Wiley to David Lynn, June 16, 1936, Copy from Records of the Architect of the Capitol, Office of the Curator, Supreme Court of the United States.

> than any other group of persons in the United States, it was found the lighting was not up to snuff.
>
> The Justices and the lawyers couldn't see. As a temporary measure a false ceiling was put in and painted over. It was discovered in the first instance that the dark blues and browns absorbed the light and kept it from reaching the bench.
>
> Capitol Architect David Lynn conducted a series of experiments with colors and different lights until he reached the right tone. The new specifications have been completed and Mr. Winter is redecorating in gold leaf, ivory and light colors to reflect the light to its proper place.[4]

This new ceiling paint scheme certainly changed the appearance of the room from the darker Paris & Wiley version in keeping with Gilbert's original design intent. Winter tried to keep some beauty in the ceiling, reporting to Lynn it was 80% lighter but "I do not see how it is possible to make a still lighter scheme and have anything left at all in the way of decorated ceiling."[5]

The *Washington Star* described Winter's completed work on October 31, 1936, under the headline "Beauty and Perfect Light Give Rays for High Court,"

> The ceiling design is made up of a series of blocks that contain a central floral motif. That is, there are 25 squares that cover the ceiling and each of these squares is divided into four smaller squares. In the center of each of these four smaller squares is an open blossom, conventional in form and each differing slightly from the others in the details of petal arrangement or the flower's center. The large block made up of these four small squares is outlined in a band of lemon color, the color of the blossoms themselves, while the background throwing the blossoms in relief is painted a soft grayish blue.
>
> At the corners of these large blocks are small squares containing a central design painted in a rich terra cotta. It is these terra cotta medallions, incidentally, that are the secret of the richness of the ceiling's effect, adding the depth of color necessary, and used, ingeniously enough, where no reflecting power is necessary — an office performed by the lighter gray-blue background.
>
> From the center of the terra cotta medallions hang the chandeliers, and there are 16 of these lights in the forward part of the chamber.

[4] Unidentified newspaper, possibly "The Greatest Show on Earth" column, *The Washington Times*, August 26, 1936.

[5] Ezra Winter to David Lynn, August 15, 1936, noted in "Ezra Winter" research file, Office of the Curator. Supreme Court of the United States.

Image 4: A section of the light-blue color scheme on the Courtroom ceiling and one of the old pendant lights, seen through scaffolding during repainting, early 1970s. Collection of the Supreme Court of the United States.

> No lights hang from the terra cotta medallions at the rear of the chamber. It is interesting that the first row of lights contains bulbs of 1,500 watts, and this is graduated until the last row contains bulbs of 750 watts, so that the greatest illumination falls above the desks of the justices and, the chamber is not too strongly lighted in other parts.
>
> The entire ceiling is outlined by a narrow border of 20 panels, 5 to each wall, painted in a paler tint of terra cotta than the medallions, and decorated with a palm leaf motif."[6]

Over the next few years, Lynn and the Court staff continued to tinker with ways to improve the poor lighting. Additional light fixtures were hung and for a time the red drapes behind the Bench were covered with white sateen to reflect more light. It seems Winter's revised paint scheme survived until the early 1970s when the Architect of the Capitol's staff removed the pendant chandeliers and painted the ceiling to its present appearance, with red behind the rosettes. (Image 4)

[6] "Beauty and Perfect Light Give Rays for High Court," Washington Star, October 31, 1936.

Image 5: Detail showing carved flowers forming part of the decoration along the West Pediment frieze. Collection of the Supreme Court of the United States.

As noted, similar rosettes appear throughout the building in the more decorative rooms: the East and West Conference Rooms, the Library's Main Reading Room, and above some of the staircases. Over time, Paris & Wiley's other ceiling in the Great Hall was also painted over with a lighter scheme, and Mack, Jenney & Tyler's West Conference Room was modified. The work of the other decorative painters survived largely unscathed and restoration in the early 2000s returned them to their original appearance.

Ceiling rosettes, however, are not the only floral decorations to appear in the building's architecture. On the exterior of the building, carved festoons, garlands, and swags appear in the marble, and some interior bronze work features floral motifs. For example, most people looking at the West Pediment sculpture above the main entrance with its famous inscription EQUAL JUSTICE UNDER LAW miss the decorative swags that run to either side along the frieze. (Image 5) Various classically inspired leaves, vines, and blossoms form decorative borders, flow behind recognizable legal symbols on bronze doorframes, or appear carved in the marble.

Aside from the rosettes and decorative flowers, symbolic floral elements do appear within the larger sculptural program, most notably in the Courtroom frieze sculpted by Adolph Weinman. In the west panel, an allegory Weinman referred to as "The Triumph of Justice," a figure representing *Peace* holds a dove in one hand and a bouquet of flowers in the other, while a crown of flowers rests upon her head. (Image 6) At the center of the same

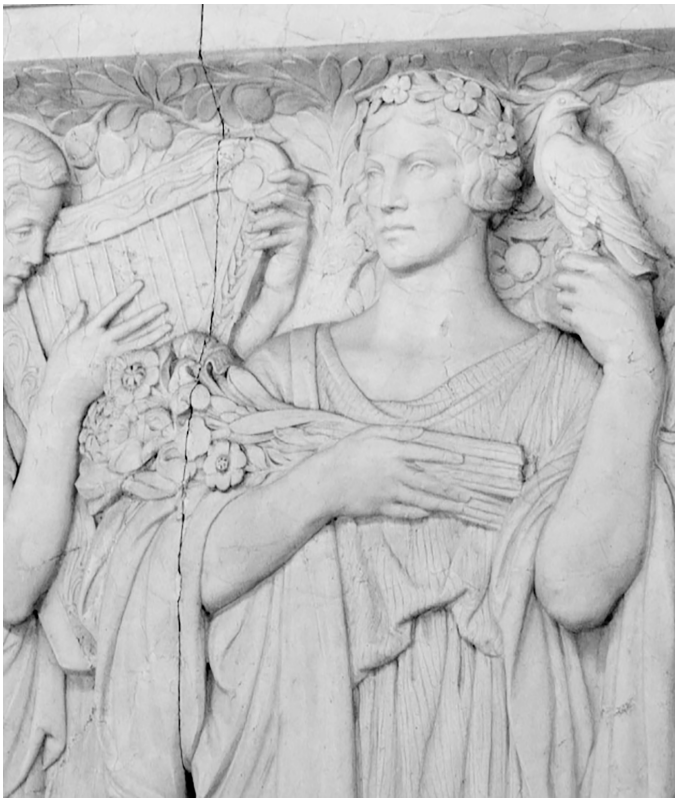


Image 6: Wearing a crown of flowers, *Peace* holds a bouquet in the west panel of the Courtroom frieze. Collection of the Supreme Court of the United States.

panel, beside the looming figure of *Justice*, sits *Truth* depicted as a female figure holding a rose, likely symbolizing purity, and a mirror, a traditional symbol associated with revealing veracity in its reflection. (Image 7)

On the opposite wall, above the Bench, oak trees form part of the backdrop for the central grouping depicting *The Majesty of the Law* and *The Power of Government*. To the right among the group of figures stands *Liberty*, wearing the traditional cap, and releasing a bird in one hand and holding a flower in the other. (Image 8) Unlike the clearly carved rose held by *Truth*, this floral depiction does not appear to represent an actual flower but perhaps is a reference to the 1861 poem "The Flower of Liberty" by Oliver Wendell Holmes, Sr., father of Justice Holmes. The first stanza reads,

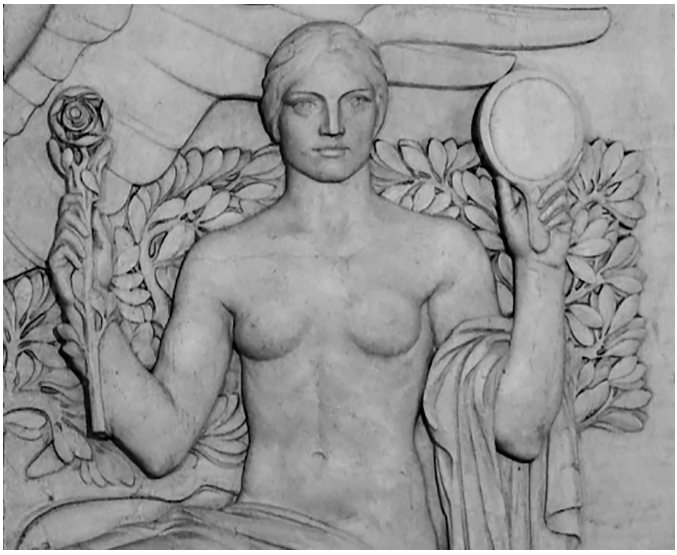


Image 7: A figure representing *Truth* with rose and mirror in the west panel of the Courtroom frieze. Collection of the Supreme Court of the United States.

What flower is this that greets the morn,
Its hues from heaven so freshly born?
With burning star and flaming band
It kindles all the sunset land; —
O, tell us what its name may be!
Is this the Flower of Liberty?
It is the banner of the free,
The starry Flower of Liberty![7]

Another symbolic use of flowers appears in Hermon A. MacNeil's East Pediment sculpture, located on the less visible eastern side of the building's exterior. Like other works in the building's sculptural program, this one seeks to represent the Court's role in administering justice but also to symbolize its authority as the highest court in the land. To either side of the central group of lawgivers (Confucius, Moses, and Solon), MacNeil places supporting groups, each bearing a symbolic offering. To the left, a male figure with a

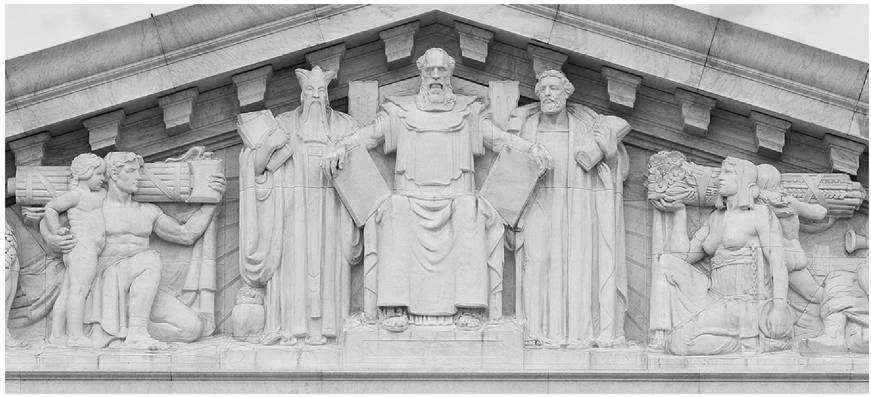
[7] For the rest of the poem, see *The Atlantic*, November 1861.

Image 8: Detail of Liberty with flower and eagle as depicted in the east panel of the Courtroom frieze. Collection of the Supreme Court of the United States.

child holds the fasces, an ancient Roman symbol of authority, or as MacNeil described it, "the means of enforcing the law." For balance on the opposite side, he depicts a woman and child bearing a similar load, a bundle of flowers. MacNeil described this group as "tempering justice with mercy" and included an important, often overlooked detail.[8] At the woman's side is a set of scales, a traditional symbol of law, which she has put aside to offer up the flowers instead. Perhaps MacNeil's message is that administering justice should not be a matter of only weighing the sides with an unsympathetic scale, but recognizing, as did Thomas Aquinas, that "justice without mercy is cruelty." (Images 9 and 10)

In summary, most flowers in the architecture of the Supreme Court Building are purely decorative, used to connect to the classical structures of ancient Greece and Rome, and adding beauty to the various spaces they adorn. In a few places, however, the use of flowers is more symbolic, conveying the specific ideas of peace, truth, liberty, and mercy that the sculptors hoped might inspire the Court's deliberations.

[8] Quotes from "Description of Eastern Pediment," submitted by Hermon MacNeil, 1934, Office of the Curator, Supreme Court of the United States.



Images 9 and 10: The central section of the East Pediment by Hermon A. MacNeil, with detail of figure described as "tempering justice with mercy" offering a floral tribute. Steve Petteway, Collection of the Supreme Court of the United States.

I hate flowers — I paint them because they're cheaper than models and they don't move.

Georgia O'Keefe
N.Y. Herald Tribune, April 18, 1954

FIVE RECOMMENDATIONS

Lee Epstein[†]

Terri Jennings Peretti
Partisan Supremacy: How the GOP Enlisted Courts to Rig Election Rules
(University Press of Kansas 2020)

"There is no such thing as a Republican judge or a Democratic judge." Well, yes, Justice Gorsuch, there is. Peretti demonstrates as much in this tour de force on the role of party identity (distinct from ideology) in judging.

Peretti's basic argument is that the GOP, determined to win elections in the face of a Democratic-leaning electorate, not only rigged the rules of the game; it also packed the courts with Republican judges all too willing to play along. With a focus on four areas of election law (the Voting Rights Act, voter id laws, redistricting, and campaign finance) Perretti validates her argument against qualitative and quantitative data. But, along the way, the data sorta belie the book's title, showing that there aren't just Republican judges; there are Democratic judges too. To provide one example: Democratic federal judges are nearly as likely to oppose voter ID laws (only 28 percent of their votes were favorable) as Republicans are to support them (81 percent).

[†] University Professor of Law & Political Science and Hilliard Distinguished Professor of Law, University of Southern California.

This is just a sample of the many noteworthy findings that make *Partisan Supremacy* a great read for anyone interested in (learning more about) election law. But Peretti's work should also interest scholars of judicial behavior. For far too long, the field has elevated ideology over partisanship; indeed, if party identity makes an appearance in our studies, it's almost always as a proxy for ideology. Peretti offers strong theoretical arguments and empirical evidence for treating partisanship as an important driver of judicial behavior in its own right.

Brandon L. Bartels and Christopher D. Johnston
Curbing the Court: Why the Public Constrains Judicial Independence
(Cambridge University Press 2020)

Political scientists have long told a story about the relationship between the public and the U.S. Supreme Court, and it goes something like this: Because the Court enjoys such wide and deep public support, politicians avoid attacking it out of fear of electoral reprisal.

These days, this story seems almost quaint if not downright suspect. After the Court's same-sex marriage decision (*Obergefell v. Hodges*), Republicans hardly felt constrained in calling for the Court's head. As Bartels and Johnston recount it, Bobby Jindal, Republican governor of Louisiana, asserted that the "Court is completely out of control" and recommended its abolition to "save some money"; Ted Cruz proposed constitutional amendments to overturn the Court's decision and to strip its authority to hear same-sex marriage cases.

Democrats are no less shy about proposing Court "reform" measures. In the wake of the failed Garland nomination, Kavanaugh's confirmation amid charges of sexual assault, and Barrett's breakneck proceedings — all of which pushed the Court to the right — proposals for packing the Court have gained traction among Democratic politicians. Writing in the *Boston Globe*, Senator Elizabeth Warren suggested that the Court is extremist, partisan, and even lawless. Only by adding four or more seats, she declared, could Congress "restore balance and integrity to a broken institution."

Because none of this squares with the conventional (political science) "legitimacy" story, the question naturally emerges: What's going on? Bartels and Johnston offer a sensible, even intuitive, answer. The public acts far less as a veto on politicians' Court-curbing calls than as a cheerleader for reform proposals when it disagrees with the Court's decisions. To quote the authors, "citizens care more about policy outcomes than protecting the Court's long-term integrity."

Being the good political scientists that they are, Bartels and Johnston do more than make this claim; they verify it using a range of survey and experimental data. The results are clear. There is no "wide and deep" reservoir of goodwill toward the Court as was long thought.

For political scientists, *Curbing the Court* is an eye-opener, upending decades of conventional thinking. For other Court-watchers, the implications of the findings are worth considering. Should the Court follow its Republican benefactors' game plan (see Peretti) and veer *sharply* to the right, its support will plummet among a less conservative-leaning public. Only by charting a different path (see Zilis below) can the justices save their Court from losing the legitimacy so crucial for its efficacy.

Michael A. Zilis
The Rights Paradox: How Group Attitudes Shape US Supreme Court Legitimacy
(Cambridge University Press 2021)

Losing legitimacy is also a theme of *The Rights Paradox.* The idea is that citizens evaluate the Supreme Court based on the set of interests they think the justices support — specifically, when Americans believe that the Court is allied with groups they dislike, their evaluations of the Court take a nosedive. After its high-profile rulings advancing gay rights, for example, the Court's legitimacy ratings declined markedly among citizens expressing antipathy toward gays.

To the extent that these and similar findings (re: immigrants, labor unions, political protestors, business, et al.) raise questions about the durability of the Court's legitimacy, they parallel results in *Curbing the Court.* No readers can leave either book without rethinking everything they thought they knew about how institutions gain, maintain, and most pointedly lose legitimacy.

The Rights Paradox, though, offers a path forward for justices interested in saving their institution — though it isn't one that all readers will find attractive. In Zilis's words, "One important implication of my findings is that they offer a clear incentive for Supreme Court justices to deemphasize their traditional role as a guardian of minority rights. When Americans penalize the modern Court for protecting the rights of unpopular groups, and these penalties come in the form of institutional illegitimacy … the institution may be forced to abandon this crucial role."

James L. Gibson and Michael J. Nelson
Judging Inequality: State Supreme Courts and the Inequality Crisis
(Russell Sage Foundation 2021)

Taking Zilis's advice shouldn't be a heavy lift for state supreme courts. Because the electorate in most states has some say on who serves as judges, you'd think the state courts would be squarely majoritarian institutions, issuing decisions that further entrench political, social, and economic inequities. And yet Gibson and Nelson's exceptional book shows that the particulars of the states' selection and retention systems aren't especially good predictors of whether judges will favor greater (in)equality.

What does matter? The "simple truth," Gibson and Nelson write, is that "conservative and Republican judges tend to vote in favor of inequality, while liberal and Democratic judges tend to vote in favor of greater equality." Both tendencies, it turns out, are amplified when well-resourced litigants (the "haves") advance claims of (in)equality.

Well, this may be the simple truth of the matter. But getting there was no simple matter. Executing the study required the authors to develop "an ocean's worth of data" on the courts' decisions implicating equality, the judges' characteristics, and the states' systems of judicial selection and retention. The resulting database is nothing short of a treasure trove for scholars interested in exploring *Judging Inequality's* many striking results (and non-results) or testing hypotheses of their own devising.

Adam Chilton and Mila Versteeg
How Constitutional Rights Matter
(Oxford University Press 2020)

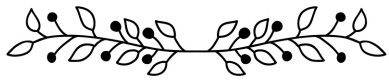
We may live in an age of data (see the books above) and ever more powerful microcomputers but scholars of con law — and especially *comparative* con law — are still using quill pens. They seem unaware of the role that data and statistical methods have played in transforming entire fields of legal inquiry, reshaping what we ask and what we know (again, see the books above).

Within this scholarly backwater, *How Constitutional Rights Matter* is downright cosmopolitan.

In the first place, the authors actually provide a testable answer to the question posed in the book's title: Constitutionalizing freedom of religion, the ability to unionize, and the right to form political parties can lead to better "rights outcomes." That's because these rights are designed to be practiced (and ultimately protected) by organizations, making it harder for governments to violate them.

The second place is even more important: Like the other authors featured in this review, Chilton and Versteeg don't stop with mere speculation and claims; they rigorously test them. Sometimes their tests take the form of "case studies" (the typical modus operandi in comparative constitutionalism and so perhaps an effort to appeal to traditionalists). But the book's real bite comes in a stunningly powerful statistical analysis of constitutional rights in 194 countries over six decades. Not only does the analysis support the thesis about the impact of organizational rights; it also shows the converse: that constitutionalizing rights primarily granted to and practiced by *individuals* (*e.g.*, the right to healthcare) are *not* associated with improved outcomes.

In a blurb for *How Constitutional Rights Matter*, Ran Hirschl called it "a game-changer." I sure hope so. The book is nothing short of a model on how to use data to advance a field of study *and* to develop important implications for democracy and the rule of law.



When you take a flower in your hand and really look at it, it's your whole world for a moment. I want to give that world to someone else. Most people in the city rush around so, they have no time to look at a flower. I want them to see it whether they want to or not.

Georgia O'Keefe
New York Post, May 16, 1946

FOUR RECOMMENDATIONS

Charmiane G. Claxton[†]

National Collegiate Athletic Association v. Alston et al.
141 S.Ct. 2141 (2021)
opinion for the court by Associate Justice Neil Gorsuch

It is remarkable how much energy was expended by an entity that takes in billions of dollars a year to restrict the amount that could be paid to the very individuals that make those billions of dollars possible. In an excellent opinion, Justice Gorsuch addresses the history of collegiate athletics in America, the tension between amateurism and compensation, and the interplay with antitrust law.

A group of current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball filed the instant class action case against the National Collegiate Athletic Association (NCAA) and the 11 Division I conferences (the Southeastern Conference and the remaining conferences that wish that they were the SEC) alleging violations of the Sherman Act by establishing rules that limit the compensation that the student-athletes may receive for their athletic services. The district court held a ten-day bench trial and issued a 50-page opinion finding that the NCAA's compensation limits "produce significant anticompetitive effects in

[†] Magistrate Judge, U.S. District Court for the Western District of Tennessee.

the relevant market."[1] NCAA was enjoined from limiting education-related compensation that conferences and schools may provide to the student-athletes playing Division I football and basketball. However, the district court did not enjoin the defendants from fixing compensation and benefits unrelated to education. This left both sides unhappy.

On appeal to the Ninth Circuit, the student-athletes argued that the district court did not go far enough and that it should have enjoined all compensation limits set by the NCAA. The defendants argued that the district court went too far by weakening the NCAA's ability to restrict education-related compensation and benefits. The Ninth Circuit held that the district court was just right and affirmed in full. The appeal to the Supreme Court was made only by the NCAA as to the issue that was raised and rejected at the Ninth Circuit. The student-athletes chose not to appeal.

Justice Gorsuch begins his opinion with an interesting and educational history of the role of money in college athletics and the origin story of the NCAA. The evolution from protector of amateur athletics to college sports juggernaut is accomplished by resorting to the anti-competitive mechanisms that this litigation targets. This very balanced opinion resolves the issues presented by reminding the parties that the place to look for the answers sought is not 1 First Street NE but the building just across First Street — the U.S. Capitol:

> For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task is simply to review the district court judgment through the appropriate lens of antitrust law.'"[2]

U.S. v. Trevino
7 F.4th 414 (6th Cir. 2021)
opinion for the court by Judge Joan L. Larsen

The expression "ignorance of the law is no excuse" is said so much and so often that people believe it as an absolute truth. Daniel Trevino thought he would put it to the test with the appeal of his conviction to the Sixth Circuit. In 2018, Trevino and his codefendants were charged with conspiracy to manufacture, distribute, and possess with the intent to distribute marijuana and other related charges.

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[1] In re National Collegiate Athletic Association Grant-in-aid Cap Antitrust Litigation, 375 F.Supp. 3d 1058, 1067 (N.D. Cal. 2019)

[2] Citing In re National Collegiate Athletic Association Grant-in-aid Cap Antitrust Litigation, 958 F.3d 1239, 1265 (9th Cir. 2020).

In fact, in *Landen v. United States*,[3] the Sixth Circuit has recognized a narrow application of this exception in situations where "highly technical statutes, such as tax or banking statutes, require a 'willful' violation of the law."[4] Anticipating this potential defense, the United States filed a motion *in limine* to preclude Trevino's deployment of the defense. Trevino's operating theory was that he did not possess the requisite *mens rea* to be found guilty of the conspiracy count. The district court granted the motion and upon conviction Trevino appealed that decision among other rulings.

Landen is a Prohibition-era case that held that sometimes conspiracy does require proof that the defendant knew that his conduct was unlawful. Ignorance or mistake of law is only available as a defense to conspiracy "[1] where the contemplated act is not inherently wrongful, [2] where the prohibitory statute is ambiguous, [3] where there is a good reason for both lawyers and laymen to think that the act planned is not prohibited, and [4] where the respondent plans and does the act in the actual belief, supported by good-faith advice of counsel, that it is a lawful act."[5] The Sixth Circuit held that the exception did not apply here. There are no ambiguities in the Controlled Substances Act conspiracy provision or in the substantive offenses that were the object of Trevino's conspiracy.

Certainly a valiant try on Trevino's part but his ignorance was not a good enough excuse.

Glennborough Homeowners Association v. U.S. Postal Svc.
21 F.4th 410 (6th Cir. 2021)
opinion for the court by Judge Chad A. Readler

How often do you consider the humble Zone Improvement Plan ("ZIP") Code? Introduced in 1963, the purpose of the ZIP code was to ensure that mail travels efficiently and quickly. But the residents of the Glennbourough Homeowners Association placed even more stock in their ZIP Code and decided to make not one but two federal cases out of it.

The first was in 1997 when the developers of the Glennbourough subdivision filed suit seeking a court order to require the Postal Service to recognize "Ann Arbor, MI 48105" as the last line of addresses in the subdivision instead of "Ypsilanti, MI 48198". After a couple of years of litigation, the parties agreed to resolve the matter by settling on "Superior Township, MI 48198". This agreement was enshrined in a consent order.

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[3] 299 F. 75 (1924).
[4] United States v. Roth, 628 F.3d 827, 835-36 (6th Cir. 2011).
[5] Landen, 299 F. at 79.

Alas, the issue reared its head again in 2015. The homeowners association took up the cause and again asked the Postal Service to change the third line to "Ann Arbor, MI 48105". After the Postal Service declined, the homeowners association asked again in 2016. The next rejection came with an admonition not to ask again for another decade. Not to be outdone, the homeowners association filed the lawsuit at issue in this appeal.

You may be asking "what could possibly be the cause or causes of action here?" The complaint alleged violations of the First Amendment, the Freedom of Information act and breach of the 1999 consent judgment. The Postal Service filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The motion was granted in its entirety. The homeowners association appealed only the issue of the 1999 consent judgment.

The Sixth Circuit opinion, delivered by Judge Readler, provides a detailed discussion of constitutional standing and why the homeowners association fails on each of the three elements to establish Article III standing. The complaint fails to identify what "concrete injury resulted from the Postal Service's willingness to deliver mail addressed to 'Ypsilanti' to Glennborough." There is a failure to establish traceability between the injury and the breach. The court found that none of the alleged injuries were caused by the alleged breach of the consent judgment. Finally, the homeowners association could not show that it was fairly likely that their alleged injury would be redressed by the relief sought. In this case, the relief sought — changing the ZIP Code — would not remedy any alleged breach of the consent judgment as the agreement only requires the Postal Service to recognize Superior Township or Ann Arbor, MI 48198 as an appropriate last line instead of Ypsilanti, MI 48198.

In the future, have a care for the humble ZIP Code. Just not as much as the Glennborough Homeowners Association.

Taylor v. City of Saginaw, et al.
11 F.4th 483 (6th Cir. 2021)
opinion for the court by Judge Richard A. Griffin

Allison Patricia Taylor's name will go down in history as a groundbreaking civil rights warrior, for she has rescued the people of Saginaw, Michigan from the unconstitutional intrusion of warrantless tire chalking.

The City of Saginaw maintained the policy and practice of marking tires with chalk to determine whether the car was parked in excess of the time allowed by city ordinance. After receiving several parking tickets, Ms. Taylor filed a 42 U.S.C. § 1983 class action suit alleging that tire chalking was a Fourth Amendment violation. The first trip to the Sixth Circuit resulted in

a ruling that tire chalking is a search for Fourth Amendment purposes. On remand, Taylor moved for class certification and the City moved for summary judgment. Summary judgment was granted in favor of the City and the instant appeal ensued.

This opinion discusses the intricacies of the administrative-search exception to the warrant requirement and why it is not applicable in this case. It also analyzes the mistakes that the district court made by relying on this exception in its decision to grant summary judgment. The real joy of this decision is that it guarantees that yet a third entry in the annals of tire chalking jurisprudence is in the offing. On remand, the district court will still have to resolve the issues of class certification and the City's liability under § 1983.

Kimberly Robinson remains one of our favorites on Twitter.[6] Consider this exchange from July 2, 2021:

> @KimberlyRobinsn: #SCOTUS will hear civil rights case asking if plaintiffs can seek compassion for emotional distress. No. 20-219 Cummings v. Premier Rehab.
>
> @FrankMacniven: Do you mean compensation for emotional distress?
>
> @KimberlyRobinsn: lol, yes. Compensation for emotional distress, not compassion for emotional distress. That's not something courts usually sort out.

[6] *See, e.g.*, *Preface*, 2016 Green Bag Alm. 4.

THE FLOWER AND THE FEVER

JUDGES' POSIES AT THE OLD BAILEY

Aaron S. Kirschenfeld[†]

On the dates of the formal opening of court — should those dates fall between the months of May and September — visitors to the Central Criminal Court, or Old Bailey, in the City of London will see the Lord Mayor of London, a number of both High Court and circuit judges,[1] and other participants carry small bouquets of English garden flowers[2] into the courtroom.[3] The Old Bailey, as the court is known,[4] has existed in one form or another since the mid-16th century, and has hosted this ritual since 1750, save a few years during the Second World War when flowers were rationed.[5]

[†] Digital Initiatives Law Librarian and Clinical Associate Professor of Law, University of North Carolina at Chapel Hill.

[1] Email from Adam Rout, Head of Operations, The Mansion House & Central Criminal Court, City of London Corporation, to the author, *Dates When Posies Will Be Carried: May-September 2022* (Jan. 31, 2022, 8:58 AM EST) (copy on file with the author). Formal openings of court are usually in January, April, July, and October. The January 2022 ceremony was canceled due to COVID restrictions.

[2] In 1908, the compact bouquets were described as being carried in the right hands of the judges, the Lord Mayor, the sheriff, and the aldermen, and as containing "red and pink roses or sweet peas" and being "bound up in long white paper holders embroidered and perforated in imitation of lace[.]" Cassilly Cook, *A Famous Murder Trial in "Old Bailey,"* 4 AM. L. SCH. REV. 556, 558. In this essay, posies, nosegays, and bouquets are used interchangeably. *See Posy*, 22 ENCYCLOPEDIA BRITANNICA 197 (11th ed. 1911) ("a verse of poetry or a motto, either with a moral or religious sentiment or message of love, often inscribed in a ring or sent with a present, such as a bouquet of flowers, which may be the origin of the common use of the word for a nosegay or bouquet.").

[3] John Morecroft et al., *The Old Bailey: London's Seat of Criminal Justice*, 57 ABA J. 1104, 1110 (1971). This article is excerpted from a forty-page booklet, John Morecroft et al., THE OLD BAILEY (1969), but I am choosing to cite from the former since it is considerably easier to locate and use. For a recent, general account of the court's tradition with posies, *see* Ludmila B. Herbst, *Flowers for the Judge*, 79 ADVOCATE 627 (2021). A more dated account can be found at William R. Riddell, *The Judge's Nosegay at the Old Bailey*, 15 ABA J. 49 (1929).

[4] "The Old Bailey evidently takes its name from the *Ballium*, or external wall of defence which existed between Ludgate and Newgate, which ran along the east side of that somewhat narrow and crooked street known as the Old Bailey." CHARLES GORDON, THE OLD BAILEY AND NEWGATE 1 (1902).

[5] *Lavender Scents Old Bailey Again, Bath-Night or No,* WASH. POST, Aug. 18, 1946, at B5.

Showing posies before the judges at the Old Bailey in 1750.
Charles Gordon, The Old Bailey and Newgate 166 (1902).

Through the years, many have seen this parade of flowers into a storied English court as a "seemingly meaningless"[6] but "charming tradition,"[7] though its origins have long been known to be anything but meaningless, and now, after two years of contagious and capriciously fatal pandemic, anything but charming.

[6] *Id.*
[7] Morecroft, *supra* note 3, at 1110.

On Thursday, April 26, 1750,[8] the Old Bailey was unseasonably hot; it was also very crowded, with many thronging for the sensational trial of Captain Edward Clarke.[9] Clarke had been indicted for killing a fellow officer in a duel.[10] The trial was like a set piece from one of Patrick O'Brian's Aubrey-Maturin books, with the conflict stemming from an earlier court martial, leading to a stream of naval captains, admirals, and other grandees as witnesses to the provocative insults given and the root of the quarrel.[11] Clarke was convicted of murder, but the jury asked the court for mercy, and he was spared.[12] Unfortunately, many others there that day were not.

The court, at that time, was adjacent to the notorious Newgate Prison, which, like many English prisons, was dirty, overcrowded, and suffocating.[13] While there had been several outbreaks of "gaol fever" at Newgate and at other prisons, the aftermath of the Clarke trial was tragic. Several judges, the Lord Mayor, and somewhere between 40 and 60 attorneys, functionaries, and spectators sickened and died during this Black Session.

The Lord Chief Justice, William Lee, was stricken but survived. *The Gentleman's Magazine* reported that "[a] messenger from Ld C. Justice *Lee*, attended the court of alderman, to acquaint them of the necessity of some new regulations for the Newgate Goal [sic], or that, it would be dangerous for persons to attend the business of the sessions at the Old Baily. To the message was annex'd a list of above 20 persons … that were at the last

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[8] THE PROCEEDINGS OF THE OLD BAILEY, 1674-1913, an online resource available at www.oldbailey online.org/, contains searchable records of nearly 200,000 criminal trials. Further details on the trial of Edward Clarke can be found in the pamphlet THE TRIAL OF CAPT. EDWARD CLARK, COMMANDER OF HIS MAJESTY'S SHIP THE *CANTERBURY*, FOR THE MURDER OF CAPT. THO. INNES, COMMANDER OF HIS MAJESTY'S SHIP THE *WARWICK*; IN A DUEL IN HYDE-PARK, MARCH 12, 1749. AT JUSTICE-HALL IN THE OLD BAILEY; ON THURSDAY THE 26TH OF APRIL 1750. BEING THE FOURTH SESSIONS IN THE MAYORALTY OF THE RT HON. SIR SAMUEL PENNANT, KNT. LORD-MAYOR OF THE CITY OF LONDON (1750) (hereinafter THE TRIAL OF CAPT. CLARK).

[9] Judge Foster wrote a contemporary account of the case. "At the Old Bayly Sessions in April 1750, one Mr. Clarke was brought to his Trial, and it being a Case of great Expectation, the Court and all the Passages to it were extreamly crowded; the Weather too was hotter than is usual at that time of the Year." Michael Foster, REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GAOL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES (1762).

[10] THE TRIAL OF CAPT. CLARK 4.

[11] *Id.* at 10-15.

[12] *Id.* at 17. Clarke was later pardoned and continued his naval service. Edward Clarke (c. 1708-1799), THREE DECKS, threedecks.org/index.php?display_type=show_crewman&id=2135 (last visited Jan. 28, 2022).

[13] ARTHUR GRIFFITHS, THE CHRONICLES OF NEWGATE 149-152 (1896). For a shorter account of Newgate's history, see *The Demolition of Newgate*, 11 GREEN BAG 113 (1899). The present Central Criminal Court was constructed in 1907 on the former site of Newgate, which was ultimately torn down in 1902.

sessions, who have since died, as thought, from the noisome stench of the prisoners."[14]

Gaol fever, which is now believed to have been typhus, is caused by the bacteria *Rickettsia prowazekii* carried by the body louse *Pendiculus humanus corporis* and is transmitted by contact.[15] Symptoms include fever, chills, headache, rash, cough, nausea, vomiting, and confusion.[16] Typhus generally kills through sepsis and organ failure.[17]

But the miasma theory of disease, then prevalent, held that air became malignant due to contamination with suspended particles of rotting organic matter. Sweet smells could be expected to combat noxious ones, and so "the judges, from that time on, carried with them and had on the bench before them a nosegay of flowers to ward off the prison smells."[18] Lord Chief Justice Lee also ordered that preventive measures, including "fumigating the court several times a day by means of a hot iron plunged in a bucket filled with vinegar and sweet-smelling herbs," be implemented.[19] Many areas of the courtroom, including the bench and the dock, were likewise perfumed.[20]

The peril of gaol fever prior to the Black Session was not surprising, nor was it unprepared for. The first court at the Old Bailey was built in 1539.[21] It was known then that prisoners would "be many tymes vystyed with Syknes and by reason therof the place ys infectyd and moche peryll and daungyer hath chauncyd to the Justyces and other worshipful cominers."[22]

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[14] 20 GENTLEMAN'S MAGAZINE 233 (1750).
[15] CDC, *Epidemic Typhus* (last reviewed Nov. 13, 2020), www.cdc.gov/typhus/epidemic/index.html.
[16] *Id.*
[17] David H. Walker et al., *Rickettsial Diseases*, *in* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE (J. Larry Jameson et al. eds., 20th ed. 2018). The author regrets that more nothing more than basic medical reference texts could be consulted, as he would have had several panic attacks at the detailed descriptions of disease and etiology.
[18] DONALD RUMBELOW, THE TRIPLE TREE: NEWGATE, TYBURN AND OLD BAILEY 30 (1982). The reference to posies in the children's nursery rhyme "Ring a ring o' roses" is thought to originate from their similar role as prophylaxis during the Great Plague of London, 1665-66. However, there is no evidence to support this claim. DANIEL HAHN, THE OXFORD COMPANION TO CHILDREN'S LITERATURE (2d ed. 2015). *See also* WILLIAM S. BARING-GOULD & CIEL BARING-GOULD, THE ANNOTATED MOTHER GOOSE 252 n.116 (1962).
[19] JOHN CAMPBELL, 3 LIVES OF THE LORD CHANCELLORS AND CHIEF JUSTICES OF ENGLAND 118 (1873).
[20] Albert Crew, *The Reformation of the Old Bailey*, 3 MEDICO-LEGAL & CRIMINOLOGICAL REV. 149, 160 (1935). One imagines that these interventions were about as useful as the plague doctor's beaked mask, which, while stuffed with flowers, herbs, and oils, also came perforated with air holes. Erin Blakemore, *Why Plague Doctors Wore Those Strange Beaked Masks*, NATIONAL GEOGRAPHIC, www.nationalgeographic.com/history/article/plague-doctors-beaked-masks-coronavirus (last visited Jan. 31, 2022).
[21] RUMBELOW, *supra* note 18, at 67.
[22] *Id.*, quoting the resolution passed by the City of London Common Council to providing for the first court at the Old Bailey.

After the Great Fire of London in 1666, the building was rebuilt in 1673 as an open-air amphitheater, but was eventually closed up in 1736.[23] Unfortunately, the importance of ventilation did not outweigh the wish to avoid the elements. Even in the wake of the Black Session, not much changed structurally at the Old Bailey. Well into the late 19th century, before construction of the new courthouse, it was described in this publication's predecessor as "a gloomy building with several narrow, draughty and ill-ventilated courts imbedded in it."[24] After all, crises pass, or we tire of them, or we fail to adapt and hope they won't happen again.

There is not much to say about the obvious parallels to our own time, nor really is there a way to say it subtly. Disease and death are grim business, and certainly not confined to the past. The work of the courts must continue in times of plague, and it has. The state courts have devised unique approaches to mitigate risk while hearing cases, as have the federal courts.[25]

It is difficult to believe that these new preventive rituals — the masks, vaccine requirements, and advances in air filtration — will seem charming in 250 years. That is, except perhaps for the artifact of the Zoom cat lawyer.[26] Should the judges of the Old Bailey appear online as kittens, each holding a small posy of flowers, we will perhaps see our own strange history reflected in the traditions of that venerable court.

Fair daffodils, we weep to see
You haste away so soon.

Robert Herrick
To Daffodials (1648)

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[23] *Id.* at 68-70.

[24] *The Demolition of Newgate*, *supra* note 13, at 114. As for reform in prison conditions, one early step was the passage of the Gaol Distemper Act 1774, 14 Geo. 3 c. 59 (Eng.), which provided for cleaning and ventilation. John Howard's critical *The State of the Prisons in England and Wales* followed in 1777.

[25] State court responses to the COVID-19 pandemic can be found at NATIONAL CENTER FOR STATE COURTS, *Coronavirus and the Courts*, www.ncsc.org/newsroom/public-health-emergency (last visited Jan. 28, 2022). Federal court orders are collected at UNITED STATES COURTS, *Court Orders and Updates During COVID-19 Pandemic*, www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic (last visited Jan. 28, 2022).

[26] 394th District Court of Texas, *Kitten Zoom Filter Mishap*, YouTube (Feb. 9, 2021), youtu.be/KxlPGPupdd8.

FOUR RECOMMENDATIONS

G. Edward White†

Herma Hill Kay
Paving the Way: The First American Women Law Professors
(University of California Press 2021)

This book is the culmination of a project that Herma Hill Kay conceived in 1989, when she was named the president of the Association of American Law Schools; that she worked on sporadically between then and 2000, when she retired from the deanship at Berkeley; and that occupied much of her attention between that year and 2010, resulting in her having largely completed a manuscript two years before her death. Kay's object in the project was to identify the women who been members of American law school faculties before she was appointed to the Berkeley faculty in 1960. By 1990 she had identified thirteen such women and had begun interviewing those who were still alive, ultimately interviewing nine of what eventually became fourteen early female law professors, the fourteenth having been mistakenly listed as starting at Wisconsin in 1961 when she actually had joined the faculty in 1959. "I was motivated" to write the book, Kay said, "because the stories of these fourteen early women law professors [are] rapidly being forgotten."

When Kay died the book manuscript was not yet in a publishable state, being overly long and missing some details in its coverage. A group of Kay's

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friends and colleagues persuaded Patricia Cain of the Santa Clara law faculty, a longtime close friend of Kay, to shepherd the manuscript to publication. That gestation process has resulted in some unevenness of coverage.[1]

Paving The Way's principal historical contribution is a collective portrait of the fourteen women law professors who preceded Kay. Together most of them shared some distinctive characteristics. Most were graduates of the law schools who hired them as faculty members, and had done conspicuously well in their student careers, several receiving the highest academic grades in their graduating classes. Most remained at their home institutions for their entire careers. None, in interviews with Kay or in other records of their careers, exhibited a sense of being discriminated against on the basis of their gender. Their attitudes seem characteristic of "first-generation pioneers" in numerous professions, combining a sense of being "outsiders" with a determination to succeed on the terms of the occupation they were undertaking, which, for Kay's first fourteen, meant combining a demanding, rigorous approach to classroom teaching with the avoidance of contentious faculty issues, including gender discrimination.

The last characteristic displayed by several of Kay's original subjects was their having gone through the process of entering law school and eventually joining law faculties while raising children. In only one instance were a female candidate's family commitments taken into account in assessing her comparative lack of productivity in her tenure decision. In general, American law faculties both expected their early female members to bear the principal responsibilities for child rearing and gave them no credit for that role. For the most part Kay's pioneers quietly accepted that attitude, persevered, and thrived. Let's hope their female successors aren't experiencing comparable attitudes from male colleagues, and if so aren't tolerating them.

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[1] In addition to Kay's narratives of the lives and careers of women who joined law faculties before 1960, there is a lengthy chapter on women entrants into the legal academy in the 1960s, 1970s, and 1980s. It is not clear how much of that chapter was included in Kay's manuscript, but its emphasis, given the much larger number of entrants in those days, is more quantitative than analytical. A concluding chapter to the book is followed by an "Appendix," briefly documenting the career of the sixth of the pioneering women, Clemence Myers Smith, who taught at Loyola (Los Angeles) from 1952 to 1982, and an "Afterword" by Melissa Murray, who joined Kay on the Berkeley faculty in 2006 and whom Kay mentored in her early career. The Appendix on Smith was apparently added to correct her having been omitted in Kay's original manuscript. It is not clear why Murray's Afterword was added. Most of Murray's essay advances an argument that Kay's criteria for including coverage of her pioneer subjects was based on the American Bar Association's declining to accredit institutions that did not offer three-year, fulltime programs. Consequently Kay eliminated from her consideration early faculty members at several schools that served African-American, immigrant, and female students.

Gregory Ablavsky
Federal Ground: Governing Property and Violence in the First U.S. Territories
(Oxford University Press 2021)

It became evident, after the British colonies in America declared their independence and eventually wrote a federal Constitution to accompany their state governments, that the "western lands" of those states were going to become outlets for settlement. Moreover, beginning in 1803 the United States acquired a vast amount of new territory from Spain, France, and Great Britain, doubling its territorial size.

That territory, when first acquired, was almost exclusively occupied by indigenous tribes. It was plain, however, that it would not long remain in that state as the non-indigenous resident population of the United States grew and migrated westward. The central question raised by that prospect was how the new "federal territory" should be governed as it transitioned from a largely "vacant" (in terms of European settlement) area to new states poised to enter the Union.

Ablavsky's book is about the details of how that question was attempted to be answered in the "first" federal territories, which became the states of Tennessee and Ohio. In an impressive unearthing and analysis of primary sources, he demonstrates that neither of two existing historiographical narratives captures the process of governing those territories. The Tennessee and Ohio territories, in the years before those states entered the Union, were neither examples of unfettered federal power nor locations where chaos reigned and the federal government's authority was largely nonexistent. Instead they were regions beset by common problems that were responded to in a common fashion.

The problems were the allocation of land titles and the governing of violence between tribal members and settlers. With respect to the former, the common response was the creation of federal land agencies charged with the disposition of land through the "exhaustion" of "Indian titles" and sales to settler speculator groups and individual settlers. With respect to the latter, the common response was the creation of federal territorial courts whose goal was to administer impartial justice between settlers and tribes. The first of the responses was largely "successful" in that it facilitated the widespread dispossession of tribes from land they had occupied. The second response largely failed, resulting in both settlers and tribes increasingly resenting one another's presence and eventually precipitating action on the part of states carved out of federal territories to remove tribes from within their borders.

Critical to both responses, Ablavsky demonstrates, was the emergence of local settler residents as federal officials. They not only staffed federal land agencies and federal courts, they managed to become dispensers of federal government largesse, sometime to native tribes but more commonly to settlers engaged in land ventures or seeking to pacify or direct the activities of tribes. The governance of the first federal territories was thus a mixture of a regular, but not always successful, federal presence and the increasing involvement of settlers in the federal government, often for self-interested reasons. The responses of Tennessee and Ohio territories, Ablavsky concludes, provided a model which subsequent federal territories adopted, and resulted in relatively long intervals in which regions of the United States remained territories while the problems confronted by Tennessee and Ohio, which proved to be habitual in the American West, were addressed. One might conclude from Ablavsky's analysis that at least some residents of federal territories had little incentive to promote those territories' joining the Union, since as federal officials they were exerting more influence over policy decision than they might once statehood had been secured.

David Alan Sklansky
A Pattern of Violence: How the Law Classifies Crimes and What it Means for Justice
(The Belknap Press of Harvard University Press 2021)

Sklansky begins his book by identifying "two stories … in the recent history of the American criminal justice system" that he characterizes as "tragedies." One is the rate of mass incarcerations for criminal offenses in America, which is now "five or ten times as high as … in democratic societies elsewhere in the world," so that the U.S. has "5 percent of the world's population and 25 percent of its prisoners." Moreover, the American prison population is "disproportionately dark-skinned and poor," with "people of color [accounting for] 60 percent of all prisoners."

The other story involves the collapse of police reform. Widely thought at the opening of the twenty-first century to be so successful that it no longer needed to even be on the agenda of public officials and policymakers, police reform seems to have so deteriorated over the past two decades that "for many Americans, the police [seem] beyond reform: they [need] to be abolished, and replaced with something radically different."

Sklansky believes that both of those stories are "about the law understands and responds to violence." Mass incarceration, in his view, "has been driven in large part by fears about violent crime." Roughly half of the people currently serving prison sentences have been convicted of offenses classified as "violent."

And "the failure of police reform … is partly a story about a decline in the salience of violence in the rules that govern law enforcement, and in our thinking about the police more broadly." As military-style equipment and tactics became common features of policing in the early twenty-first century, and the courts' attitude toward "stop and frisk" cases increasingly permitted violent detentions of persons by police officers, conceptions of "police misconduct" shifted from an attention on "incivility, … invasions of privacy, or the use of informants" to "police violence," especially "the extraordinarily high rate at which American police forces kill young men of color." Violence, perceptions about it, and reactions to it were directly connected both to the rise of mass incarceration and the collapse of police reform.

The paradox around which Sklansky's book pivots is not one that he explicitly identifies, but it can readily be discerned. Mass incarceration rests on the assumption that violent crime is qualitatively "worse" than non-violent crime and that violent criminals are thus more dangerous to members of the public than other criminals, and perhaps characterologically "badder" individuals, worthy of being incarcerated. But that assumption does not seem to govern responses to police behavior, at least not until very recently. Violent police "misconduct" has not tended to be treated as "worse" than other forms of police misconduct, such as corruption or illegal surveillance or intrusion. The resultant paradox is that violence is taken to be an extremely salient characteristic in the sentencing of criminals, but not in the disciplining of members of the police. Moreover, Sklansky suggests, neither assumption may be accurate, because our understanding of legal ideas about violence — "how the legal system understands violence and tries, or does not try, to tame it" — may be imperfect.

Patterns of Violence is fundamentally about "how American law thinks, and sometimes fails to think, about violence." It raises such questions as "Is violence always worse than nonviolence? How is violence defined? What causes violence, and how is it best controlled? Is violence rooted in the character of violent people or in the circumstances they confront?" Sklansky believes that "the answers the law gives to these questions are more complicated and more varied than we often imagine," and that "ideas about violence embedded in the law are deeply entangled with race, with gender, [and] with class." Those are important and pressing questions, and Sklansky's exploration of the answers current American criminal law seeks to give them is both rewarding and troubling.

Claire Priest
Credit Nation: Property Laws and Legal Institutions in Early America
(Princeton University Press 2021)

For many years the historiography of the Founding Era pivoted around debates about whether "republicanism" or "liberalism" was its dominant perspective on issues of political economy. Republicanism tended to be associated with collectivist and hierarchical conceptions of work, labor, and socioeconomic status, whereas liberalism was identified with free markets, individualized conceptions of work and labor, and the relaxation of status hierarchies. Although most scholars acknowledged that late eighteenth-century America contained strands of both ideologies, a central message of the debates was that "precapitalist" attitudes toward property-holding and economic interchange were still present in the world of the framers.

Credit Nation, the culmination of work stretching back to a 1999 student note in the *Yale Law Journal*, revises that historiography in a surprising fashion. By concentrating on developments in England in the early eighteenth century and some decisions made by British colonies in America at the same time, Priest demonstrates that from the early eighteenth century on the American colonies conceived of property, and its transfer, differently from England.

In England the dominant policy affecting property transfers, especially land, was the preservation of landed estates in the nobility and aristocracy. This policy was effectuated by two principal mechanisms: confidentiality in the identification of land titles and restrictions on the capacity of creditors to attach landholdings in satisfaction of debts. Since the actual ownership of land tended to be known only to individual family members and those representing them, it was difficult for creditors to discern the assets of persons in debt to them. And even if they could learn who owned land, they could not affect the capacity of family members to transfer land to their relatives unencumbered by debt.

In the British colonies in America, however, land was far more of a speculative commodity than in England and was freely transferred. Recording acts in colonies made it much easier to determine the ownership of land. Many more persons acquired land with the prospect of selling it as settler population growth increased. In its speculative capacity, land came to be seen as an asset comparable to personal property, and in the early eighteenth century colonies tended to reclassify land so as to allow creditors to attach landholdings in satisfaction of debts.

Meanwhile English merchants who had extended credit to colonial planters in the early eighteenth century began to express dissatisfaction with

their inability to attach colonial landholdings to satisfy debts. Parliament responded with the Debt Recovery Act of 1732, which reclassified land as a commodity in all the British colonies and enabled creditors to attach it. The Act essentially meant that any property held by American colonists — land and personal property, including slaves — could be attached by creditors in England or elsewhere. Although slaves were exempted from the Act in all British colonies in the early nineteenth century, the United States was no longer a British colony, so slaves continued to be a source of debt repayment.

Priest argues that the commodification of land in colonial America, and the inclusion of slaves as objects creditors could attach, transformed the treatment of property in America, making it more clearly an object for commodification and market exchange. The ability of creditors to attach slaves in satisfaction of debts, she claims, had the effect of furthering the growth of slavery in the United States, as slaveowners with limited capital flow could seek credit to develop their plantations, knowing that they had a "free" supply of slaves to serve as collateral.

Priest's work reveals that property-holding in colonial and Revolutionary America took on a distinctively commercial form much earlier than commonly believed, as well as the unfortunate role that form had in perpetuating American slavery. Early American historiography needs to be revised to take her work into account.

What's in a name? That which we call a rose
By any other word would smell as sweet.

William Shakespeare
Romeo and Juliet (1595)

FIVE RECOMMENDATIONS

Cedric Merlin Powell †

Erwin Chemerinsky
Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights
(Liveright 2021)

Preeminent constitutional law scholar and dean Erwin Chemerinsky offers a compellingly sober account of how the Supreme Court empowered the police — by expanding their investigatory and enforcement powers — and effectively diminished the civil and constitutional rights of citizens. The title of the book says it all — citizens are presumed guilty, and the presumption is legitimized by a Court actively engaged in expanding the power of police so that constitutional protections are significantly diluted.

Presumed Guilty chronicles how the Court dismantled all the fundamental protections established by the Warren Court and gave its approval of wide-ranging power and discretion to police in the "War on Crime." Undermining the Fourth Amendment so that a citizen's privacy and autonomy become secondary to the police's investigatory mandate; discarding the Fifth Amendment privilege against self-incrimination so that suspects have only a sem-

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blance of constitutional protection; ignoring gross systemic malfunctions like false eyewitness identifications; and insulating police misconduct from review in the courts — all leading to the subversion of civil rights.

Chemerinsky masterfully examines the Court's criminal justice jurisprudence, and, case-by-case, connects them to the devastating impact on citizens on the ground. *Presumed Guilty* opens with the heart-wrenching cry of George Floyd — "I Can't Breathe" — and illustrates in painful detail how race, a Supreme Court opinion captioned *City of Los Angeles v. Lyons*, which inexplicably held that chokehold victims could not seek injunctive relief unless they could prove that they would be subject to a chokehold again, and a system that is predisposed to deny relief all subvert constitutional rights (especially those of Black and Brown people).

Presumed Guilty makes a formidable contribution to a burgeoning canon that critically assesses the structural dynamics of race, racism, and the systemic interplay of the criminal justice system.

Laura Coates
Just Pursuit: A Black Prosecutor's Fight for Fairness
(Simon & Schuster 2022)

Part memoir, part self-reflective journal, and fully comprehensive in its indictment of the criminal justice system, *Just Pursuit* is a skillfully executed assessment of the system by Laura Coates, a former federal prosecutor. *Just Pursuit* is far from the typical narrative of a prosecutor finding redemption after realizing that she was part of the crushing machinery of mass incarceration. Here the prosecutor's inner struggle between her identity as a Black woman (and this is a complex intersectionality in itself) and as an agent of the system locking up a disproportionate number of her own people is laid bare.

After securing yet another guilty verdict against a Black defendant, Coates recounts how the words of her trial supervisor, "We … got … another … one!" snapped her into the reality of her choice to leave the prosecutor's office, tell her story, and work to reform the system. Coates writes

> I walked away the day my four-year commitment ended, not knowing whether I had been a proud champion or a coward, complicit or exonerated, the public's humble servant or its slave. … I removed the muzzle and used my experiences in the courtroom as a guide to educate the public as a law professor, news analyst, and radio talk show host. In that, I have found a new calling (p. 7).

Coates certainly found her calling. *Just Pursuit* is written with passion and resolve to dismantle a criminal justice system where race matters at every level.

Peter S. Canellos
The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero
(Simon & Schuster 2021)

In a majestic and captivating treatment of the life of the Great Dissenter, John Marshall Harlan, Peter S. Canellos canvasses not only history, but the far-reaching implications of the color line. "There are silences in history." And so begins Cannellos' introduction to John Marshall Harlan, a towering jurist of the late 19th and early 20th century, who broke the silence of complacency and retrogression with his resoundingly prescient dissents in *The Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896), decisions that continue to shape the enduring legacy of race and racism in American society. Harlan wrote his dissents for future generations because, Cannellos posits, "He saw things that [the other justices] did not" (p. 2).

And the way that Harlan saw those things was shaped by a complex life view of a mirror image color line that his fair-skinned African-American brother Robert — whose parentage was a matter of "hushed discussion" (p. 5) — could see but never traverse for there were strict laws, conventions, and limits even for those Blacks who were constructively "free." Harlan "learned first-hand, from his family, that those born into slavery could drink just as deeply of freedom as white men could" (pp. 8-9). *The Great Dissenter* offers inspiring insights into how Justice Harlan interpreted the Constitution to make that freedom a reality in a post-Reconstruction union reasserting the primacy of white supremacy.

Finally, *The Great Dissenter* complements *Separate* (2019), Steve Luxenburg's comprehensive historical narrative of *Plessy v. Ferguson,* by focusing on Justice Harlan's judicial philosophy and how it was shaped by his life and times.

Kathleen Belew and Ramón A. Gutiérrez
A Field Guide to White Supremacy
(University of California Press 2021)

In these fraught and explosive times, there is no more appropriate primer to guide the reader through a polity on the verge of unraveling than *A Field Guide to White Supremacy.* A distinguished convening of interdisciplinary scholars, journalists, and historians excavates the foundations of white supremacy. In 19 essays, the authors distill the central tenets of white supremacy and how they circulate in a post-racial society to reify subordination.

A Field Guide to White Supremacy constructs a pathbreaking conceptual and doctrinal bridge between whiteness studies and Critical Race Theory as the authors analyze the maintenance and profitability of whiteness; iterations of white supremacy and the present day effects of past discrimination; the power

of whiteness to exclude through anti-immigration policies; and how white supremacy has moved from the fringe to the mainstream. (I take issue with the term "fringe," as white supremacy is endemic to American life, indeed the book proves this fact.) *A Field Guide to White Supremacy* will be an invaluable resource in disrupting falsehoods, centering the analysis of race in a post-racial society, and providing the conceptual tools to eradicate structural inequality and white supremacy. "If we can recognize and name the many variants of white supremacy around us, might we imagine a world that is not so permeated with them?" (p. 9). The answer is an empathic, "yes" because we are only limited by our own imaginations in liberating our world from the enduring pernicious power of white supremacy.

Gilda R. Daniels
Uncounted: The Crisis of Voter Suppression in America
(NYU Press 2021)

Concluding that the Voting Rights Act was unnecessary, the Supreme Court, in *Shelby County v. Holder* (2013), a 5-4 decision, held that the statutory preclearance provision unconstitutionally subjected states, with a prior history of voter suppression and discrimination, to unduly burdensome federal supervision given the current neutral and fair conditions of American democracy. This is the New States' Rights federalism where the Court signals to the states to expand their power, shift to retrogressive policies, and entrench a minority political party (the Republican Party of the former president) in power through voter suppression disguised as efforts to eliminate fraud and make the franchise accessible to all.

Identifying all of the anti-democratic voting reforms, cloaked in the deceptive cover of neutrality, as undermining the fundamental right to vote, *Uncounted* "identifies and analyzes the cycles of voter suppression. These cycles occur from progress to regress and continue to replicate" (p. vii). To break this cycle of subjugation, which dates to the First Reconstruction and the passage of the Fifteen Amendment in 1870, *Uncounted* prescribes structural solutions designed to open the process of democracy by fortifying the fundamental right to vote. A fully invigorated fundamental right to vote would mean universal suffrage ("an affirmative right to vote embedded in the federal and state constitutions," p. ix); automatic voter registration; same-day registration, early voting, and no-excuse absentee ballots (*id.*). Removing all these structural barriers to voting would ensure that all votes would be *counted*. In these existential times, where democracy hangs in the balance, *Uncounted* is essential reading as we fight to "break the cycle of voter suppression and move from crisis to cure to true democracy" (p. x).

THE INELUCTABLE MODALITY OF THE VISIBLE

FAIR USE AND APPROPRIATIONISM IN FINE ART

Heather J. Meeker[†]

In 2021, the sale of Beeple's $69 million NFT *Everydays-The First 5000 Days* made international news.[1] It was one of the most expensive pieces of art ever sold at auction, but the sale was especially newsworthy because it challenged our definition of visual art — and our definition of art ownership. The work was a collage of 5,000 artworks created by the artist over more than 13 years, and it was the first purely digital art ever offered by Christie's.[2]

Beeple's art represented an entire career's worth of effort, an astonishing work. Perhaps one of the more astonishing aspects of the work is that he was not sued for using several iconic movie and video game characters in his 5,000th day[3] — a practice with long and controversial history in fine art and the law.

Visual art may seem frivolous in a world facing a global pandemic and environmental calamities, but is increasingly part of our world and our culture. Today, we spend more and more of each day absorbing visual images — from Instagram feeds, to the logos on our computer screen, to emojis with which we communicate. Some say we are in a post-literate world, but in fact, we now live in a multi-literate world, where we use the language of visual images to communicate, as much as we use words.

Visual images have always had a unique way of making us think. In *Ulysses*, James Joyce, through his alter-ego Stephen Dedalus, spoke of the "ineluctable modality of the visible." In doing so, he drew on precepts going back as far as Aristotle. In contemporary parlance, we are all visual learners. Modern visual artists are the progeny of Joyce, speaking in a symbolic language of quotations and allusions. The grammar of this process in art is sometimes

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[1] twitter.com/ChristiesInc/status/1361670588608176128/photo/1.

[2] www.christies.com/features/Monumental-collage-by-Beeple-is-first-purely-digital-artwork-NFT-to-come-to-auction-11510-7.aspx?sc_lang=en.

[3] *Id.* (scroll down to "01.07.21").

called Appropriationism — the incorporation of familiar visual images into new works of art — and is heavily associated with the post-Modern art movement of the late 20th century. But appropriation — capitalized or not — continues strong today. And it is still at loggerheads with copyright law.

Modern Art, Postmodern Art, and Appropriationism

Modern art began with Cubism. At the turn of the 20th century, western culture was experiencing great change, absorbing the transformation of the industrial revolution. The progression from Cezanne's moody yet recognizable countrysides[4] to Marcel Duchamp's practically unrecognizable "Nude Descending a Staircase"[5] took place in less than a decade — 1904 to 1912.[6]

The first Appropriationist style was collage. The industrial revolution brought not only social change, but the mass availability of manufactured things, sometimes things that were shoddy and disposable in a way that seemed to cheapen day-to-day experience. Fine art was quick to assimilate and comment on these new things. In his 1912 painting "Still Life with Chair Caning," Picasso incorporated an oilcloth printed with a caning design found on the cafe tables, injecting an image from the real world into his composition.[7] Collage was soon embraced by the Dadaists. In 1920, for example, Hannah Hoch created "Pretty Maiden," a collage replete with 22 BMW logos, a pneumatic tire, a wig, and a light bulb.[8]

Soon, visual artists began incorporating mass-produced images, as well as mass-produced things, into their artworks, and the result was Pop Art. As Marshall McLuhan said, "Information pours upon us, instantaneously and continuously."[9] Even Robert Hughes, one of the more outspoken critics of post-Modern art, shares this view. "Nature has been replaced by the culture of congestion: of cities and mass media. We are crammed like battery hens with stimuli, and what seems significant is not the quality of meaning of the

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[4] Paul Cezanne, *Mont Sainte-Victoire* (1904-06), The Henry and Rose Pearlman Foundation, on long-term loan to the Princeton University Art Museum, artmuseum.princeton.edu/cezanne-modern/c%C3%A9zanne/mont-sainte-victoire.

[5] Marcel Duchamp, *Nude Descending a Staircase, No. 2* (1912), Philadelphia Museum of Art, PD-US, en.wikipedia.org/w/index.php?curid=3922548.

[6] ROBERT HUGHES, THE SHOCK OF THE NEW 19, 52-53 (1991). This book is a classic work of art criticism, and highly recommended for more background on post-Modernism.

[7] Pablo Picasso, *Still Life with Chair Caning* (1912), Picasso Museum, Paris, www.pablopicasso.org/still-life-with-chair-caning.jsp#prettyPhoto[image2]/0/.

[8] Hannah Hoch (1920) Pretty Maiden, utopiadystopiawwi.wordpress.com/dada/hannah-hoch/the-beautiful-girl/.

[9] MARSHALL MCLUHAN AND QUENTIN FIORE, THE MEDIUM IS THE MESSAGE 63 (1967).

messages, but their excess. Overload has changed our art."[10] Keep in mind that Hughes wrote this many years before the iPhone transformed us into a society of images and gestures.

Artists, armed with the technology of mass production and digital authoring tools, are now able to create digital images with little or no technical training. The first to publicly capitalize on that idea was Andy Warhol, who set up his "Factory," a studio in which hired artisans mass-produced his ideas. Later, Jeff Koons, a commodities broker-turned-artist, became notorious — and a defendant in a famous lawsuit in the 1990s — for producing Appropriationist sculptures that he had no hand in crafting. But this lack of craft was part of the point; one tenet of post-Modernism is its notion that quality and originality are "sinister devices of cultural control."[11]

Copyright and Fair Use

To the law, appropriation is fundamentally copyright infringement, so the philosophical underpinnings of Appropriationism and intellectual property law naturally conflict. In copyright law, originality and appropriation fight it out under the aegis of the *fair use doctrine*. The Copyright Act[12] specifies the factors to be taken into account when determining whether a possible infringement is fair use.

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

There are two competing — or perhaps parallel — philosophies of creativity underpinning fair use. One view is that creativity happens in the mind of the artist. The romantic conception of authorship envisions the artist creating art from nothing but imagination. This view supports a narrow definition of fair use. The Appropriationist notion is that creativity is mostly a synthesis

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[10] Robert Hughes, *The Shock Of The New*, at 324.
[11] Paul Richard, *Welcome to the 'Image World'; At the Whitney, a Sleek, Chic and Shallow Response to the Media Blitz*, WASH. POST, Nov. 12, 1989, at Gl.
[12] 17 U.S.C. 107.

of existing expression, a notion that questions the idea of originality. This view supports a broad definition of fair use.

How should the law strike a balance between these two philosophies? The "ineluctable modality of the visual" is a Joycean way of saying that visual arts are special — they are different from works based on sound, or touch, or words. Assuming that's true, should visual arts enjoy special treatment under copyright law, and particularly under fair use?

The fair use doctrine has been called "the most troublesome in the whole law of copyright."[13] As Lawrence Lessig quipped, "'fair use' is the right to hire a lawyer,"[14] commenting on the decade-long war between Google and Oracle over the application of fair use to software: two trials, two Federal Circuit reversals, one Supreme Court reversal of that, and over $100 million in legal fees.[15] The vagueness of the fair use doctrine makes Appropriationism a risky business. Courts are reluctant to resolve fair use questions on summary judgment, so relying on fair use as a defense is often expensive, lengthy, and unpredictable. That means that a defendant who can't afford to fight ends up being silenced instead.

Much of the development of copyright law in the last decades has been a process of adapting the law to new forms of expression; as technological advancements have come faster and in greater leaps, they stretch copyright law far beyond its original focus. At the same time, as a political matter, the media industry has successfully lobbied for more and longer copyright protection, mostly without effective opposition. The duration of copyright protection has been inflating — now life plus 70 years for individuals — even while the technology to mix and recast images in creative ways has hurtled forward. Lately, the advance of art and technology has put more and more pressure on the fair use doctrine, as we seek to balance the rights of the quoter and the quoted in our world.

Fair Use Factors and Appropriationism

The first factor is usually not favorable to Appropriationism. To a lay person, the purpose of Appropriationist art does not fit neatly into either a commercial or non-commercial category. But to the law, fine art is a business. Commentators have criticized the courts for classifying fine arts as a commercial use, saying that the distinction between commercial and educa-

[13] *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).
[14] twitter.com/lessig/status/1379116748180447237?s=20.
[15] en.wikipedia.org/wiki/Google_LLC_v._Oracle_America,_Inc.

tional purposes is indistinguishable when applied to the fine arts.[16] Moreover, as art finds its way into museum collections or is displayed to the public, it does inure to the public benefit. One federal district court in California has held that broader scope is given to fair use in the field of fine arts than in "commercial enterprises."[17]

The second factor, the nature of the copyrighted work, categorizes the original work, parallel to the way the first factor categorizes the infringing work. Courts generally give less latitude to artists than to authors of academic or news material. The Second Circuit has held that "When informational works are involved, as opposed to creative ones, the scope of fair use is greater."[18] Courts generally draw the line between these categories rigidly, turning a deaf ear to claims that artistic expression is intended to inform its viewer.

The ineluctable modality of the visible is crucial to the third factor. Unlike text or music, which are sequential in nature and can be more easily excerpted, visual material comes in one, instantaneous image. One court has held that every frame of a film is a work of art, thus rendering the use of any one frame a complete copying of the underlying work.[19] Some commentators have therefore suggested that the substantial use criterion should not be applicable to visual works.[20] Over the years, the courts have begun to agree. For visual images, use of an entire work often will qualify as fair use. In *Nunez v. Caribbean Int'l News Corp.*,[21] a case involving re-use of photographs by a newspaper, the court simply said, "The third factor does not seem particularly relevant in this context."

The last enumerated factor is the effect on the potential market for the original work, originally the "single most important element" of the fair use analysis.[22] This factor asks whether the new work has supplanted the market for the original work. For fine artists, this factor can cut either way, depending not only on the equities of the case but on the vagaries of the art market. Courts often distinguish between the market for the plaintiff's work and the market for the infringing work. This factor can also backfire for the plaintiff, when the very fact of the copyright infringement claim increases sales of the infringed work. But some courts disregard this notoriety value.

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[16] Sigmund Timberg, *A Modernized Fair Use Code for Copyrights*, in JOHN LAWRENCE AND BERNARD TIMBERG, FAIR USE AND FREE INQUIRY 313-14 (2d ed. 1989).
[17] *Loew's Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955) (the *Gaslight* case).
[18] *See Wojnarowicz v. American Family Assn.*, 745 F. Supp. 130, 144 (S.D.N.Y. 1990).
[19] Time, Inc. v. Bernard Geis Assoc., 293 F.Supp. 130, 159 (S.D.N.Y. 1968).
[20] Timberg, *Modernized Fair Use*, in LAWRENCE AND TIMBERG, at 313.
[21] 235 F.3d 18 (1st Cir. 2000).
[22] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Transformation: The "Fifth Factor"

Fair use in Title 17 covers a non-exclusive list of factors, intended only to set the stage for an equitable judgment. Over the past few decades, courts have relied more and more on an uncodified fifth factor — transformation — in fair use analysis. This factor is often cast as part of factor one. A use is transformative when it "adds something new, with a further purpose or different character," as the Supreme Court put it in *Campbell v. Acuff-Rose Music*.[23] Via a string of cases in the late 1990s and the 2000s, the courts began to place more and more emphasis on this factor. In a seminal article on the topic, Judge Pierre Leval said:

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. … [If] the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[24]

This new focus on transformation arguably changed the relationship of copyright and Appropriationism forever.

Fair Use, Appropriationism, and Fine Arts in the Courts

The patron saint of Appropriationism is Andy Warhol. Warhol was the figurehead of the pop art movement in the 1960s, and his trademark style reproduced commercial images that had become cultural icons. His best known work is the 1962 "32 Campbell's Soup Cans."[25] His serial photographs of Marilyn Monroe (in *Marilyn Diptych)* are now cultural icons in their own right.[26]

One heir to Warhol's artistic vision is Richard Prince, who engages in a form of Appropriationism called re-photography, and is most famous for his appropriation of the men from Marlboro cigarette ads.[27] In 1983, Prince ran afoul of the law by appropriating a photograph of Brooke Shields, which he

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[23] 510 U.S. 569 (1994).
[24] Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).
[25] Andy Warhol, *Campbell's Soup Cans* (1962), MOMA.
[26] Andy Warhol, *Marilyn Diptych* (1962), Tate Museum.
[27] Richard Prince, *Untitled* (cowboy) (2016), LACMA.

entitled "Spiritual America No. 1" and exhibited in a fake art gallery he had set up.[28] The picture's original photographer, Gary Gross, attempted to serve Prince with a lawsuit but was thwarted by the disappearance of the fake gallery.[29]

Even 30 years later, Prince was still warring with copyright law, but with more success. Patrick Cariou, a professional photographer, had published a book of photographs entitled *Yes Rasta*, capturing "the strict, separatist, jungle-dwelling, fruit-of-the-land lifestyle — popularized by reggae legends Bob Marley, Peter Tosh, and Burning Spear." Prince created a series of paintings and collages entitled "Canal Zone," incorporating the Cariou photographs, along with other images and materials.[30] The district court found infringement notwithstanding Prince's assertion of the defense, and ordered Prince to deliver unsold "Canal Zone" works to Cariou. But on appeal, in *Cariou v. Prince*,[31] the Second Circuit concluded that 25 of the 30[32] works at issue constituted fair use, because Prince's "composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs." The court also found no evidence that Prince's work usurped the market for Cariou's photographs. The market for Prince's art was fine art collectors and museums, some selling for $2 million or more, whereas Cariou's book of photographs was marketed as a commercial book, at modest prices. (Indeed, as of this writing, it is available on Amazon.com for $24.95.)

Prince's Appropriationism, as well as his battles with copyright law, continue to this day. His "New Portraits" series was a collection of screenshots of Instagram posts.[33] It resulted in at least two ongoing lawsuits in which Prince has invoked fair use. The posts feature comments of Prince, like "non sequitur," "gobbledygook," "jokes," "oxymorons," "'psychic jiu jitsu,'" and "inferior language" that "sounds like it means something."[34]

Prince's Instagram installation is particularly interesting given the counterpoint in other fair use cases involving Instagram postings. In a recent case, a paparazzo took a picture of Emily Ratajkowski, a model and actress, and

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[28] William Zimmer, *Appropriation: When Borrowing From Earlier Artists is Irresistible*, N.Y. TIMES, June 14, 1992, sec. 13CN at 22.

[29] Paul Taylor, Richard Prince, *Art's Bad Boy, Becomes (Partly) Respectable*, N.Y. TIMES, May 17, 1992, Arts & Leisure sec. at 31.

[30] www.artistrights.info/cariou-v-prince.

[31] 714 F.3d 694 (2d Cir. 2013).

[32] Infringement analysis on the other 5 was remanded to the district court.

[33] Richard Prince, *New Portraits* (2019), MOCAD, detroitartreview.com/2019/11/richard-prince-portraits-mocad/.

[34] *Graham v. Prince*, Complaint Section 28 Case 1:15-cv-10160-SHS (S.D.N.Y. Dec. 30, 2015). The other case is *McNatt v. Prince*, Case 1:16-cv-08896-SHS (S.D.N.Y. Nov. 16, 2016), whose complaint contains an entire section called "Defendant Prince's Contempt for Copyright Law."

Ratajkowski copied the photo, added the words "mood forever" to the bottom of the photo, and posted it to her own Instagram account as a "story" — a feed that persists for only 24 hours. The photographer sued for copyright infringement. The court declined to decide the fair use defense on summary judgment, saying that there was an issue of fact as to whether the use was transformative.[35] The similarity between the substantive transformation here and in the Richard Prince installation suggests that Prince might be successful on a fair use defense — but clearly, Prince makes a practice of dancing on the edge of what is lawful, and that is part of his artistic vision.

Collage is still alive, though physical collage now intersects with "found art." In 1988, artist Dennis Oppenheim created a sculpture for a Santa Monica business development. entitled "Virus,"[36] which resembled "a jungle gym with 34 fiberglass figures of Mickey Mouse and Donald Duck skewered on a matrix of bronze rods."[37] Oppenheim cast the figures from plastic toys made 60 years ago in Japan. He molded them into Fiberglass in dull colors. The Walt Disney Company discovered the artwork less than a year after it was completed, filed suit, and demanded the sculpture's removal, alleging copyright infringement. Disney offered to settle the matter with a $15,000 retroactive license, but Oppenheimer refused. The artist claimed that, due to fabrication difficulties, he made no profit on the sculpture and could not afford the license. He offered to cut up the figures to make them less recognizable, but Disney in turn demanded removal of the sculpture. Oppenheim made this comment about the lawsuit: "You go to a flea market, you buy a bunch of figures, two of them turn out to be Mickey Mouse and Donald Duck, and you put them in a sculpture or a collage. Artists do this all the time. That's appropriation."

But the digital age is rife with electronic collage. Jeff Koons, whose work has created a cottage industry for copyright lawyers, created a digital collage called "Niagara" that incorporated a commercial image of Gucci sandaled feet from *Allure*, a lifestyle magazine. There, the Second Circuit held the use transformative, saying that transformation "almost perfectly describes" the appropriation by Koons to create "a massive painting commissioned for exhibition in a German art-gallery space."[38]

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[35] *O'Neil v. Ratajkowski*, 1:2019cv09769 (S.D.N.Y. October 23, 2019).
[36] Dennis Oppenheim, *Virus* (1988), Museum of Fine Arts, Houston.
[37] Suzanne Muchnic, Disney Orders Removal of Sculpture, L.A. TIMES, Oct. 16, 1992, at Bl, B8.
[38] *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

Art Imitates Art

Most of Pop Art was reuse of commercial images, or images considered unartistic by the Appropriationist artist. But sometimes, different castes of artists borrow from each other.

One dispute took place in in the mid-1960s over the Andy Warhol series "Flowers," which was based on a photograph of hibiscus blossoms by Patricia Caulfield.[39] Warhol was estimated to have painted more than nine hundred "Flowers."[40] Caulfield sued Warhol, and the case was settled. However, that case was before the 1976 Copyright Act that codified the fair use doctrine. Reportedly, the settlement included copies of the offending print. However, it allowed Warhol to continue to use the photograph in his art.[41]

Probably the most famous — and most criticized — case about Appropriationism was the 1990s case *Rogers v. Koons*.[42] Jeff Koons, a notorious Appropriationist artist, used a photograph by Arthur Rogers, a commercial photographer, to create a sculpture for his "Banality" show. Rogers had been commissioned by an acquaintance, Jim Scanlon, to make a photographic portrait of his dogs. Rogers photographed Scanlon and his wife holding eight German Shepherd puppies between them in a row. The photograph was exhibited in the San Francisco Museum of Contemporary Art and sold under license as a commercial postcard.

"Banality" consisted of twenty sculptures to be fabricated by an Italian studio. Koons neither draws nor paints, and does not keep a studio.[43] Koons bought a copy of the postcard, tore the copyright notice off, and sent it to Italy to be copied. He visited the studio and directed the artisans to use the same angles, poses, and expressions "as per photo." He altered the work in minimal ways, placing daisies in the couple's hair and adding vivid colors. The sculpture was made in an edition of four, three of which Koons intended for exhibition and sale and one of which he reserved for himself. Koons titled his sculpture "String of Puppies."

Rogers filed suit in federal district court for copyright infringement. Koons asserted the fair use defense, claiming that he was parodying not the original postcard but the sentimental and maudlin elements of our culture that it symbolized. The court rejected the argument, identifying the elements

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[39] rugs.com/blog/andy-warhol-flowers-patricia-caulfield-hibiscus-blossoms/.
[40] JOHN HENRY MERRYMAN AND ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 202 & note 15 (2d ed. 1987).
[41] These facts have been reported in various secondary sources, but are hard to verify.
[42] 960 F.2d 303 (2d Cir. 1992).
[43] Kristine McKenna, *The Art World is Ripe for Me'; Jeff Koons' High Profile Marketing at Media Manipulation Makes his Talent Seen Secondary*, L.A. TIMES, Jan. 22, 1989, Calendar sec. at 4.

of the photograph that created a copyrightable work — lighting, pose, angle, selection of film, and camera — and held that since Koons copied these elements, he had substantially copied the work. The court ordered a remand on damages and required Koons to give the plaintiff the sculpture Koons had retained for himself.

Any lay viewer can see the similarities between these two works, but can also see that they are quite different in character and artistic message. Martin Garbus, a New York attorney specializing in constitutional law, commented in a 1992 *New York Times* article that the decision in *Rogers v. Koons* may have been unduly influenced by the fact that the court never viewed the actual sculpture.[44] The decision was written on the basis of Rogers's photograph and a photograph of Koons's work. Both were black and white, and both were the size of a postcard. Garbus felt that the photograph did not adequately bring out the differences in Koons's work — the unique coloring, huge size, and obvious satirical intent. John Caldwell, Curator of Painting and Sculpture at the San Francisco Museum of Modern Art, agrees that it is not possible to judge artwork like Koons's from a small photograph.[45] Caldwell calls the decision in *Rogers v. Koons* "outrageous." He comments that Rogers, who has possession of Koons's sculpture, does not deserve it. "It's not his work," he explains.

Koons's "Banality" show appropriated other images as well, with fewer legal repercussions. The cornerstone of his "Banality" phase work included a 1988 sculpture entitled "Michael Jackson and Bubbles." The sculpture, like "Puppies," is done on a semi-monumental scale and painted with exaggerated, garish colors. Michael Jackson, with white skin and gold clothes and decoration, is seated beside his pet chimpanzee. The image was copied directly from a publicity photograph.[46] Caldwell reports that according to Koons, Michael Jackson was pleased with the work.[47] In previous works, Koons has appropriated the Pink Panther and Odie (of the Garfield cartoon), and faced lawsuits for each.[48]

Finally, no description of Appropriationism would be complete without Marcel Duchamp's 1919 work "L.H.O.O.Q." — his mustachioed Mona

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[44] Martin Garbus, *Law Courts Make Lousy Art Critics*, NEWSDAY, Apr. 22, 1992, at 46.
[45] Telephone interview with John Caldwell, Curator of Painting and Sculpture, San Francisco Museum of Modern Art (Dec. 12, 1992).
[46] Captions from the "Banality" room at *Jeff Koons*, exhibit at the San Francisco Museum of Modern Art (Dec. 10, 1992 through Feb. 7, 1993).
[47] Telephone interview with John Caldwell.
[48] *It's Art, but is it Theft as Well?*, N.Y. TIMES, Sept. 22, 1991, at D7.

Lisa.[49] If Da Vinci held a copyright in 1919, it is likely that this work never could have survived its legal exposure. But then again, it would have been nearly miraculous for any painting to become such an icon of western culture within its term of copyright protection.

The value of appropriation was already being questioned by the art world that created it, soon after its initial heydey. "Oh no, not another appropriationist, simulationist image-stealer," lamented one art critic, calling the Appropriationists the "rerun tribe."[50] Thirty years ago, Robert Hughes called Appropriationism a "dead end"[51] and an art critic for the *New York Times* commented, "Post-Modernism has already made its points."[52]

But while art movements may come and go, copyright law is forever. Warhol's estate is still litigating some of his creations. In 2019, more than 30 years after Warhol's death, a fair use case is still ongoing. In 1981, Lynn Goldsmith, a photographer, took shots of the musical artist Prince. *Vanity Fair* magazine licensed one of these photos as an "artist's reference," and then commissioned Warhol to create an illustration based on the photo. Warhol ultimately created 16 silkscreen works based on the photo. After Prince died in 2016, Goldsmith learned of the use, made claims of copyright infringement, and the Warhol Foundation brought an action for declaratory judgment. The district court found the use transformative and therefore non-infringing, partially on the strength of the *Cariou* case. Goldsmith appealed to the Second Circuit, which concluded that the work was not transformative, saying "the district judge should not assume the role of art critic and seek to ascertain the intent behind or the meaning of the works at issue … judges are typically unsuited to make aesthetic judgments … ."[53] The Second Circuit referred to the *Cariou* case as a "high-water mark" for fair use, stated that the Warhol Prince works were less transformative than those five for which it remanded in that case, and remanded to the district court. The case is still pending, now at the Supreme Court.[54]

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[49] Marcel Duchamp, *L.H.O.O.Q.* (1919) Norton Simon Museum. en.wikipedia.org/wiki/File:Marcel_Duchamp,_1919,_L.H.O.O.Q.jpg.

[50] Kevin Thomas and Suzanne Muchnic, *The Art Galleries: La Cienega Area*, L.A. TIMES, Oct. 16, 1987, Calendar sec. at 24.

[51] Robert Hughes, *Mucking with Media; The Whitney Offers a Long Trek Through the Alien Goo*, TIME, Dec. 25, 1989, at 93.

[52] Andy Grundberg, *As It Must To All, Death Comes To Post-Modernism*, N.Y. TIMES, September 16, 1990, § 2, at 47.

[53] *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021).

[54] Ronald Mann, *Justices debate whether Warhol image is "fair use" of photograph of Prince*, SCOTUSBLOG (Oct. 14, 2022), www.scotusblog.com/2022/10/justices-debate-whether-warhol-image-is-fair-use-of-photograph-of-prince/.

Personal Note, and Conclusion

I first wrote about this topic in 1992, in law school, and my article in the *University of Miami Entertainment & Sports Law Review* was my first published legal writing. Now, in 2022, I have been in private practice for nearly 30 years, mostly in the field of copyright licensing, and written quite a lot about copyright law. During that time, of course, the world has changed, and my perspective has changed, too. In updating this article, it was interesting to revisit these ideas with a new point of view.

The decision in *Cariou v. Prince* was a bright note for artists, and did some good to repair the damage of *Rogers v. Koons*. But remedies for cases of Appropriationism that fail the fair use test have still not been addressed. In *Rogers v. Koons,* the court granted not only damages but an injunction, and ordered that Koons return the unsold copies of the statue to Rogers.[55] This is what made many in the art community believe the *Rogers v. Koons* decision was unfair — not so much its assessment of liability, but its application of injunctive relief.

Today, the courts rely much more heavily on transformation as an element of fair use than they did 30 years ago. This factor, a nascent offshoot of factor one in 1992, is custom-made for Appropriationism, and the result in *Cariou v. Prince* illustrates how it can tip the balance. Today, due to the transformation test, the opinion in *Rogers v. Koons* or the outcome of the Warhol *Flowers* case could have been different. In fact, transformation is the core of what is valuable about Appropriationism. It is why we react differently to the Marlboro Man re-photography of Richard Prince, which merely reproduces the photographs of others, and the Pop Art of Andy Warhol, who transforms them so completely that his works have their own iconic status.

Also, in the meantime, the phenomenon of free culture, in which I have been heavily involved for most of my legal career, has created a lawful and privately-ordered system for appropriation in visual art. While my own practice has mostly centered on open source software licensing, open licensing in visual images has grown in concert with the open source movement — led by the Creative Commons initiative started by Larry Lessig. Both open source and Creative Commons were sea changes that were bound to happen. In the 2000s, the law was lagging far behind technology in allowing sharing of images and other copyrightable works. So, various "open" licensing models emerged to standardize license terms enough to allow sharing and improvements without complex clearance work or lawsuits — or waiting for Congress

[55] *Rogers v. Koons*, 960 F.2d at 313.

to adjust the law. In a sense, appropriation isn't appropriation if it's allowed. Perhaps that is one reason why the case law in this area has slowed during the intervening years. A great deal of material is available under terms that allow sharing and transformation, via licensing vehicles that did not exist in the 1990s. But also, Appropriationism is partially a commentary on the very copyright law that threatened to silence it. So now that there are free culture licenses, it is fair to ask, how much does Appropriationism matter anymore?

The reuse of images on the Web is rampant, of course, but I distinguish the use of commercial images in fine art from the use of media images in fan art, memes, or mash-ups. Many owners of commercial images actually encourage fan art, because it is mainly an homage that enhances the market for their media properties — for example, Star Trek promotion of fan art.[56] So, while the Web is rife with this kind of appropriation, it is rarely litigated. In fact, allowing use of media images in fan art is a way that media companies exercise control over what might otherwise be fair use, because they often impose "morality clauses" that limit re-use in ways that would be offensive or derogatory — for example, the DC Universe guidelines.[57] For Appropriationism, on the other hand, casting the original in an unfavorable light is usually the whole point.

In 1992, I suggested that injunctive relief for Appropriationist art was not good policy, and that copyright infringement damages — particularly disgorgement of profits — could be a proxy for a compulsory licensing model, given a music-style compulsory license model would not work for fine art. It's easy to suggest something like compulsory licensing as a newly-minted lawyer. But even with the perspective of 30 years of practice, I haven't changed my view much. I still think that the courts should maintain a baseline definition of fair use, for which there is no liability, and accommodate Appropriationism by changing not the scope of the defense, but the availability of remedies. Injunctive relief should not be available in fine art, because of its chilling effect on expression. In other words, to me, it might have been reasonable for Koons or Warhol to share some of their proceeds from their art with those whose images they appropriated, but the fact that Rogers owns the only extant copy of Koons's "String of Puppies" is a small tragedy. Artists can be ordered to share their profits, but shouldn't be ordered to give up their creative works to those trying to silence them.

I still perceive a difference between fine art and mere everyday Internet appropriation of images, and think that injunctive relief should be an available

[56] www.startrek.com/news/fan-art-friday-featuring-some-of-our-favorite-fandom-creations.
[57] support.dcuniverse.com/hc/en-us/articles/360035343533-FanArt-Submission-Guidelines.

remedy for the latter. The challenge, of course, is to distinguish between the two, and I leave that to the next generation to sort out.

A prior version of this article, entitled "The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era" appeared in the *University of Miami Entertainment & Sports Law Review* in 1993.[58] Thanks to both the *University of Miami Entertainment & Sports Law Review* for publishing my article in the first place, and to the editors of *The Green Bag* for encouraging me to update it.

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You can also find an online version of this article, with many of the images discussed in the article, at www.heathermeeker.com/the-ineluctable-modality-of-the-visible-fair-use-and-appropriationism-in-fine-arts.

> I never saw daffodils so beautiful. They grew among the mossy stones about and about them; some rested their heads upon these stones as though on a pillow for weariness; and the rest tossed and reeled and danced, and seemed as if they verily laughed with the wind that blew upon them over the lake.
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> Dorothy Wordsworth
> *Grasmere Journal* (Apr. 15, 1802)

[58] repository.law.miami.edu/umeslr/vol10/iss1/9.

STOPPING TO SMELL THE 1-800-FLOWERS

DIGNITARY HARMS IN ACCESSIBILITY LITIGATION

Blake E. Reid[†] *& Zainab Alkebsi*[*]

On first glance, *Gathers v. 1-800-Flowers.com* is a garden-variety web accessibility case.[1] Advocacy organization Access Now, on behalf of its members Lisa Gathers and Stephen Théberge, blind Bay Staters,[2] and R. David New, a blind Floridian, sued 1-800-Flowers.com, operator of a variety of web-based gift shops, for failing to make its websites accessible to the screen readers often relied on by web users who are blind and visually impaired[3] in violation of the Americans with Disabilities Act (ADA).[4] The District of Massachusetts allowed the suit to proceed over a thicket of technical objections.[5]

1-800-Flowers.com was quickly tossed atop the overflowing cornucopia of web accessibility cases, which some circuits (like the First) have endorsed, others (like the Third) have not, and others (like the Ninth) have endorsed only conditionally when there is a "nexus" between a website and a physical

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[1] Gathers v. 1-800-Flowers.com, No. 17-CV-10273-IT, 2018 WL 839381, at *1 (D. Mass. Feb. 12, 2018).

[2] *See* Craig F. Walker, *'Massachusettsan?'*, BOSTON GLOBE (Aug. 5, 2019) (explaining that while the official term for people from Massachusetts is "Massachusettsan," many locals prefer "Bay Stater" or (gulp) "Masshole").

[3] There is significant debate over the appropriate language to use in these contexts; we defer to the formulations used by the plaintiffs in *1-800-Flowers.com*. *E.g.*, Amended Complaint at 2, ¶ 4 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 20, filed May 5, 2017).

[4] Amended Complaint at 1-3, ¶¶ 1-2, 5-7 (highlighting an array of "floral, fruit, plants, gift baskets, gourmet foods, chocolate and candies, plush and specialty gift products" sold at the titular www.1-800-Flowers.com, "premium chocolates and confections" sold on www.fanniemay.com and www.harrylondon.com, "premium popcorn and specialty food products from www.thepopcornfactory.com, "baked cookies and gifts" from cheryls.com and "gift-quality fruit" from www.harryanddavid.com, and a wide range of other websites).

[5] *1-800-Flowers.com* at *1. Shortly thereafter, the parties stipulated and agreed to dismiss the case. *See* Stipulation of Dismissal with Prejudice at 1 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273, Doc. No. 50, filed July 24, 2018). The authors were unable to determine whether the dismissal was the result of a confidential settlement or some other reason.

place like a store or restaurant.[6] But *1-800-Flowers.com* provides an opportunity to set aside the metaphysical questions about the ADA's application that pervade the Internet accessibility literature[7] and reflect on the indignity that web users with disabilities frequently suffer for having the audacity to enforce their civil rights.

In particular, *1-800-Flowers.com* calls us to examine the harms visited on web users with disabilities who must undertake the rigors of litigation in federal court simply to undertake ordinary tasks such as buying flowers for a loved one. Prof. Elizabeth Emens has conceptualized the extra labor involved in vindicating disability rights as "a particular form of labor that especially burdens people with disabilities" — the "admin of life."[8] *1-800 Flowers.com* demonstrates how the disproportionate burden faced by people with disabilities can include not only economic and participatory harms, but dignitary harms that come with enduring and responding to the beration, insults, and impugning of one's character that often come with ADA litigation.

Access Now's complaint in *1-800-Flowers.com* explains the "isolation and stigma" faced by blind and visually impaired web users.[9] Users with disabilities often and suddenly encounter impassable technical barriers, imposed by the carelessness or overt cost-avoidance of firms that build websites without accessibility in mind.

As the old saying goes, "I must have flowers, always, and always."[10] But New, one of the plaintiffs, explained how his desire to "send flowers to family and friends" via www.1-800-Flowers.com led him to encounter a bouquet of technical incompatibilities with his screen reader software.[11] According to New, these incompatibilities ranged from missing buttons to misplaced error messages to a cacophony of audio played when New entered the "Customer Support" area of the site that refused to stop until he closed his browser and gave up on his order.[12] With few apparent options for recourse, New worked with Access Now and his fellow plaintiffs to bring suit.

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[6] *See generally* Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 598-99 (2020) (citing cases).

[7] *See, e.g.*, Blake E. Reid, Christian Vogler, and Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, COLO. L.R. FORUM (Nov. 9, 2020), lawreview.colorado.edu/digital/telehealth-and-telework-accessibility-in-a-pandemic-induced-virtual-world/.

[8] *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2331 (2021).

[9] *See* Amended Complaint at 3, ¶ 7.

[10] This quote is frequently attributed to Claude Monet, *e.g.*, Virginia Museum of Fine Arts, *"I must have flowers, always, and always."* (June 15, 2015), vmfa.museum/connect/i-must-have-flowers-always-and-always/, though the authors were unable to identify an authoritative source.

[11] Amended Complaint at 9, ¶ 29.

[12] *Id.* at 9, ¶ 30 .

In response, 1-800-Flowers.com accused New and the other plaintiffs of filing a series of "form complaints," citing to some twenty-nine complaints that they had filed against other website proprietors.[13] 1-800-Flowers alleged that the plaintiffs' allegations were undated and accused the plaintiffs of "embark[ing] on a fishing expedition … in search of alleged 'barriers'" only after 1-800-Flowers.com had filed its motion to dismiss.[14] 1-800-Flowers.com accused the defendants of "failing to plead a concrete, present plan" to actually return to the websites,[15] implying that the lawsuit was pretextual. 1-800-Flowers.com broadly accused the plaintiffs of "flooding the courts with [web accessibility] cases, and pursuing litigation . . . apparently for [their] own financial benefit."[16]

1-800-Flowers.com further argued that the problems with the websites amounted to only "a handful of technical issues" that weren't "specific to a disability" and were merely a function of "Internet technology [not being] perfect."[17] 1-800-Flowers.com even insinuated that the problems plaintiffs experienced might be their own fault — a result of screen reader software that "does not work perfectly."[18]

After New and the plaintiffs re-explained their experiences,[19] 1-800-Flowers.com again accused the plaintiffs of only "bother[ing] to actually access the [w]ebsites" after it had filed a motion to dismiss.[20] 1-800-Flowers.com even argued the plaintiffs had "[b]y implication, admit[ted] that the [w]ebsites are accessible" by not being sufficiently detailed in their complaint.[21]

Judge Talwani summarily denied 1-800-Flowers.com's motion to dismiss in an unpublished opinion, essentially ignoring the accusations of impropriety and relegating them to the purgatory of litigation conduct never to grace the pages of the *Federal Supplement*.[22] Indeed, some readers may join Judge Talwani in reading 1-800-Flowers' accusations as the ordinary puffery of overzealous trial lawyers, worthy of no more opprobrium than polite dismissal

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[13] Defendant's Memorandum of Law in Support of Motion to Dismiss at 3-4 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 27, filed May 30, 2017).
[14] Def.'s Memo at 5-6 (quotation marks in original).
[15] *Id.* at 8.
[16] *Id.* at 6.
[17] *See id.* at 10.
[18] *Id.*
[19] Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 6-8 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 30, filed June 13, 2017).
[20] Defendant's Reply at 2 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 33, filed June 29, 2017).
[21] *Id.*
[22] *1-800-Flowers.com* at *3.

under the familiar contours of Rule 12(b)(6).[23]

But we contend there is more at play here. Judge Talwani's unpublished order declined to engage with the significant dignitary harm that 1-800-Flowers.com's ableist rhetoric and imputations visited on the plaintiffs.

Whatever the veracity of the plaintiffs' claims, 1-800-Flowers went beyond defending itself to leveling stunning accusations of impropriety and litigation chicanery against the plaintiffs, all stemming from the simple pleasure of buying flowers. 1-800-Flowers.com's rhetoric plays on a litigation-specific flavor of what Prof. Doron Dorfman has described as the fear of the "disability con" — a "moral panic" of people with disabilities "fak[ing]" legal assertions "to take advantage of rights, accommodations, or benefits."[24]

1-800-Flowers.com unsubtly and aggressively cited the blind and visually impaired plaintiffs' desire to access all websites, evidenced by their other lawsuits, to suggest that *this lawsuit* couldn't possibly be legitimate. The implication was clear: surely web users who were blind and visually impaired couldn't *really* expect to use the *whole* Internet, much less a trivial activity like ordering flowers.[25]

1-800-Flowers.com's implication went further: that the plaintiffs' claims were pretextual and that they were only *in it for the money* — despite the fact that they had sought only declaratory and injunctive relief along with costs and reasonable fees for their attorneys.[26] 1-800-Flowers.com's rhetoric mirrors that of political commentators who have accused disability rights lawyers of "churn[ing] out assembly-line complaints" and running "ADA filing mills."[27]

1-800-Flowers.com not only took aim at the lawsuit itself, but sought to discredit the actual experience of the plaintiffs with disabilities. It marginalized the significance of the barriers they encountered, contended that the plaintiffs had not explained their problems in sufficient detail, and even tried to blame them and their screen-reader software for the problems, suggesting that *they weren't doing it right*.

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[23] *See id.*

[24] *E.g.*, Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOCIETY REV. 1051 (2019).

[25] While the implication may have been to self-deprecate the seriousness of 1-800-Flowers.com's business, we note that the company is an enormous e-commerce conglomerate traded on the NASDAQ with a current market cap of more than 400 million dollars. www.nasdaq.com/market-activity/stocks/flws (last visited Oct. 21, 2022).

[26] Amended Complaint at 18-19.

[27] *See, e.g.,* Walter Olson, *ADA's Assault on the Web: Your Turn, Congress*, CATO INSTITUTE (July 8, 2016), www.cato.org/blog/adas-assault-web-turn-congress; *see also* Lainey Feingold, *Ethics in the Digital Accessibility Legal Space: ADA Enforcement Cases or Something Else?* (July 23, 2019), www.lflegal.com/2019/07/ethics-2/ (distinguishing legitimate web access cases from "drive-by, click-by, or surf-by cases").

1-800-Flowers.com implicitly rested its argument on an ableist stereotype of people who are blind or visually impaired not knowing how to use screen-reader software. 1-800-Flowers.com insinuated that that its websites were not the problem, and in turn that it should not be responsible for the necessary — and simple — fixes to make the websites accessible.[28] 1-800-Flowers' strategy was instead to conceptualize users with disabilities as the problem, and in turn to argue that no restorative action was necessary.

Finally, 1-800-Flowers.com forced the plaintiffs to re-explain their experiences. In doing so, 1-800-Flowers.com not only marginalized its responsibility for the websites' barriers, but inflicted unnecessary emotional labor onto the plaintiffs by forcing them to endure the emotionally exhausting and painful process of reliving barriers to access throughout the litigation.

Rhetoric like 1-800-Flowers.com's may be commonplace in federal court. But enduring it shouldn't be a prerequisite for basic access to simple pleasures, from digital flower delivery to the bounty of other cultural, social, economic, and democratic fruits that the web provides — and that non-disabled people often take for granted. As Okakura Kakuzo once wrote:

> In joy or sadness, flowers are our constant friends. We eat, drink, sing, dance, and flirt with them. We wed and christen with flowers. We dare not die without them … . How could we live without them?[29]

Before adding insult to injury, web accessibility defendants should ask themselves why they are denying access to the simple pleasures of their goods and services — and foregoing revenues from millions of customers with disabilities — instead of acknowledging their shortcomings and working with plaintiffs to resolve them. Web accessibility unequivocally is the morally, ethically, legally, and economically right thing to do. As Luther Burbank said, "[f]lowers always make people better, happier and more helpful; they are sunshine, food, and medicine for the soul."[30]

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[28] *Cf.* Eric Goldman, *11th Circuit Says Grocery Store Website Isn't Covered by the ADA — Gil v. Winn-Dixie*, TECHNOLOGY & MARKETING LAW BLOG (Apr. 18, 2021), blog.ericgoldman.org/archives/2021/04/11th-circuit-says-grocery-store-website-isnt-covered-by-the-ada-gil-v-winn-dixie.htm (querying why a web defendant chose to defend an ADA case instead of spending less money to simply "fix the site" and "generate additional revenue" from customers with disabilities as a result).

[29] The Book of Tea, ch. 6. www.gutenberg.org/files/769/769-h/769-h.htm.

[30] Nina Antze, *The Legacy of Luther Burbank*, THE BOTANICAL ARTIST (Dec. 2014), www.pcquilt.com/wp-content/uploads/2013/08/TBA_Dec_Burbank.pdf.

FIVE RECOMMENDATIONS


Femi Cadmus[†] *& Ariel A.E. Scotese*[*]

Stephen Breyer
The Authority of the Court and the Peril of Politics
(Harvard University Press 2021)

It is not often that a sitting Supreme Court Justice authors a book. Justice Breyer's mini book (exactly 101 pages), based on a lecture that he delivered on the Court's power and separation of powers, traces how the public developed an acceptance of and respect for the decisions of the Court. Breyer uses Court decisions, including *Marbury v. Madison*, *Brown v. Board of Education*, and *Bush v. Gore*, to provide context for the evolution of the Court's power and the role played by the executive and legislative branches of government.

Breyer notes that even where there is significant disagreement with the Court's position (*Bush v. Gore* for example), there is ultimate acceptance and respect from the public. Even so, he warns that this acceptance cannot be taken for granted, citing recent data from Pew Research which show a precipitous decline in the public's perception of the Court's fairness and neutrality. He further notes that media influences and an increasing practice of inserting partisan politics into the commentary might be contributory to the diminish-

[†] Law Librarian and Professor of Law at Yale Law School.
[*] Associate Director for User Services and Lecturer in Law at the University of Chicago Law School.

ing perception of fairness and impartiality of the court. Decrying the infusion of politics in the Senate confirmation process, he states that "the popular perception has grown that Supreme Court justices are unelected political officials." Breyer however stridently and optimistically maintains that the differences on the Court are jurisprudential and not political. In essence, alignments of Justices are reflective of judicial, not political, philosophies with positions embedded in textualism or purposivism. This book is written in a style that will appeal to a diverse audience seeking a better understanding of the Supreme Court's position in a politically polarized era and the implications for the rule of law.

Herma Hill Kay (author) and Patricia Cain (editor)
Paving the Way: The First American Women Law Professors
(University of California Press 2021)

For the very first time, there is an excellent resource that traces the pathway of the first women professors in the legal academy. Paving the way explores the career trajectories of 14 women and how they surmounted obstacles to break into law teaching. Ruth Bader Ginsberg (also featured in the book), in a foreword, describes the work of the author, Herma Hill Kay, as a "prodigious effort" and one of "inestimable value." While this was undoubtedly a laudable effort, the criteria of only including ABA accredited schools and those approved for AALS membership proved to be exclusionary to women from underrepresented groups. There is an imperfect solution to remedy these omissions by including the accounts of women of color, such as Patricia Harris, the first black female law professor at Howard, in a separate chapter. In addition, women who entered the faculty from librarianship were also excluded from the first 14 women law professors, because of an adherence to the stipulation of full-time classroom teaching as a requirement for inclusion. Despite these unfortunate omissions, *Paving the Way* provides wonderful insight into the careers of early women law teachers.

Faith Gordon and Daniel Newman (editors)
Leading Works in Law and Social Justice
(Routledge, 2021)

The intersection between law and social justice is both vexing and crucial. On the one hand, the law can be a tool for driving positive changes in our society. On the other hand, the law can entrench and reinforce systemic injustice. Individuals interested in exploring this paradoxical relationship or passionate about social justice will find *Leading Works in Law and Social Justice*

an excellent foundational text. *Leading Works* is a compilation of essays wherein scholars and practitioners discuss books or articles that they see as foundational or critical to the study of law and social justice. These essays discuss different policies and legal frameworks and their connection to particular injustices, such as racism and classism. The works that the authors discuss range from classics by Karl Marx and W.E.B. Du Bois to writings by more contemporary individuals, including journalists, activists, and academics whose work is instrumental in promoting social justice in the legal system. While the contributors are all from Western Europe and Australia, the essays' topics and analyses are relevant to legal scholars internationally, including the United States. This excellent and thought-provoking book is of interest to anyone passionate about social justice or, more generally, people wanting to challenge their underlying assumptions about the function of the law and the role that the law could play in creating a more just society.

Naa Oyo A. Kwate (editor)
The Street: A Photographic Field Guide to American Inequality
(Rutgers University Press, 2021)[1]

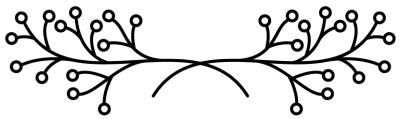
Inequality in the United States continues to be a highly relevant and critical topic for exploration. *The Street: A Photographic Field Guide to American Inequality* is a compilation of essays exploring different manifestations of inequality in the United States from transportation policies to health care and education to law enforcement. Where this book stands out, though, is in its innovative approach to this discussion by using the format of a field guide to "describe the policies and social exchanges that characterize and contest inequality in the United States."

Each chapter begins with a stark and stunning photograph, taken by Camilo Jose Vergara, of a scene in Camden, New Jersey before launching into the discussion. The chapter discusses the particular set of policies that drive inequality, how the picture relates to that topic, and the typical impact of these policies in cities across the United States. Each essay is well-researched and informative while remaining approachable for all readers regardless of expertise. The result is an impactful summary of inequality that also humanizes the people adversely impacted by it.

[1] Craig Futterman, a contributor to this exemplary work, is a professor at the same institution where reviewer Ariel Scotese is employed. This had no bearing on the book selection or the opinions expressed in the review.

Michael Hoeflich and Ross Davies (editors)
The Black Book of Justice Holmes:
Text Transcript and Commentary
(Talbot Publishing 2021)[2]

Justice Oliver Wendell Holmes, a long-serving associate justice of the Supreme Court of the United States (1902-1932), was an erudite jurist and a prolific note-taker, jotting down his observations on a wide variety of topics, including lists of books he had read and travel accounts. These notes were preserved over a fifty-year period in his Black Book. *The Black Book of Justice Holmes: Text Transcript and Commentary* provides an excellent accompaniment and aid to the original manuscript. The editors painstakingly undertake the formidable task of transcribing a significant portion of the Black Book while acknowledging imperfections in the endeavor due to Justice Holmes' copious, often hard-to-decipher notes and lists. Researchers and scholars will also benefit from the inclusion of scholarly essays providing insights on the life and work of Justice Holmes through the lens of the Black Book.



For oft, when on my couch I lie
In vacant or in pensive mood,
They flash upon that inward eye
Which is the bliss of solitude;
And then my heart with pleasure fills,
And dances with the daffodils.

William Wordsworth
I Wandered Lonely as a Cloud (1815)

[2] This exemplary work was co-edited by one of the editors of the *Green Bag Almanac & Reader*. This had no bearing on the book selection, which was based entirely on merit.

THREE RECOMMENDATIONS

James C. Ho[†]

Preterm-Cleveland v. McCloud
994 F.3d 512 (6th Cir. 2021)
solo concurring opinions by
Judges Jeffrey Sutton, Richard Griffin, and John Bush

As a federal appellate litigator, I was always fascinated by rehearings en banc. To begin with, they are the rarest of beasts — the U.S. Supreme Court typically hears over twice as many arguments as the number of en banc arguments heard by all federal courts of appeals combined.

Moreover, when they do occur, en banc arguments in virtually every circuit involve well more than nine judges.[1] The greater numbers naturally make en banc advocacy quite the experience for advocates. It also makes it all the more striking when a judge takes the time to write a separate opinion that, for whatever reason, not a single other member of the en banc court sees fit to join.

Among the most notable examples of the past year: the en banc decision in *Preterm-Cleveland v. McCloud*.[2] By a vote of 9-7, the court rejected a constitutional challenge to an Ohio law that prohibited doctors from performing an abortion if they knew the mother wanted to abort because the unborn

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[†] Judge, U.S. Court of Appeals for the Fifth Circuit.
[1] 28 U.S.C. § 44.
[2] 994 F.3d 512 (6th Cir. 2021).

child has Down syndrome.

No federal appeal nationwide generated more separate solo en banc writings this past year. *Preterm-Cleveland* spurred not one, not two, but three solo en banc opinions — all concurrences — all highly impassioned about the topic at hand. And remarkably, the purpose of each solo writing was to sharply criticize long-established Supreme Court precedent in the area of abortion.

Judge Jeffrey Sutton bemoaned what he described as the federal judicial takeover of abortion regulation in 1973.[3] As he put it:

> Assuming … judicial responsibility over so much abortion policy comes with terrain-altering costs to the judiciary. An independent judiciary has always been crucial to America's constitutional order. But a politicized judiciary cannot be an independent judiciary. The more the judicial branch enumerates our country's policies in areas of unenumerated liberty rights over which the people have legitimate disagreements, the more it becomes a new source of power — an allocation of responsibility that comes with the worst features of gerrymandering: a warping of democracy and a perceived manipulation of the decision-making process. Any effort to insulate such power from the political fray is not likely to last long or end well. Far better, in my view, to give States like Ohio more latitude, not less, to weigh and decide complex questions about abortion policy.
>
> …
>
> The more the federal courts do when it comes to abortion policy, and the longer they do it, the less reason there is for compromise at the local level. That has not been good for the federal courts or for obtaining more stable law over an issue unlikely to go away anytime soon.[4]

Next up: Judge Richard Griffin wrote separately to observe that "[t]he philosophy and the pure evil that motivated Hitler and Nazi Germany to murder millions of innocent lives continues today. Eugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today."[5] He went on to explore the deplorable history of eugenics, both in Europe and in the United States, before concluding that, "whatever else might be said about" the Supreme Court's abortion jurisprudence, "it

[3] *Id.* at 535.
[4] *Id.* at 537, 538.
[5] *Id.* at 538.

did not decide whether the Constitution requires States to allow eugenic abortions."[6]

Finally, Judge John Bush examined the interplay between Supreme Court precedent and the original meaning of the Fourteenth Amendment in the area of abortion. He articulated a framework for "balanc[ing] our role as lower court judges with our duty to apply the Constitution's original meaning."[7] "When no holding of the Supreme Court can decide a question, … our duty to interpret the Constitution in light of its text, structure, and original understanding takes precedence."[8] And he concluded that there are "serious questions as to the correctness of the Supreme Court's abortion jurisprudence … as a matter of the Constitution's original meaning."[9]

This flurry of separate writings in *Preterm-Cleveland* naturally leads to the following question: What's the point of writing separately, when you're just one of well over a dozen judges? The answer presumably varies from judge to judge — and from case to case. But the timing of these proceedings may suggest one possible objective: Judges Sutton, Griffin, and Bush issued their separate writings on April 13, 2021. A month later, on May 17, the Supreme Court granted certiorari in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

In re: MCP No. 165
20 F.4th 264 (6th Cir. 2021)
solo dissenting opinion by Judge John Bush

By an 8-8 vote, the Sixth Circuit denied initial hearing en banc to a legal challenge to the COVID-19 vaccination mandate issued by the Occupational Safety and Health Administration. The eight dissenters argued that OSHA lacked Congressional authorization to impose a vaccination mandate by regulatory fiat.

But Judge Bush decided to go even further — and did so without the company of any of his colleagues. He opined that Congressional authorization wouldn't have mattered in any event, because Congress lacks constitutional authority to impose a nationwide vaccine mandate.

Judge Bush provided a brief history of federal vaccine policy. He observed that "Congress has passed many laws to regulate the purity of vaccines, facilitate their distribution with information and funding, and compensate those

[6] *Id.* at 540.
[7] *Id.* at 542.
[8] *Id.* at 543 (quotations omitted).
[9] *Id.* at 546.

injured by their administration, but it has apparently never invoked the commerce power to *mandate* their imposition upon the general public."[10]

Furthermore, Judge Bush invoked *NFIB v. Sebelius*.[11] As readers may recall, a majority of the Supreme Court in *NFIB* agreed that Congress has no constitutional authority to compel citizens to purchase health insurance. Judge Bush reasoned that, *a fortiori*, Congress cannot authorize the mandate challenged here. As he explained:

> [In *NFIB*,] Congress claimed the power to regulate the failure to engage in a commercial activity — the buying of insurance — because uninsured persons' failure to do so had a substantial aggregate effect on interstate commerce. Here, by contrast, OSHA claims the power to regulate the failure to engage in a *non-commercial* activity — the taking of a vaccine — because unvaccinated persons' failure to do so may affect interstate commerce. OSHA's theory of the commerce power is thus even more extravagant than what the Supreme Court has already rejected. If Congress cannot solve a perceived commercial problem with a "mandatory purchase," then how can it possess the authority, much less delegate it, to solve a perceived commercial problem by mandating that Americans engage in a *non-commercial* activity? The answer, of course, is that it likely cannot.[12]

In re Wild
994 F.3d 1244 (11th Cir. 2021)
dissenting opinion by Judge Lisa Branch and
solo dissenting opinion by Judge Frank Hull

My final example of a noteworthy solo en banc opinion involves the horrifying case of Jeffrey Epstein.

The Constitution guarantees various rights to those accused of a crime. But what about the *victims* of crime? Congress enacted the Crime Victims' Rights Act in 2004 to guarantee victims "[t]he right to be treated with fairness and with respect" — including "[t]he reasonable right to confer with the attorney for the Government in the case."[13]

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[10] *In re: MCP No. 165*, 20 F.4th 264, 290-91 (6th Cir. 2021) (collecting examples).
[11] 567 U.S. 519 (2012).
[12] 20 F.4th at 288 (citations omitted).
[13] 18 U.S.C. § 3771(a)(5), (8). Full disclosure: As chief counsel to Senator John Cornyn from 2003 to 2005, I worked on the Act when it was introduced as S. 2329 (108th Cong.). S. 2329 was then incorporated into H.R. 5107 and enacted into law as Pub. L. No. 108-405. My wife Allyson later represented the lead Senate sponsors, Dianne Feinstein, Jon Kyl, and Orrin Hatch, as amici curiae in this appeal.

It's hard to imagine a more compelling case for protecting crime victims than this one. Courtney Wild was repeatedly victimized by Epstein — and then "left in the dark" and "affirmatively misled" "by government attorneys" who "secretly negotiated and executed a non-prosecution agreement with Epstein."[14]

Wild asserted her rights under the CVRA. As she explained, Congress went out of its way to protect her right to confer with the Government *even* "if no prosecution is underway."[15] Quoting the Fifth Circuit, she said that her right to confer "clearly" and "logically" "appl[ies] *before* any prosecution is underway."[16]

But the Eleventh Circuit rejected her claim by a 7-4 vote. It held that the Act does not grant victims a judicially enforceable right to confer with the Government without a pending indictment — and then outlined the additional "practical and constitutional problems" that recognizing such a right would cause.[17] Judge Gerald Tjoflat, joined by four of his colleagues, wrote separately to spell out those concerns further. He declared that it would be "unconstitutional" for Congress to codify such a right, because it would allow victims to interfere with prosecutorial prerogatives and place "intense pressure on the United States Attorney."[18]

Judge Lisa Branch authored the primary dissent, joined by three of her colleagues. In her view, "the plain text of the CVRA … provides crime victims with the statutory private remedy of judicial enforcement of those rights 'if no prosecution is underway.'"[19] She noted that the government had not "raised any as-applied challenge to the constitutionality of the statute," while noting it was "free to bring [one] in a future case."[20] She also observed that, "in the many years since the Fifth Circuit's opinion in *In re Dean* … , the government has not presented any evidence suggesting any difficulties."[21]

I also note the solo dissent authored by Judge Frank Hull, who observed:

> The Majority's ruling also exacerbates disparities between wealthy defendants and those who cannot afford to hire well-connected and experienced attorneys during the pre-charge period. Most would-be defendants lack resources and usually have no counsel

[14] *In re Wild*, 994 F.3d 1244, 1247 (11th Cir. 2021).
[15] 18 U.S.C. § 3771(d)(3).
[16] *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (emphasis added).
[17] 994 F.3d at 1247, 1266.
[18] *Id.* at 1280, 1282-83 n.14.
[19] *Id.* at 1288.
[20] *Id.* at 1311 n.29.
[21] *Id.* at 1313 n.30.

> during this pre-charge period. Consequently, they do not have the pre-charge opportunity to negotiate the kind of extremely favorable deal that Epstein received. This sort of two-tiered justice system — one in which wealthy defendants hire experienced counsel to negotiate plea deals in secret and with no victim input — offends basic fairness and exacerbates the unequal playing field for poor and wealthy criminal defendants.[22]

As Judge Hull concluded, "the Majority laments how the national media fell short on the Epstein story," but "this case is about how the U.S. prosecutors fell short on Epstein's evil crimes."[23] The court's approach "leaves federal prosecutors free to engage in the secret plea deals and deception pre-charge that resulted in the travesty here."[24]

Where have all the flowers gone?
Long time passing
Where have all the flowers gone?
Long time ago
Where have all the flowers gone?
Young girls picked them every one
When will they ever learn?

Pete Seeger
Where have all the flowers gone? (1961)

[22] *Id.* at 1327.
[23] *Id.*
[24] *Id.* at 1326.

BLUNT TOOLS AND DELICATE BUDS

THE ORCHID TRADE, CITES, AND U.S. ENFORCEMENT

Meredith Capps[†]

Learning that socialite Lee Radziwill, sister of First Lady Jacqueline Kennedy and at one point a Slavic princess (by way of marriage),[1] purportedly once declared, "[i]f I see an orchid that's fantastically expensive, I'll buy it,"[2] legal readers versed in environmental crimes might pause to wonder whether lay purchasers of these prized blooms investigate the provenance of their acquisitions. Radziwill's proclamation may, of course, have pre-dated present-day legal frameworks regulating trade in certain imperiled plant species, but she would surely not be alone in failing to consider that her local florist unwittingly participates in illicit trade, nor that her houseplant is the object of criminal activity. In this brief essay, I examine laws governing the orchid trade, the prevalence of that trade, and enforcement activity, offering several examples of floral legal intrigue.

LAW GOVERNING THE ORCHID TRADE

In the United States, the Endangered Species Act and the Lacey Act render importation of species designated by selected federal agencies unlawful, absent agency approval.[3] In order to import protected plant species into the U.S., one must obtain a permit from the U.S. Department of Agriculture and/or the Fish and Wildlife Service, and protected plants are outlined in appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[4] a treaty to which the U.S. and 183 other nation-states are parties.[5] Those, such as I, who are ignorant of recognized

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[1] *Lee Radziwill*, WIKIPEDIA, en.wikipedia.org/wiki/Lee_Radziwill (last updated June 30, 2022).

[2] Caroline Hallemann, TOWN & COUNTRY, *Lee Radziwill's Best Quotes on Life, Regrets, and Beauty* (Feb. 16, 2019), www.townandcountrymag.com/society/tradition/a26373096/lee-radziwill-best-quotes.

[3] 15 U.S.C. § 1538; 16 U.S.C. § 3372.

[4] Convention on International Trade in Endangered Species of Wild Fauna and Flora Appendices I, II and III valid from 22 June 2021, cites.org/sites/default/files/eng/app/2021/E-Appendices-2021-06-22.pdf.

[5] List of Contracting Parties, Convention on International Trade in Endangered Species of Wild

orchid species might assume in consulting the CITES list that only a few categories of orchids are protected therein, seeing but eight species listed under the *orchidaceae* classification of Appendix I, and a single line encompassing undifferentiated species listed in Appendix II. However, both the CITES Plants Committee[6] and the American Orchid Society[7] state that *all* orchids are protected by CITES, and for purposes of this brief article I shall trust their assertions and advise would-be orchid traders to make a habit of seeking a permit. Not only is this scope of CITES orchid species coverage impressive, so, too, is the dominance of orchids in the universe of protected plants, as orchids apparently constitute 70% of CITES-listed species.[8]

PREVALENCE OF THE ORCHID TRADE

As a foreign, comparative, and international law librarian I naturally, in considering the orchid trade, first examined its global characteristics. How expansive, I wondered, is the cross-border trade in orchids generally, and the illicit trade more specifically? Though orchids are valued by some as attractive home or business decor, they are also used in certain communities as traditional medicines.[9] Orchids can be used in cosmetics products and perfumes, and in weaving and dyes.[10] Trade in orchids for horticulture is typically commercial and such trade is reasonably well documented, but while orchids harvested for use as food or medicine are often sold in their own domestic markets, international in this category appears to be on the upswing.[11] Trade data indicate that more than 1 billion orchids crossed borders in the decade from 1996- 2005,[12] with an estimated $121 million generated by sales within the United States in 2003.[13] Although most documented orchid trade consists

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Fauna and Flora, cites.org/eng/disc/parties/chronolo.php.

[6] Twenty-second meeting of the Plants Committee, Tbilisi (Georgia), 19-23 October 2015, *Undocumented Trade In Species of Orchidaceae*, cites.org/sites/default/files/eng/com/pc/22/Inf/E-PC22-Inf-06.pdf ("All species in the family Orchidaceae (orchids) are covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Orchidaceae represent the large majority of species appearing [in] CITES Appendices I and II.").

[7] American Orchid Society, *Orchid Conservation, CITES*, www.aos.org/about-us/orchid conservation/cites.aspx.

[8] Amy Hinsley et al., *A Review of the Trade in Orchids and Its Implications for Conservation*, 186 BOTANICAL J. OF THE LINNEAN SOC'Y 435, 440 (2018), https://doi.org/10.1093/botlinnean/box083.

[9] ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE 10 (2002).

[10] Hinsley, *supra* note 8, at 435.

[11] Twenty-second meeting of the Plants Committee, *supra* note 6 (finding instances of orchids used in Chinese medicine exported from Myanmar and India to China, and from Asia to the United Kingdom and Europe).

[12] Hinsley, *supra* note 8, at 436.

[13] Chuck Woods, *Orchid Mania: Exotic Plant Now the Fastest Growing Segment of Nation's $13 Billion*

of artificially grown plants, hundreds of thousands of documented wild plants are traded each year, and experts fear that the illegal trade in wild orchids is threatening these particularly vulnerable varieties.[14]

Is CITES thought to be an effective international legal mechanism for regulating trade in threatened orchid species? The CITES Plants Committee has itself expressed doubt regarding the treaty's impact on conservation, noting that the instrument's breadth in covering all orchid species may, paradoxically, disincentivize research and education regarding conservation at the domestic level, and discourage international cooperation with respect to such research.[15] Some evidently disenchanted orchid professionals are even willing to admit non-compliance. In 2016, researchers in the United Kingdom surveyed over 400 orchid growers and hobbyists in the UK, U.S., and Japan, and their findings may startle, or at least surprise, the conscientious consumer. Nearly 10% of respondents acknowledged having smuggled orchids across their border without completing any CITES paperwork, nearly 5% stated that they had transported orchids for which they had utilized paperwork for a different species, and another nearly 11% of respondents said that they had received orchids purchased online without having obtained permitting paperwork.[16] Though one might hope that ignorance of the law offered some excuse, survey results suggested that the opposite is, in fact, more often true — respondents demonstrating meaningful understanding of CITES frameworks were, in their survey, actually *more* likely to actively avoid compliance.[17] And CITES enforcement difficulties abound — customs officials typically lack expertise in species identification; species diversity renders education challenging as even experts struggle with taxonomy; lack of public concern, awareness, and funding diminishes investment; and plant origins are difficult to trace.[18]

Domestic Penalties and Examples

Having established that there is, indeed, a thriving worldwide orchid economy supported by both legal and illicit trade, I sought examples of criminal prosecution, or other legal consequences, of prohibited trade in or-

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Floriculture Industry, U. of FL. NEWS (Aug. 26, 2004), https://news.ufl.edu/archive/2004/08/orchid-mania-exotic-plant-now-the-fastest-growing-segment-of-nations-13-billion-floriculture-industry.html.

[14] Hinsley, *supra* note 8, at 436.

[15] Twenty-second meeting of the Plants Committee, *supra* note 6, at 4.

[16] Amy Hinsley et al., *Estimating the Extent of CITES Noncompliance Among Traders and End-Consumers; Lessons from the Global Orchid Trade*, 10 CONSERVATION LETTERS 602, 605 (2017), conbio.onlinelibrary.wiley.com/doi/pdf/10.1111/conl.12316.

[17] *Id.* at 607 (the authors suggest that "noncompliance may be linked to widespread negative opinions of CITES").

[18] Hinsley, *supra* note 8, at 445-48.

chids right here in the United States. One prominent action against orchid dealer George Norris stands out, having generated attention in the media, and among libertarian advocacy groups who decry what they see as a needlessly stringent regulatory scheme and overzealous prosecution.

Norris, a Texas resident, and Manuel G. Arias Silva, a resident of Peru, were indicted in 2004 by a federal grand jury in Florida on several counts, including smuggling in violation of 18 U.S.C. § 545, making false statements to customs officials in violation of violation of 18 U.S.C. § 1001(a), and violating the Endangered Species Act.[19] The indictment alleged that although Norris and Arias Silva did obtain CITES paperwork for their transactions, Arias Silva in fact shipped Norris different species than those listed on the CITES permit, and falsely labeled the substituted illicit product, providing a key to Norris, who ultimately sold the protected plants.[20] Arias Silva was sentenced to 21 months in prison, followed by three years of supervised released, and ordered to pay a $5,000 fine.[21] Norris pleaded guilty, but claimed that his sentence was inappropriate because the district court considered the entire value of the orchid shipments at issue, rather than the value of only the protected items, in applying sentencing guidelines.[22] The government prevailed, and Norris's 17-month prison sentence was ultimately affirmed by the Sixth Circuit.[23]

The Heritage Foundation published a lengthy article depicting the then-released Norris as a frail grandfather, unable, as a felon, to possess a firearm by which he might instill his love of hunting in his grandchildren, damaged by his experience with law enforcement, and living in a precarious financial state.[24] The Heritage Foundation also authored an opinion piece discussing Norris's case in *The Washington Times*, titled "Criminalizing Everyone."[25] In 2009 Norris's wife, Kathy, testified before the House Subcommittee on Crime, Terrorism, and Homeland Security in a hearing titled "Over-Criminalization of Conduct/Over-federalization of Criminal Law."[26] *NPR*

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[19] United States v. Norris, 452 F.3d 1275, 1278 (11th Cir. 2006).
[20] *Id.*
[21] Dep't of Justice, *Peruvian Orchid Dealer Sentenced to 21 Months in Miami for Smuggling Protected Peruvian Orchids* (Jul. 27, 2004), www.justice.gov/archive/opa/pr/2004/July/04_enrd_515.htm.
[22] *Norris*, 452 F.3d at 1280.
[23] *Id.* at 1283.
[24] Andrew Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization* (Jul. 27, 2009), www.heritage.org/courts/report/the-unlikely-orchid-smuggler-case-study-overcriminalization.
[25] Brian W. Walsh, *Criminalizing Everyone*, THE WASHINGTON TIMES (Oct. 5, 2009), www.washingtontimes.com/news/2009/oct/05/criminalizing-everyone/.
[26] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 33-40 (2009).

featured Norris in an episode of its *Uncertain Hour* podcast.[27]

Department of Justice press releases also provide examples of serious efforts by federal law enforcement to prosecute orchid offenders. In 2001 the Department announced that it had recently arrested and charged several individuals, including nationals of Australia, South Africa, Mexico, Zimbabwe, Ecuador, Indonesia, and Hong Kong, with smuggling, conspiracy, and making false statements in connection with orchid trading in California.[28] In 2004 Virginia orchid merchant James Kovach pleaded guilty in federal court in Tampa to two misdemeanor counts of violating the Endangered Species Act, acknowledging his role in importing more than 300 orchids from Peru without obtaining CITES permits. The Marie Selby Botanical Gardens and its Director of Systematics, Wesley E. Higgins, were also found guilty in the transaction, despite accepting the plants, which included a previously unidentified species, with the perhaps laudable intent of identifying the new variety and publishing information regarding the same (though in a less than virtuous turn, Kovach asked that Higgins name the species after Kovach himself).[29]

And returning to the *Norris* matter recounted above, smuggling is, it seems, sometimes a family business, one that legal prosecution will not deter. In 2015, Manuel's son, Victor Manuel Arias Cucho, was stopped in Los Angeles International Airport while attempting to transport more than 1,000 orchid specimens into the country from Australia, along with more than $15,000 in cash, hidden in tubes, clothing, pillows, toy boxes, and foil and newspaper within his luggage.[30] Arias Cucho avoided prison time in this instance, pleading guilty in exchange for two years of probation and a $7,500 fine.[31] His father, however, was, according to the criminal complaint, at large, the subject of an international extradition warrant … yet again, for orchid smuggling.[32]

By now readers may be convinced of the serious nature of legal consequences associated with importing unpermitted orchids, but wonder whether falsified paperwork is the best that I have to offer with respect to factual

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[27] *See* Villanova Univ., *The Curious Case of Orchids and Over-Criminalization* (Mar. 15, 2018), www1.villanova.edu/villanova/law/newsroom/webstories/2018/0315.html.
[28] Dep't of Justice, *Federal Agents Arrest Six Men Charged with Illegal Trafficking in Rare Plants* (Jul. 23, 2001), www.justice.gov/archive/opa/pr/2001/July/348enrd.htm.
[29] Dep't of Justice, *Virginia Orchid Dealer Pleads Guilty to Violating Endangered Species Act* (June 10, 2004), www.justice.gov/archive/opa/pr/2004/June/04_enrd_397.htm.
[30] Criminal Complaint at para. 8, 11, U.S. v. Cucho, No. 2:15-cr-00581 (C.D. Cal. Sept. 25, 2015).
[31] Judgment and Probation Commitment Order, U.S. v. Cucho, No. 2:15-cr-00581 (C.D. Cal. Oct. 28, 2015).
[32] Criminal Complaint at para. 9, U.S. v. Cucho, *supra* note 32.

excitement. Though one would be forgiven for assuming that the orchid trade, while environmentally consequential, lacks in interpersonal drama, at least one reported case this author located suggests otherwise.

In the matter of *Martin v. County of San Diego*, no parties were charged with illegal import, but the illicit trade nevertheless clouded the matter, as plaintiff David Martin was something of a pariah in the orchid community given his role as a federal informant working with local law enforcement officials, and supplying information regarding other area vendors in connection with an investigation that was, delightfully, called "Operation Botany."[33] Martin had sued a fellow orchid vendor, William Phillips, for defamation, claiming that Phillips told his family and fellow orchid vendors that Martin burglarized his nursery, and that Phillips told law enforcement officials that Martin was "a crook," which Martin claimed was an effort to discredit himself and the federal investigation,[34] as part of a broader scheme to protect orchid smugglers. A federal district court was persuaded that Phillips's statements to fellow vendors might be deemed malicious given his knowledge of Martin's status as an informant, and allowed those claims to proceed. Martin was not satisfied, however, with suing Phillips alone, and also sued the city and the police department in connection with their burglary investigation, even raising constitutional claims and claims of false arrest and false imprisonment, against officials who transported him to the hospital for DNA testing. Martin's claims remained the subject of litigation for more than a decade.

As a postscript, Phillips's business, Andy's Orchids, still operates in Encinitas, California, and according to the business's website cultivates 7,000 species. Not only has Andy's operation remained robust, but he is the beneficiary of effusive online customer reviews, averaging 4.5 stars on Yelp,[35] 5 stars on Facebook,[36] and 5 stars on Google reviews.[37] Perhaps, having enjoyed this foray into the wild (pun intended!) world of orchid trading, readers will seek out their own reputable local purveyors, and posit but a question or two regarding import paperwork for foreign species, while marveling upon their well-curated selection with fresh appreciation.

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[33] Martin v. Cty. of San Diego, No. 03 CV1788 LEG (WMC), 2006 WL 8441692, at *3 (S.D. Cal. Mar. 30, 2006).

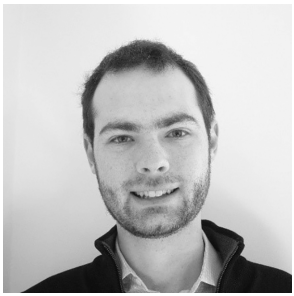
[34] For more on Operation Botany, see Lauren Kessler, *The Cult of the Cycads*, N.Y. TIMES MAGAZINE, Aug. 28, 2005, at 30.

[35] *Andy's Orchids*, YELP, www.yelp.com/biz/andys-orchids-encinitas.

[36] *Andy's Orchids*, FACEBOOK, www.facebook.com/AndysOrchids.

[37] Selected comments include the bold "best selection of species orchids in the northern hemisphere," and the essential "staff is very knowledgeable and they have a clean bathroom." GOOGLE, www.google.com (search for "Andy's Orchids Google Reviews").

FOUR RECOMMENDATIONS

Jed S. Rakoff[†] *& Lev Menand*[*]

Erwin Chemerinsky
Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights
(Liveright 2021)

This is not the first great book that Erwin Chemerinsky, Dean of Berkeley Law School, has authored, but it is perhaps his most chilling. For in 308 pages of tightly reasoned detail, he demonstrates beyond cavil how the Supreme Court of recent decades (and well before the addition of the Trump appointees) undertook to undercut most of the reforms by which the Warren Court had sought to reduce police misconduct. As Chemerinsky shows, prior to the Warren Court, extreme deference to police practices was the norm in both state and federal courts. But in a series of brave decisions, the Warren Court sought to impose constitutional restraints on everything from routine frisks to deadly choke-holds. Yet by the 1970s, and gaining speed thereafter, the Court sought to "refine" these restraints to the point of non-existence. As it now stands, for example, in most states the police can stop almost anyone at anytime on the flimsiest of excuses, and, should the person dare to

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[*] Associate Professor of Law, Columbia Law School.

protest or fail to follow police directions with total precision, the police are free to choke or shoot the offender, sometimes fatally.

Except in some minority communities that suffer most from such misconduct, most Americans approve of their police departments, with the result that neither the executive nor the legislative branches of government are likely to impose or enforce restraints. It thus becomes the role of the judiciary to protect our citizens from police misconduct. But, far from so doing, the judiciary, and especially the Supreme Court of the last few decades, has not simply abdicated this role but has, as Chemerinsky demonstrates, "contributed enormously to the problem of policing, and race-based policing, in the United States" by removing whatever restraints the Warren Court had imposed.

At the same time, Chemerinsky argues, the radical solutions advocated by some of those who recognize the problem — solutions as impractical as abolishing the police — not only are doomed to failure but also fail to focus on the fact that it is the judiciary that is best situated in our governmental arrangements to impose meaningful restraints on police misconduct. Given the present composition of the Supreme Court, Chemerinsky believes that it is the state courts, or at least some of them, who are most able to carry out these reforms, although he also details a host of legislative measures that might gain passage in those states where outrageous acts of homicide by the police have stoked moral outrage. For despite the American tradition of strongly supporting the police, such outrageous incidents do at times convince many ordinary Americans that something must be done, even to prosecuting the offending policepersons. But until more Americans come to recognize that these extreme events are just the tip of the iceberg, it is unlikely that broader-based institutional reforms will occur. It is one of the many strengths of Chemerinsky's book that not a single reader will be left with anything but a total conviction that bringing about such reforms is a moral imperative, one that even the courts may come to recognize.

Claire Priest
Credit Nation: Property Laws and Legal Institutions in Early America
(Princeton University Press 2021)

The U.S. economy revolves around credit. Americans borrow to buy cars, homes, and appliances; send their kids to college; run their businesses and cover emergency expenses. All of this borrowing depends upon law. Law governs property claims and contracts, debt obligations and bankruptcy. Lenders are willing to lend because, among other things, they believe that the legal system will ensure that they are paid back (with interest) most of the time.

In a brilliant new monograph, Claire Priest, the Simeon Baldwin Professor of Law at Yale Law School, and an expert in American property law, recovers the legal origins of our credit economy in the British colonial and early American Founding period. Priest shows that in an effort to attract investment from the Old World and strengthen the position of domestic creditors, the colonies (and later the states) established market-oriented property institutions. As early as the 1730s — decades before the Revolution — they dismantled the English inheritance system, permitting unsecured creditors to gain title to land over heirs. They defined land as a chattel — something that could be seized by creditors just like machinery or equipment — breaking with the English practice, which often shielded land from creditors. And they treated enslaved people as commodities, breaking entailments to land, so that creditors could treat enslaved people as collateral for loans.

In elucidating the origins of our "credit nation," Priest is sensitive to intellectual and ideological dimensions as well as economic and material determinants. As leaders of a self-proclaimed republic, Americans were keen to eliminate feudal property rules that entrenched wealth in Europe. The United States, abundant in natural resources and short on machinery and finished goods, was also hungry for foreign investment. By creating a legal framework beneficial to creditors, it could weaken protections for inherited fortunes while also attracting capital from abroad and encouraging domestic creditors to invest at home. As Priest reminds us, capitalism is a legal system, and American laws and institutions are at the center of the country's commercial and financial economy.

Marc I. Steinberg
Rethinking Securities Law
(Oxford University Press 2021)

The securities markets of the United States have changed radically in the past few decades. Where once the stocks of most public companies were held by individual investors, they are now mostly held by asset-management funds and the like, whose focus is on increasing assets under management and who often hold stakes in companies passively, regardless of their performance. Moreover, with the explosive growth of private securities markets, which now account for more than half the new capital raised each year in the United States, the oversight role of the S.E.C., which is largely focused on public markets, has substantially diminished. Recognizing these changes, Professor Steinberg, a well-known expert in securities laws, proposes a simple but radical solution: federalize corporate governance.

As most lawyers know, corporations in the U.S. are largely governed by Delaware law. This oddity dates to the late 19th century, when the tiny state of Delaware sought to improve its economy by offering the rapidly expanding corporations of that era the opportunity to avoid all state taxes if they re-incorporated in Delaware. Most large U.S. corporations accepted the offer, and two-thirds of all Fortune 500 companies are still incorporated in Delaware. But the long-term result was that the Delaware legislature, and to some degree its courts as well, became ever more supportive of corporate management, leading to the current situation where anything (well almost anything) goes if it can be portrayed as an exercise of "business judgment."

After each major corporate scandal of the past 20 years, Congress has tried to address this problem through minor intrusions into the requirements of corporate governance, but little has changed. Steinberg would take the bull by the horns by turning over to the federal government virtually complete control of corporate governance. For example, he would have Congress pass legislation mandating that the chair of a company's board of directors be an independent director holding no position in the company's management. Similarly, the proposed legislation would require that at least one member of the board be chosen from the company's non-management employees. Further still, Steinberg's proposed legislation would impose a strict cap on the percentage of disparity between the CEO's compensation and that of the median employee.

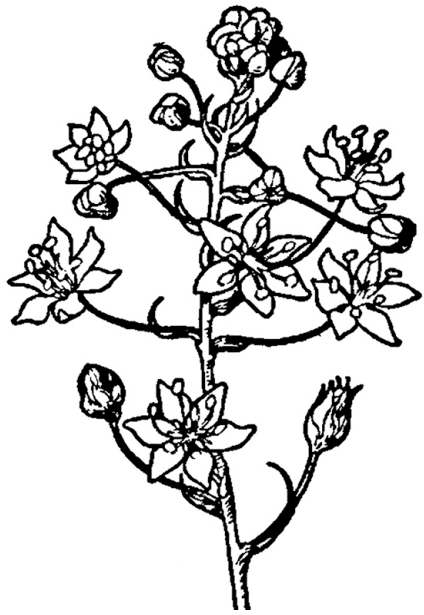
In these and numerous other ways, Steinberg's book causes the reader to rethink much of what most securities lawyers have taken for granted. How likely it is that his proposed legislation will be enacted in the immediate future is more unclear, not least because the Presidency is currently occupied by a loyal inhabitant of Delaware. But when there is another corporate crisis — and inevitably there will be — many of Steinberg's radical suggestions may well take root.

Christine Walker
Jamaica Ladies: Female Slaveholders and the Creation of Britain's Atlantic Empire
(University of North Carolina Press 2021)

In the 18th century, Jamaica was Britain's wealthiest slaveholding colony. But, as the legal archives of the time demonstrate, a large number of the slaveholders in Jamaica were women — many of them, in fact, freed slaves. In this fascinating study of previously overlooked Jamaican archives, Christine Walker, an assistant professor history at Yale-NUS College in Singapore, convincingly demonstrates that these female slaveholders achieved wealth

and status in Jamaica far surpassing what most women of their time could have achieved elsewhere. But in the process, even those women who had formerly been slaves themselves became strong supporters of this brutal regime.

Winner of the Cromwell Foundation's Prize for the best book of legal history published in 2021, *Jamaica Ladies* shows, all too sadly, the role played by these "handmaidens of empire" in perpetuating and rationalizing slavery. It also provides considerable insight into the culture of slavery that soon overtook much of the U.S. as well.



Gather ye rosebuds while ye may,
Old Time is still a-flying;
And this same flower that smiles to-day,
To-morrow will be dying.

Robert Herrick
To the Virgins, to Make Much of Time (1648)

FIVE RECOMMENDATIONS

Susan Phillips Read †

Jack M. Beermann
The Journey to Separate But Equal: Madame Decuir's Quest for Racial Justice in the Reconstruction Era
(University of Kansas Press 2021)

This book tells the story behind *Hall v Decuir*,[1] a "little-known first step" toward the United States Supreme Court's eventual adoption of the separate-but-equal doctrine in *Plessy v Ferguson*,[2] and a "significant milestone in the march toward Jim Crow." The litigation arose out of the refusal of the captain and owner of the riverboat *Governor Allen* to provide Madame Josephine Decuir with a stateroom in the "ladies' cabin," an area of the boat with more refined accommodations, which was reserved for White women. Madame Decuir, a member of the French-speaking mixed-race aristocracy of antebellum Louisiana, was traveling from New Orleans to a location upriver, accompanied by her lawyers, to examine records related to the remnants of the property of

† Associate Judge (ret.), New York Court of Appeals.
[1] 95 U.S. 485 (1878)
[2] 163 U.S. 537 (1896).

her late husband, a one-time wealthy plantation owner whose finances were devastated by the Civil War. At the time of Madame Decuir's trip, Louisiana's 1868 constitution and an 1869 statute forbade racial segregation and exclusion in many public places, including all modes of transportation.

Madame Decuir brought suit to recover damages and to vindicate her right to equal dignity and respect in post-slavery Louisiana. She recovered $1,000 in damages in the trial court and successfully defended the verdict in the Louisiana Supreme Court, which called her treatment "a gross indignity to her personally." The United States Supreme Court, however, reversed, holding that Louisiana lacked the power to prohibit discrimination on the *Governor Allen* because the boat was engaged in interstate commerce on the Mississippi River. The author notes that, of the "many blows cast in this period by the Supreme Court against civil rights enforcement[, *Hall v Decuir* was] the only one in which the Court prevented a Southern state from using *its own law* to protect Black people from discrimination" (emphasis in original). As the author points out in the Epilogue, however, by the mid-20th century *Hall* had become a useful precedent in the fight against state laws imposing segregation in interstate transportation.

The author has chased down the extensive litigation record, surprisingly still in existence with just a few gaps, and has examined the lives and circumstances of the colorful cast of litigants, attorneys and judges who took part in *Hall v Decuir*. This approach adds considerable interest to a narrative that never flags.

Peter S. Canellos
The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero
(Simon & Schuster 2021)

John Marshall Harlan was born to a prominent slaveholding family in Kentucky. He freed the slaves whom he owned only after ratification of the Thirteenth Amendment, which he himself had opposed. Yet Harlan became "The Great Dissenter" on the post-Reconstruction United States Supreme Court. During his tenure on the Court from 1877 to 1911, Harlan consistently broke with his colleagues to protest decisions that constricted the rights of the formerly enslaved. He effectively laid out the legal framework for the eventual repudiation of *Plessy* and the 20th-century civil rights movement.

All of this has been chronicled before. Less well-known about Harlan is his respectful and admiring relationship with his mixed-race brother Robert.

Rumored to be the son of Harlan's father and an enslaved woman, Robert Harlan, something of a polymath, grew up alongside the future Justice and was a successful horseracing impresario, gold rush entrepreneur, financier of Black-owned businesses, world traveler, state representative and leading Black citizen of Ohio. As the biographer observes, his brother's success must have made an impression on the Justice and influenced his racial attitudes and jurisprudence. Robert Harlan is a fascinating character, and the discussion of his life lends much additional interest to this biography.

Jorge M. Contreras
The Genome Defense: The Epic Legal Battle to Determine Who Owns Your DNA
(Algonquin Books of Chapel Hill 2021)

The Genome Defense explains the genesis of *Association for Molecular Pathology (AMP) v Myriad Genetics, Inc.*,[3] a case brought by the American Civil Liberties Union (ACLU) on behalf of 20 medical organizations, geneticists, women's health groups, and patients, and traces its journey to the United States Supreme Court. Mutations of the BRCA1 and BRCA2 genes are linked to a dramatically increased risk of breast and ovarian cancer. After discovering the precise location and sequence of the BRCA1 and BRCA2 genes, Myriad obtained key patents, thereby preventing any competitor from developing a cheaper diagnostic test or even studying these genes. In *AMP*, the Court sided with the ACLU on the question of whether a human gene can be patented, holding that a naturally occurring DNA segment is a product of nature and is not patent-eligible merely because it has been isolated.

The book highlights the forethought required to make *AMP* a successful "test" case against a well-funded adversary in the powerful biotech industry. For example, the ACLU identified Myriad as the defendant because its gene patents related to more prevalent conditions rather than a rare disorder; assembled multiple plaintiffs in order to withstand the inevitable challenges to standing (in the end, only one plaintiff survived); raised public awareness of gene patenting through cultivation of major print and television news outlets; assembled a team of scientifically-knowledgeable advisers; and took care to couch complex scientific subject matter as much as possible in understandable terms (e.g., the lead attorney reduced a potential technically complex "Question Presented" to the simple, common-sense "Are human genes patentable?").

[3] 569 U.S. 576 (2013).

Noah Feldman
The Broken Constitution: Lincoln, Slavery, and the Refounding of America
(Farrar, Straus and Giroux 2021)

This book is a thought-provoking addition to the vast and ever-growing body of literature examining the life and thought of our sixteenth President. The author argues that Lincoln understood the Constitution as a compromise to accommodate slavery where it already existed in order to obtain Southern ratification and thereby allow the United States to form and expand. Like his hero, Henry Clay, Lincoln optimistically anticipated that slavery would eventually fade away, but that did not happen. Instead, the territorial expansion facilitated by the formation of the union and encouraged by the invention of the cotton gin fueled sectional hatred and strife over slavery every time a new state sought to join the United States.

While Lincoln in his first inaugural address announced that he was prepared to recognize the legal legitimacy of slavery if this would hold the states together, he eventually concluded that he had to "break" the compromise (and compromised) Constitution in order to preserve the union. Hence, he used armed force to prevent the Confederate states from leaving the union; unilaterally suspended basic civil liberties; and emancipated the slaves in the Confederate states, three actions at odds with his understanding of the Constitution. These measures, the author contends, allowed Lincoln to free the Constitution from its compromised character and laid the groundwork for the Constitution to be remade by the Thirteenth, Fourteenth, and Fifteenth Amendments into a moral vision of liberty and equality.

Martha Minow
Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech
(Oxford University Press 2021)

Saving the News is an installment of Oxford Press's *Inalienable Rights* series of compact books written by legal scholars to explore a particular freedom cherished by Americans. The title seems counterintuitive: The First Amendment provides that "Congress *shall make no law* … abridging the freedom of speech, or of the press" (emphasis added), which seems, on the face of it, to rule out government intervention in matters of free speech and freedom of the press. The author argues, however, that constraining government from restricting these freedoms does not bar government from taking

actions to strengthen them. As she points out, antitrust law, tax law, government subsidies, intellectual property law, and libel and defamation law already coexist, if at times uncomfortably, with the First Amendment.

The author identifies major trends in the news business which, in her view, have impeded the public's access to independent information, a mainstay of self-government. These trends include the rise and disruptive nature of free-riding digital platforms, which divert advertising revenue from legacy media and especially from local news; failing business models for newspapers; new owners with varied agendas; and shrinking viewership for broadcast news. The author's suggestions for reform include requiring payment for news circulated on social media in order to help support journalists and editors; curtailing immunity of digital platforms to liability lawsuits; regulating large digital platforms as public utilities; and supporting nonprofit consumer-protection efforts and nonprofit news sources. Some of these proposals are similar or identical to those suggested by members of Congress. Whether the reader agrees with the author's views about the nature and existence of a problem or her prescriptions for cure, this book offers a concise analysis of issues bound to be the subject of lively public debate in the coming years.

To gild refined gold, to paint the lily,
To throw a perfume on the violet,
To smooth the ice, or add another hue
Unto the rainbow, or with taper-light
To seek the beauteous eye of heaven to garnish,
Is wasteful and ridiculous excess.

William Shakespeare
King John (1591-1598)

FLOWERS V. MISSISSIPPI

HOW A PODCAST HELPED WIN A SUPREME COURT CASE

Tony Mauro[†]

The abbreviated name of the Supreme Court case *Flowers v. Mississippi* has no connection to the flora of the Magnolia State.

But the fuller title of the case, *Curtis Flowers v. State of Mississippi,* stands as an extraordinary example of how litigation can evolve and succeed at the Supreme Court with the help of the news media — a podcast, to be precise.

Flowers was sentenced to death for allegedly killing four employees of a furniture store in Winona Mississippi in 1996. He insisted from the beginning that he was innocent. Prosecutor Douglas Evans tried Flowers six separate times in Mississippi courts, persistently using peremptory challenges to strike African-Americans from the jury pool. Flowers is Black.

His lawyers fought for decades on his behalf, not only asserting that he was innocent but claiming that the almost all-Black jury strikes violated *Batson v. Kentucky*, the 1986 Supreme Court decision holding that racial discrimination in the selection of jurors violates the Sixth and Fourteenth Amendments.

The Flowers case went as far as the Supreme Court, not once but twice: in 2016 when his case was remanded for further consideration, and then in 2019 when a majority of the court concluded that Evans's jury strikes were of discriminatory intent. Justice Brett Kavanaugh wrote for a 7-2 majority, with Justices Clarence Thomas and Neil Gorsuch in dissent. After the decision was handed down, Mississippi's charges against Flowers were dropped, and he was freed in September 2020.

So, why did the Supreme Court rule this way, and what did the news media have to do with it? Seeds of the answer begin with the heinous crime itself. The small town of Winona was stunned by the murder of four residents, which swiftly drew media coverage.

"You know what a quadruple murder does for a town that never saw anything like that before," Jerry Mitchell, a renowned Mississippi journalist told

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me in an interview. Mitchell, a MacArthur Fellow who reported on civil rights cases at *The Clarion-Ledger* in Jackson, said, "It was stunning. You can imagine all the reporting that went on in those days. But it was pretty much people regurgitating what the authorities said."

Winona residents wanted to get the crime dealt with quickly, Mitchell said. "They believed he was guilty. All the white locals that I talked to or had connections with, they were all convinced the guy's guilty and they just need to hurry up and get done with this and execute this guy."

For the first three trials, the jury convicted Flowers and sentenced him to death. But the verdicts were overturned by the Mississippi Supreme Court for a variety of reasons, including prosecutorial misconduct. For the next two trials, the juries included Black jurors and could not reach a verdict. For the sixth trial — the one that went up to the U.S. Supreme Court — the jury consisted of 11 whites and one Black, and yet again, they convicted Flowers and sentenced him to death. A divided Mississippi Supreme Court ruled that the state used valid "race-neutral reasons" in picking the jurors, so the *Batson* rule was not violated. In the first trip to the U.S. Supreme Court, the justices sent the case back to the Mississippi Supreme Court to evaluate a *Batson*-related issue. By a 5-4 vote, the Mississippi high court again upheld the conviction and the death sentence.

Clearly, all along the way, the belief that Flowers was a killer persisted in Mississippi. Finding the truth might have been a task for the news media, but that would have been easier said than done.

"It is unrealistic to expect that an experienced newspaper reporter will be on hand in Flowers's hometown of Winona, Mississippi (population 4,100) and in towns like it across the country to independently monitor the conduct of prosecutors and judges," Frank LoMonte, a University of Florida journalism professor, wrote in an American Bar Association publication. "The disintegration of professional community journalism puts the duty of oversight on the public's shoulders."

Nationwide media organizations did not seem to delve deeply into the Flowers case either — until a podcast titled "In the Dark" came along. "There may have been some national stories here and there," Mitchell at *The Clarion-Ledger* said, "but really, it was 'In the Dark.' It deserves a lot of credit. I think they're the ones that really came in, dug into it."

APM (American Public Media) Reports — a collection of investigative journalists, documentary producers, and data reporters — produces "In the Dark." Its stated mission is to report on issues "that are often hidden from public view." It reports on "powerful institutions and people, injustice and accountability."

Based on a tip from Mississippi, the "In the Dark" team decided to take up the Flowers story like nobody else did — investigating not just the murder, but the trials and the legal process as well. They interviewed pertinent players who revealed information about the alleged murders that was never heard before, and developed important data never seen before. They tallied information about 6,700 jurors in the Mississippi district where Flowers was tried, finding that the prosecutor's office struck Black people from juries at more than four times the rate it struck white people.

They spoke to witnesses, neighbors, and others who said things they had not told police or prosecutors. The team sometimes spent weeks or months to get to know sources, hoping they would talk. They even interviewed prosecutor Evans several times.

In other words, it was the kind of investigation that neither prosecutors nor defense lawyers nor the traditional news media would have the time or resources to undertake.

"For a five-person team of reporters and producers to be full-time on the story for a year, that's a serious commitment and I know that's not a commitment that many people could make," senior producer Samara Freemark told me in an interview.

The information unearthed by the team proved useful as the Flowers case made its way to the high court. The data from the podcast became a new backdrop of sorts for the Supreme Court case. Two amicus briefs in support of Flowers cited information gleaned by "In the Dark."

"APM's coverage made it possible for us to show how racial injustice was the driving factor in the decision to prosecute Mr. Flowers, the weakness of the prosecution against him, and the selection of a jury willing to convict him and sentence him to death for a crime he did not commit," said James Craig of the MacArthur Justice Center, counsel of record in the amicus brief filed on behalf of the Mississippi-based Magnolia Bar Association.

Another brief, filed by the NAACP Legal Defense and Educational Fund, mentioned "In the Dark" nine times.

It's not new for litigants to cite news stories, but the depth of APM's investigation may be unprecedented, and therefore of unusually high value.

Freemark emphasized that "as reporters we are not working for the defense. We don't turn over information to the defense, but whatever we make public for publishing obviously is fair game and can be used. You want to check our work? There it is."

Apart from the two amicus briefs, the impact of the "In the Dark" podcast on the Supreme Court is hard to quantify. But oddly enough, one sign that it may have been noticed came from Justice Thomas, a dissenter from

the *Flowers* decision. He argued that the Supreme Court should not have taken up the case: "Perhaps the Court granted certiorari because the case has received a fair amount of media attention," Thomas wrote. "But if so, the Court's action only encourages the litigation and re-litigation of criminal trials in the media, to the potential detriment of all parties — including defendants. … Any appearance that this Court gives closer scrutiny to cases with significant media attention will only exacerbate these problems and undermine the fairness of criminal trials."

For law-reportorial commentary, there is no one better than David Ziff. Consider this Twitter gem from December 1, 2021:

> @djsziff: BREAKING: The Federal Appendix is no more. After a twenty-year run publishing "unpublished" opinions, West announced last month it is discontinuing our old friend F. App'x. I guess there's not much of a market for bound volumes of non-precedential opinions. h/t @lawtalkingguy
>
> @djsziff: I haven't been able to find news of this elsewhere. In other words: West did not publish its decision to stop publishing unpublished decisions.

THE WARS OF THE ROSES

A BRIEF HISTORY OF HOW AMERICAN CITIES HAVE REGULATED FLOWER VENDORS

Jeremy S. Graboyes[†]

By the time I remember it, downtown Richmond had already gone to seed. The Hotel John Marshall — where my grandmother clasped an orchid-covered prayer book when she married my grandfather — had closed. The streets were lifeless outside work hours, whole blocks replaced with empty parking lots. The two steadfast department stores, Thalheimer's and Miller & Rhoads, gasped for breath. Sixth Street between them, for centuries the city's commercial heart, had become one of those lusterless, green-roofed festival marketplaces — like Harborplace in Baltimore — meant to resuscitate failing downtowns.

But the city had once swelled with life. Sixth Street teemed with produce vendors and flower vendors, who sold the dahlias, lilacs, and sweet Williams they grew in their country gardens. The flower vendors were, the *Times-Dispatch* remarked, "surely no less picturesque" than the Piccadilly flower girls or "their sisters on the banks of the Seine." "Where but in Richmond," the paper asked, "can the somewhat prosaic task of filling the family larder be carried out against so picturesque and romantic a background as that made by the happy, smiling flower women of the Sixth Street Market."[1]

Throughout the nineteenth century and well into the twentieth, the answer was obvious: Charleston, New York, Washington, New Orleans, Philadelphia, San Francisco, Los Angeles … Every city had its flower vendors, and everywhere they were picturesque. *Picturesque*. That adjective recurs across regions and decades. It must have been the vendors' defining attribute for dwellers of the gray-brown cities in an era of intense growth and industrialization. Without them, one paper wrote, "we should have little to remind us of the primitive state of the earth before man built the town — of the green and flower decked fields of the country."[2]

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[1] *Cities and Trees*, RICHMOND TIMES-DISPATCH, Apr. 5, 1948, at 10; Vera Palmer, *'Pretty Bunches, Mistis, Pretty Bunches'*, RICHMOND TIMES-DISPATCH, June 2, 1935, at 51.

[2] *City Intelligence*, N.Y. DAILY HERALD, Apr. 28, 1846, at 2.

The flower vendors were harbingers of warmth and rebirth. Newspapers cheered their arrival each year. "Here come the flower vendors," Mary Pickford wrote in a 1916 syndicated column, "now we know the spring is here!"[3] "[C]ity people know that spring has come," goes another account, "when they see the flower vendor's cart, spilling red geraniums, trundled down the street and hear his unflowery and raucous solicitation."[4]

More than just symbols of the season, flowers formed an essential part of everyday life. Flowers were fashion. They formed the lexicon of a rich and effervescent language. And so visiting the vendors became one of those little daily rituals. The vendors were also artists, weaving "floral treasures into forms of taste and beauty" and "spread[ing] their colors as recklessly as the mad Van Gogh." They were magicians and priests, too, "scatter[ing] abroad everywhere their holy influence."[5] The vendors were, in their way, as fundamental to American streetscapes as sidewalks and streetlamps.

"Resilience, Direction, and Purpose"

The flower vendors must indeed have been *picturesque*. But it's easy to lose sight that, beneath their picturesqueness, they were also people seeking opportunity. Because barriers to entry are low, selling flowers has been a natural choice for members of many marginalized groups. Vendors need next to no capital, formal education, training, physical ability, English proficiency, or documentation. They can acquire their wares by growing them themselves, buying them from friendly suppliers, even picking them freely in nature. Working for themselves, vendors could also avoid discriminatory employers and commercial landlords and gain greater autonomy over their working conditions.

The roots of flower vending in the South lie in the gardens, or patches, that enslaved communities relied on to supplement scanty rations. Alongside edible plants, gardeners cultivated flowers and other ornamental plants, suggesting that patches were not just food sources but also spaces for "beauty" and "spiritual refuge."[6] The gardens could also be a source of income.[7] In *Thirty Years a Slave*, Louis Hughes describes selling flowers in Memphis.[8]

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[3] *Daily Talks by Mary Pickford*, BOS. POST, Apr. 14, 1916, at 10.
[4] RICHARDSON WRIGHT, HAWKERS & WALKERS IN EARLY AMERICA 234 (1927).
[5] *Street Corner Magic in Spring*, RICHMOND TIMES-DISPATCH, Apr. 16, 1948, at 26; *Flowers*, NEW ORLEANS TIMES-PICAYUNE, May 1, 1858, at 2.
[6] Dwight Eisnach & Herbert C. Covey, *Slave Gardens in the Antebellum South: The Resolve of a Tormented People*, THE SOUTHERN QUARTERLY (Fall 2019), at 11-23.
[7] JESSICA B. HARRIS, HIGH ON THE HOG 84 (2011).
[8] LOUIS HUGHES, THIRTY YEARS A SLAVE 66 (1897).

An 1851 account from near Natchez describes "slaves who come into the city on Sundays" to sell flowers and shrubs.[9]

Many Black families established farms throughout the rural South after emancipation, and tasks often fell along gender lines. Men worked cash crops in the field, while women managed the gardens. These gardens offered one of the few paths for Black women to access opportunity, and many became businesswomen selling flowers in Southern cities.[10] Nine of these women appear in a June 1870 issue of *Harper's Weekly*. They stand against the brick wall of Washington's Central Market surrounded by a forest of trees, shrubs, and flowers. Horticulturist and writer Abra Lee calls them the "legendary flower sellers" on her blog *Conquer the Soil*. She describes seeing this image for the first time: "[M]y jaw dropped … . They represent resilience, direction, and purpose. The rough path I've walked for 20 years as a horticulturist has long been laid with beautiful flower petals. And these are the women I get to thank."[11]

The legendary flower sellers passed their businesses to their daughters and granddaughters, including the women who sold flowers on Sixth Street in Richmond and the famed "flower ladies" of Charleston. Joyce Coakley, whose grandmother was among the flower ladies, describes them in her book *Sweetgrass Baskets and the Gullah Tradition*. They woke early, trudged seven miles to the harbor carrying heavy baskets laden with the flowers they'd grown, and took the ferry into the unfamiliar city to earn a living. It was, Coakley writes, "the first attempt by any organized group to seek employment outside the African American community."[12]

Other groups have also found opportunity selling flowers on the streets of American cities. In her 1862 guide *How Women Can Make Money*, social reformer Virginia Penny listed "florist" and "flower girl" as occupations well suited for women.[13] Flower girls became a celebrated symbol of city life, immortalized in paintings, plays like *Pygmalion*, and films like *City Lights*.

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[9] *Grave Yard Robbers*, CONCORDIA INTELLIGENCER, Mar. 8, 1851, at 2.

[10] Dianne D. Glave, *'A Garden So Brilliant With Colors, So Original in Its Design': Rural African American Women, Gardening, Progressive Reform, and the Foundation of an African American Environmental Perspective*, 8 ENVTL. HIST. 395, 399 (2003); Kathryn Downing, *The Legendary Flower Sellers*, DENVER BOTANICAL GARDENS (Jan. 29, 2021), www.botanicgardens.org/blog/legendary-flower-sellers; Cummer Museum, *Culture and Conversation: The Invincible Garden Ladies with Abra Lee*, YOUTUBE (Jan. 15, 2021), www.youtube.com/watch?v=IHgvLF_r_zU.

[11] Abra Lee, *The Original Flower Farmers*, CONQUER THE SOIL (Mar. 26, 2020), conquerthe-soil.com/the-original-flower-farmers.

[12] JOYCE V. COAKLEY, SWEETGRASS BASKETS AND THE GULLAH TRADITION 47 (2005).

[13] VIRGINIA PENNY, HOW WOMEN CAN MAKE MONEY, MARRIED OR SINGLE, IN ALL BRANCHES OF THE ARTS AND SCIENCES, PROFESSIONS, TRADES, AGRICULTURAL AND MECHANICAL PURSUITS 140-42 (1870).

"Flower-sellers in the market at Washington, D.C."
Harper's Weekly, June 4, 1870 (drawn by A.L. Jackson)

Many immigrants from Southern Europe and the Eastern Mediterranean got their start selling flowers on the streets of northern and western cities.[14] As they and their descendants gained a firmer toehold in American society, they were succeeded by newer immigrants from Mexico, Cuba, and Nicaragua.[15]

Seniors, veterans, people with disabilities, people affected by poverty, and children have also sought paths to opportunity through flower vending. In the absence of a strong social safety net, flower vending has served as a way for members of these communities to earn some money. This has sometimes verged on explicit policy. One early twentieth-century mayor of Los Angeles, for example, supposedly issued all kinds of unauthorized permits and licenses

[14] Thomas Burgess, GREEKS IN AMERICA 36 (1913); Edmon J. Rodman, *The Sephardic immigrants who brought flowers to L.A.*, JEWISH JOURNAL (Feb. 13, 2014).
[15] Lizette Alvarez, *Down From Poverty: How Family Fled Mexico for Fetid Tunnel Cell*, N.Y. TIMES, Oct. 9, 1996; Alex Stepick, *Miami: Capital of America*, *in* NEWCOMERS IN THE WORKPLACE: IMMIGRANTS AND THE RESTRUCTURING OF THE U.S. ECONOMY 129, 138 (Louise Lamphere et al., eds.) (1994).

to seniors, veterans, and people with disabilities and their children as "an act of charity."[16]

"I Have Made You Merchants!"

People have sold flowers in city streets since ancient times and in America since the early colonial period, and the push to regulate them is surely as old. Governments have justified the regulation of flower vendors on many grounds. Early efforts were likely tied to regularizing tax collection or the establishment of public markets, which gave officials greater control over how cities were provisioned.[17]

Child labor laws affected flower vendors, many of whom were children. In the 1870s, Congress sprang into action to eradicate the "Italian Slave-Trade" after Gilded Age New Yorkers were scandalized by the hundreds of Southern European children — like Horatio Alger's *Phil the Fiddler* — who suddenly appeared selling flowers, shining shoes, and playing violin in the city's streets.[18] Child labor laws passed a few decades later drove the child flowers vendors from the streets of Philadelphia, New York, and Los Angeles.[19]

The advent of automobiles led officials to target flower vendors as "a hazard to traffic conditions" — a clash immortalized in Jean Merrill's children's book *The Pushcart War* — and a distraction to motorists. They called the vendors a "fire menace" and proposed converting curbsides to parking.[20] New laws and changing urban environments drove flower vendors from city streets to suburban roads; then use of those spaces was restricted too.

Flower vendors fell victim to city beautification efforts whose proponents attempted to order urban chaos according to pseudo-scientific notions of logic and order. Although streets have always been multi-use spaces — thoroughfares, gathering places, playgrounds, and marketplaces — devotees of the City Beautiful and other urban renewal movements viewed street vendors skeptically. The desire to order public space could border on the obsessive. Fiorello LaGuardia reportedly singled out flower vendors, with organ grinders and Good Humor ice cream sellers, in his campaign to eradicate pushcarts

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[16] *No More Free Faker's License*, L.A. HERALD, Jan. 9, 1907, at 3.

[17] Daniel M. Bluestone, *"The Pushcart Evil": Peddlers, Merchants, and New York City's Streets, 1890-1940*, J. URB. HIST., Nov. 1991, at 68.

[18] *Children as Slaves*, N.Y. TIMES, June 17, 1873, at 1; *The Italian Slave-Trade*, N.Y. TIMES, July 7, 1872, at 3.

[19] *British Paupers*, St. Paul Daily News, Sep. 5, 1893, at 1; Proceedings of the Commissioners of the Sinking Fund of the City of New York, 1893-1894, at 262 (1904); *A Proxy Parent for Little Ones*, Phila. Times, Feb. 16, 1896, at 19; *Small Girl Merchants*, Phila. Times, Jan. 12, 1891, at 6.

[20] *Traffic Changes Are Effective In City Tomorrow*, Sep. 22, 1935, at 17; *Traffic Changes Aid Progress, Police Report*, RICHMOND TIMES-DISPATCH, Sep. 24, 1935, at 24.

in New York. "I found you pushcart peddlers," he announced at the opening of an indoor market, "I have made you MERCHANTS!"[21] This perspective — that street commerce is somehow illegitimate or at least less legitimate than brick-and-mortar establishments — remains pervasive.[22]

Local officials have often cited consumer protection to justify the regulation of flower vendors. Detroit, for example, passed an ordinance in 1938 to "eliminate fraudulent practices on the part of irresponsible, itinerant merchants engaged in the business of 'doping' flowers."[23] (A state court found the law unconstitutional.) And in a 2017 viral video, a police officer told vendors outside a high school graduation near Bakersfield: "We don't know where these flowers came from. What if a little girl is in the graduation, and she has an allergic reaction to a chemical that was sprayed on that flower for bugs, and she gets a reaction from it."[24]

But perhaps the most cited justification for regulating flower vendors is the need to level the playing field for florists or eradicate unfair competition. It's hard not to see many such laws as thinly veiled attempts to control competition by and opportunities available to people of color, recent immigrants, women, people with disabilities, low-income people, and others who have always turned to selling flowers in search of opportunity.

Consider San Francisco in the late nineteenth century. Locals and visitors alike adored the group of Italian immigrants, mostly young boys, who sold affordable bouquets in the shadow of Lotta's Fountain. "Visions of loveliness," one paper called them. "[I]t does not need a heroic reach of imagination," one author wrote, "to change that Lotta Fountain crowd of lads into a bunch of Roman boys in a corner of the *Piazza di Spagna*, or in a nook on the white marble stairs of *Monte Trinita*."[25]

Florists were less fond of this "market of the populace." They tried several tactics to put the vendors out of business. They spread rumors that the vendors' wares were purloined from headstones and funeral parlors. They complained to the police, who regularly and enthusiastically arrested the vendors for obstructing the sidewalks or blocking traffic.[26] No one else seemed to

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[21] Suzanne Wasserman, *Hawkers and Gawkers*, *in* GASTROPOLIS: FOOD AND NEW YORK CITY 153, 163 (Annie Hauck-Lawson & Jonathan Deutsch, eds.) (2009).
[22] *See* Michael W. Wakefield, José Castillo & Verona Beguin, *Transient Businesses: A Street Vendor Typology and Exploratory Study*, 19 J. BUS. & ENTREPRENEURSHIP 65, 65-66 (2007).
[23] S.S. Kresge Co. v. Couzens, 290 Mich. 185 (1939).
[24] So. Cal. News Gp., *Body cam footage of Perris arrest of flower vendor (Video 2)*, YOUTUBE (Nov. 19, 2018), www.youtube.com/watch?v=bCJTAKIZNo4.
[25] Elodie Hogan, *Children of the Streets*, 4 THE CALIFORNIAN 517, 519 (1893); *Our Pretty Flower Girls*, S.F. CALL, July 15, 1892, at 7.
[26] Hogan, *supra* note 25, at 520-21; *City Licenses*, S.F. CHRON., July 31, 1892, at 21; *Our Pretty*

mind the vendors. "[T]he people of San Francisco are lovers of the beautiful," one paper responded. "They fairly adore flowers, and it matters not to them that they are crowded off the walks or compelled to squeeze through narrow passages so that the flowers may have the room."[27]

In 1892, at the florists' urging, the city passed an ordinance increasing the license fee for vendors to $10 per quarter for a license. About 25 boys paid up. Each wore a "three-cornered tin tag, like a miniature family shield" under his coat to prove to any "stalking autocrat in blue" that he was licensed. But arrests continued — even among the licensed.[28] "If the flower peddlers ran a bar attachment," the *Examiner* joked, "with an illegal side entrance, and a game in the rear, the police would deal more gently with them."[29]

Then in 1895, with business lagging amid a great depression, the florists petitioned the Board of Supervisors to raise the license fee to $25 a quarter — a rate so high it would surely drive the vendors from the streets. After the Board agreed to the plan, an "immediate wave of indignation swept over the city." Newspapers lamented the plot to "abolish one of the most unique features of life in San Francisco" and to "snatch the bread and butter from the mouths of over two score of poor, hard-working people" who "add so much to the animation of street life." Soon half the city was sporting flowers on their wrists and lapels in solidarity.[30] Even the Merchants' Association joined the cause; its President called the florists' efforts "a persecution."[31]

Phoebe Hearst asked humorist Frank Gassaway to elegize the affair in her son William Randolph's newspaper. Called "Guilty," Gassaway's poem recounts the tearful testimony of a fictional police officer who faces discipline for refusing to arrest unlicensed flower vendors:

Flower Girls, S.F. CALL, July 15, 1892, at 7; *A Raid on Peddlers*, S.F. EXAMINER, Dec. 13, 1891, at 4; *War on Flower Peddlers*, S.F. EXAMINER, Mar. 17, 1889, at 5; *Local News Notes*, S.F. CHRON., Mar. 17, 1889, at 16; *Flower-Vendors*, S.F. CALL, May 6, 1890, at 8; *Robbing the Gardens*, Oakland Tribune, Mar. 2, 1889, at 3.

[27] *They Are Offenders*, S.F. CHRON., Mar. 4, 1895, at 10; *see also Florists and the Law*, S.F. CHRON., Mar. 5, 1895, at 6.

[28] *A Battle of Flowers*, S.F. CHRON., Feb. 27, 1895, at 18; *Had No License*, S.F. EXAMINER, Mar. 27, 1893, at 3; *Unlicensed Flower Peddlers*, S.F. CALL, Mar. 27, 1893, at 10; *The Bell Without A Tinkle*, S.F. EXAMINER, Jan. 29, 1893, at 13; Hogan, *supra* note 25, at 521.

[29] S.F. EXAMINER, Mar. 3, 1895, at 6.

[30] *They Are Offenders*, S.F. CHRON., Mar. 4, 1895, at 10; *The Convention Must Come*, S.F. CALL, Mar. 2, 1895, at 12; *The Merchants' Association*, S.F. EXAMINER, Mar. 2, 1895, at 12; *A Battle of Flowers*, S.F. CHRON., Feb. 27, 1895, at 18; Deserving *Florists*, S.F. EXAMINER, Feb. 14, 1895, at 6.

[31] *Deserving Florists*, S.F. EXAMINER, Feb. 14, 1895, at 6; *A Battle of Flowers*, S.F. CHRONICLE, Feb. 27, 1895, at 18; *Florists at Outs*, S.F. CHRON., Mar. 7, 1895, at 9.

"It's because of this new ordinance," the stalwart bluecoat said,
"The one against the little tots that try to earn their bread;
I mean the kids with flowers to sell that on the corners stand
You've noticed them, your Honor, a half-starved little band?[32]

A week later, Phoebe Hearst presented the poem to the Chairman of the Board of Supervisors at a hearing on the new ordinance. The Chairman read it aloud. "A few moments of dead silence followed," Gassaway recalled, "and then the originator of the ordinance himself rose and with tears running down his cheeks moved the rescinding of the measure which was unanimously voted."[33]

"One of the Most Picturesque Features of Our City"

Attempts to drive the flower vendors from the streets were frequently thwarted by the public's love for the *picturesque*. Efforts by Richmond officials throughout the 1930s to shut down the flower vendors' businesses or convert their spaces to parking were repeatedly met with protests from the Mayor and women's groups like the Housewives League and the Federation of Garden Clubs. Letter after letter to the editor of the *Times-Dispatch* bemoaned the destruction of "one of the most picturesque features of our City."[34]

Then in 1939, the City Attorney issued an opinion finding flower vending illegal. The Mayor refused to "interfere with people who are trying to earn a modest living" and proclaimed he would not take any action that would "make Richmond as flat and colorless as the Middle West." "Most people prefer to look at the flowers instead of our monuments," he insisted. "Indeed, it might as well be said that the monuments are obstructions." (Amen.) "The time has come, I think, to let every civic society and garden club arouse themselves to what is being done to remove the beautiful flowers from our streets."[35]

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[32] *"Guilty."*, S.F. EXAMINER, Mar. 9, 1895, at 6.
[33] Frank H. Gassaway, *Mrs. Hearts and the Flower Children*, UNIV. OF CALI. CHRON., at 256 (July 1919); *F. H. Gassaway, Author and Poet, Dies Suddenly*, OAKLAND TRIBUNE, May 22, 1923, at 18.
[34] *Likes Flower Vendors*, RICHMOND TIMES-DISPATCH, Dec. 9, 1932, at 12; *Flower Vending Saved for 'Picturesqueness'*, RICHMOND TIMES-DISPATCH, May 21, 1937, at 10; *Trade Group Acts to Stop Flower Peddling on Streets*, RICHMOND TIMES-DISPATCH, Nov. 20, 1932, at 1; *Traffic Changes Are Effective In City Tomorrow*, Sep. 22, 1935, at 17; *Traffic Changes Aid Progress, Police Report*, RICHMOND TIMES-DISPATCH, Sep. 24, 1935, at 24; *Flower Vending Saved for 'Picturesqueness'*, RICHMOND TIMES-DISPATCH, May 21, 1937, at 10.
[35] *Flower Vendors an Asset to the City, Says Mayor Bright*, RICHMOND TIMES-DISPATCH, Mar. 22, 1939, at 4.

And arouse themselves they did. Enraged citizens wrote to the *Times-Dispatch* in support of "the movement." Though it's clear they loved the flowers, it's equally clear they loved the aesthetic the flower vendors lent the city. Invoking racist imagery, letter writers celebrated how "thoroughly 'Southern'" the Black flower vendors were and how marvelously they evoked "those leisure-loving days before the war."[36] Painter Julien Binford marveled at the "shortsightedness" of officials who "would destroy at a sweep the means of livelihood of a good-looking group of people and the models of those who by pen or brush carry note that Richmond exists, and beautifully."[37]

The flower vendors of Sixth Street were saved — partly for their own benefit but especially for the benefit of those who found them picturesque. But by emphasizing vendors' aesthetic appeal to others, picturesqueness can also function as control. Though white Richmonders appreciated the women who sold home-grown flowers on Sixth Street, they had less enthusiasm for their husbands, fathers, brothers, and sons selling flowers to make ends meet during the Great Depression. These men were immediately cast as unfair competition to the florists. (Never mind that nearly a dozen florists supplied them.) "What we regard as a beautiful and picturesque thing has become a nuisance and a racket," the Mayor declared. He ordered police to drive vendors from most of the city outside Sixth Street and limited vendors to selling only flowers they'd grown themselves.[38]

The effects were swift. Days after the new policy went into effect, *Times-Dispatch* writer Margaret Barker Seward went looking for a Black couple who grew flowers on their farm and regularly sold them at a residential corner near downtown. The wife was missing that day, and the husband sat in his car looking "scared to death." Seward and the vendor spoke for a few minutes. Suddenly, a white man approached. Seward describe the ensuing conversation:

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[36] *Women Chorus Approval of Flower Sellers' Defense*, Mar. 23, 1939; *Our Flowering Streets*, RICHMOND TIMES-DISPATCH, Mar. 23, 1939, at 10; *Nostalgia for Landmarks*, RICHMOND TIMES-DISPATCH, Mar. 24, 1939, at 12; *Council and the Esthetic*, RICHMOND TIMES-DISPATCH, Mar. 25, 1939, at 8; *The Blossoming Corners*, RICHMOND TIMES-DISPATCH, Mar. 27, 1939, at 8; *Gamble's Hill Pageant Planned*, RICHMOND TIMES-DISPATCH, Mar. 28, 1939, at 10; *Flowers at the Curb*, RICHMOND TIMES-DISPATCH, Apr. 5, 1939, at 8; *This Week in the Garden*, RICHMOND TIMES-DISPATCH, Apr. 16, 1939, at 39.

[37] *Artist Finds Practical Reason For Permitting Flower Vendors*, RICHMOND TIMES-DISPATCH, Mar. 26, 1939, at 10.

[38] *Downtown Flower Vendors Banned; Others Restricted*, RICHMOND TIMES-DISPATCH, Oct. 7, 1939, at 6; *Housewives To Hear Speech By Mrs. Alexander*, RICHMOND TIMES-DISPATCH, Sep. 6, 1939, at 15; *Stone House Group Studies Move to Ban Flower Vendors*, RICHMOND TIMES-DISPATCH, July 13, 1939, at 24; *Forest Hill Stone House Donated Gifts*, RICHMOND TIMES-DISPATCH, July 11, 1939, at 10.

> "Are you selling flowers?" the white man asked. "Well, come along to the station house then and bring your flowers with you."
>
> "I didn't know I was doing nobody no harm here," the vendor said, "I raise eve'y one of these flowers and I can prove it."
>
> "Come on to Second Police Station," said the white man.
>
> Another woman, who had walked eight blocks to buy flowers, asked the man "what harm were these stands doing there anyway." They were obstructing traffic, the man said, and the merchants had complained. (There was no traffic at the intersection, Seward noted, and there never was.)

The vendor slowly secured his flowers in the back seat then got in the car and started driving to the station. The white man "followed close behind." Seward later followed up with the police. The vendor had been let off with a warning.[39]

"Able Bodied Men"

Something similar happened in Los Angeles in 1906. Flower vendors there were mostly seniors, people with disabilities, veterans, and children. The city licensed them, without clear legal authority, as "an act of charity."[40] But after child labor laws drove the child vendors from the streets, people started to notice "able bodied men" selling flowers alongside the seniors, people with disabilities, and veterans. These "able bodied men" — and they were always described as "able bodied," "big," "burly," or "husky" — were immigrants, many Sephardic Jews, from the Ottoman Empire.[41]

The new Mayor, Arthur Harper, pledged to stop licensing street vendors. His administration refused to grant licenses, and the police drove the flower vendors from the main streets. There was clear popular sympathy for the "invalid and crippled" vendors. ("Must these be driven to the county poor farm?" the *Post-Record* demanded.) Sensing popular discontent at the loss of "one of the most picturesque features of Los Angeles' life," Harper quickly recommended that the Council allow him to grant licenses to the flower vendors for a $5 monthly fee.[42]

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[39] Margaret Barker Seward, *Along Richmond Streets*, RICHMOND TIMES-DISPATCH, Oct. 29, 1939, at 4.
[40] *No More Free Faker's License*, L.A. HERALD, Jan. 9, 1907, at 3.
[41] Rodman, *supra* note 14.
[42] *Flower Sellers Get Licenses*, L.A. EVENING POST, Feb. 1, 1907, at 2; *Mayor Aids Old Sellers of Flowers*, L.A. EVENING EXPRESS, Feb. 2, 1907, at 3; *City Hall Chips*, L.A. TIMES, Feb. 6, 1907, at 18; *Mayor Seeking Money for City*, L.A. HERALD, Feb. 7, 1907, at 9; *Make War on Flower Sellers*, L.A. HERALD, Feb. 2, 1907, at 12; L.A. HERALD, Feb. 3, 1907, at 14; *Are Florists Selfish?*, L.A.

But there was little feeling for the "able bodied men" who had "chose[n] the idle life of a vendor" and "could just as well be doing manual labor."[43] "Let the women and children and cripples continue the business under proper limitations," one florist said. But a "big, able-bodied Greek who sells violets at the corner of Third and Broadway is worth $20,000. He should be compelled to pay dearly."[44] "Of course the children should be kept off the streets after dark," one city councilman remarked, "but I do not see why the city should discriminate against these children to help these foreigners."[45]

The police chief ordered "all able-bodied flower vendors off the streets" in July 1907, leaving only "the aged or crippled" free to continue selling flowers. "This is not proper work for an able-bodied man," he explained, "and, besides, these Italian vendors have formed a combine to drive the cripples off the street. But this trust will be busted in record time. From now on no able-bodied man will be allowed to sell flowers on the streets of Los Angeles."

The Mayor agreed. He supported licenses for the seniors and people with disabilities but vowed to drive out the "strong" immigrants.[46] By early

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HERALD, Feb. 28, 1908, at 4; *Favors a Square Deal*, L.A. TIMES, Feb. 23, 1907, at 16; *Flower Venders Get Short Delay*, L.A. HERALD, Feb. 5, 1907, at 3.

[43] *Must These Be Driven to the County Poor Farm?*, L.A. EVENING POST-RECORD, Sep. 25, 1907, at 1; *Here Is the Pitiful Story of One "Able Bodied" Flower Vendor*, L.A. EVENING POST-RECORD, Sep. 23, 1907, at 7; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; L.A. EVENING POST-RECORD, Oct. 4, 1907, at 4; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; *"How Doth the Busy Little Bee" When He Mistakes a Nose Bloom for a Rose Bloom*, L.A. EVENING POST-RECORD, Oct. 2, 1907, at 1; *Feeble Old Man a Police a Police Victim*, L.A. EVENING POST-RECORD, Oct. 31, 1907, at 1; *Why Gabriel Was Moved*, L.A. EVENING POST-RECORD, Nov. 1, 1907, at 1; *Antonio, Violet Vendor, Waxes Wroth When Equine Eats His Wares*, L.A. EVENING POST-RECORD, Jan. 20, 1908, at 2; L.A. EVENING POST-RECORD, Sep. 24, 1907, at 4; *Mayor Aids Old Sellers of Flowers*, L.A. EVENING EXPRESS, Feb. 2, 1907, at 3.

[44] *Flower Vendors Meet the Mayor*, L.A. EVENING POST-RECORD, Sep. 26, 1907, at 3; *Decrepit Florists to Remain on Streets*, L.A. EVENING POST-RECORD, Sep. 27, 1907, at 8; *Flower Vendor Makes a Plea for Life and Spurns Offer of Charity*, L.A. EVENING POST-RECORD, Sep. 28, 1907, at 3; *Stands for Flower Vendors*, L.A. EVENING EXPRESS, Sep. 28, 1907, at 18; *Summary of the Day*, L.A. TIMES, Sep. 28, 1907, at 18; *Flower Vendors Win Their Fight*, L.A. EVENING POST-RECORD, Oct. 1, 1907, at 1; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; *Local Bits*, L.A. EVENING POST-RECORD, Oct. 9, 1907, at 8; *Mayor Aids Old Sellers of Flowers*, L.A. EVENING EXPRESS, Feb. 2, 1907, at 3; *Asks Mayor to Prohibit Comeback Floral Frames*, L.A. HERALD, Oct. 1, 1907.

[45] *Believe Flower Girls Discriminated Against*, L.A. HERALD, Mar. 11, 1905, at 7; *Flowers Embarrass the Newly Wed Prosecutor*, L.A. HERALD, Aug. 17, 1906, at 8; *25 Years Ago Today — From the Express, Sept. 9, 1906*, L.A. EVENING EXPRESS, Sep. 9, 1931, at 14.

[46] *Strong May Not Sell Flowers*, L.A. EVENING POST-RECORD, July 29, 1907, at 1; *Flower Vendors Meet the Mayor*, L.A. EVENING POST-RECORD, Sep. 26, 1907, at 3; *Decrepit Florists to Remain on Streets*, L.A. EVENING POST-RECORD, Sep. 27, 1907, at 8; *Flower Vendor Makes a Plea for Life and Spurns Offer of Charity*, L.A. EVENING POST-RECORD, Sep. 28, 1907, at 3; *Stands for Flower Vendors*, L.A. EVENING EXPRESS, Sep. 28, 1907, at 18; *Summary of the Day*, L.A. TIMES, Sep. 28,

1908, permits were largely limited to "women, decrepit persons and youths." The few "able bodied" vendors who could acquire licenses for $5 a month were told they "would be good perhaps only for a month and that they must keep moving continually to avoid arrest." By year's end, the police remained committed to ending the street trade "as soon as it can be done without working a severe hardship on the poor people who make a scant living in this manner."[47]

"Local Color"

Even among groups protected by their picturesqueness, aesthetics could operate as a form of control. That was the case in Charleston, a city once genuinely famous for its flower vendors. The flower ladies, as they were called, were the descendants of enslaved people from Mount Pleasant, across the river. Some say they first came to Charleston in the nineteenth century; others describe their emergence during the Great Depression. But by the mid-1930s, they were an integral part of the Charleston streetscape.[48]

Charleston was then, and still remains, the consummate tourist town. Once among the richest cities in America, Charleston languished, decaying and gothic, in the decades after the Civil War. Then something happened. Woodrow Wilson was President. *Birth of a Nation* was the highest-grossing film until *Gone with the Wind* surpassed it. Charleston rode this new southern popularity, spawning the eponymous dance craze, DuBose Heyward's novel *Porgy*, Gershwin's opera *Porgy and Bess*.

The Charleston Renaissance was in full swing between the world wars. But unlike the Harlem and Southern Renaissances, which viewed the South critically, Charleston's Renaissance was a full-throttle publicity campaign. Artists like Elizabeth O'Neill Verner, who illustrated *Porgy*, filled their canvases and sketchpads with symbols of the Old South: cypress swamps, Spanish moss, marsh grasses, palmettos, piazzas, church steeples, and wrought-iron fences. Verner was instrumental in crafting this image of Charleston as sanitized antebellum fantasyland. "Her work is so iconic," says historian Harland Green. "I think that many Charlestonians, when we close our eyes, we actually see Elizabeth Verner's view of the city rather than our own."[49]

1907, at 18; *Flower Vendors Win Their Fight*, L.A. EVENING POST-RECORD, Oct. 1, 1907, at 1; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; *Local Bits*, L.A. EVENING POST-RECORD, Oct. 9, 1907, at 8.

[47] *Mayor Anxious to Aid Women*, L.A. Herald, Dec. 6, 1908, at 9; *Able-Bodied Foreigners Seek Vender Permits*, L.A. HERALD, Jan. 12, 1908, at 8; *Would Restrict Vendors in Central Square Park*, L.A. HERALD, Feb. 28, 1908, at 6.

[48] *The Flower Venders*, CHARLESTON EVENING POST, Dec. 18, 1934, at 13.

[49] Maura Hogan, *Top SC arts award moves forward with a name change that fosters arts world soul-searching*, CHARLESTON POST & COURIER, Oct. 23, 2020.

The flower ladies became a potent symbol of the city in this mythmaking, especially the group that congregated outside the central post office. They appeared on postcards and a 1939 *National Geographic* spread written by Heyward.[50] They were a hallmark of Verner's sketches and paintings too. She peopled her cityscapes with them and other Black workers, but she used them, to quote one historian, as "decoration rather than character study." In Verner's own words: "the negro is Nature's child; one paints him as readily and fittingly into the landscape as a tree or marsh."[51]

Despite their popularity, the flower ladies also had their detractors. The post office custodian insisted a regulation prohibited them from setting up shop there. Some people complained to the police that the vendors left plant cuttings in gutters. Some complained they employed sales tactics that were too "aggressive."[52] Others complained about the vendors' cries. As Jessica Harris documents in *High on the Hog*, complaints about the "auditory nuisance" of Black vendors weren't uncommon. In Charleston, there were calls to regulate their behavior as far back as 1823.[53]

The police eagerly enforced city ordinances that required the flower vendors to keep moving. Officers arrested vendors who stopped just long enough to make a sale or set down their heavy baskets.[54] They once arrested four women for "causing headaches" with their yellow jonquils.[55] But the newspapers received sacks of letters from concerned readers every time the police took action, and the vendors were always back on the street a week or two later.

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[50] DuBose Heyward, *Charleston: Where Mellow Past and Present Meet*, 75 NAT'L GEO. 273 (Mar. 1939); *Mrs. Verner Noted Etcher*, CHARLESTON NEWS & COURIER, Aug. 20, 1938, at 11; *The Flower Venders*, CHARLESTON EVENING POST, Dec. 18, 1934, at 13; Ethlynne E. Holmes, *Flower Vendors*, PHYLON 117 (2d Quarter 1941).

[51] ELLEN NOONAN, THE STRANGE CAREER OF PORGY AND BESSS: RACE, CULTURE, AND AMERICA'S MOST FAMOUS OPERA 131 (2012).

[52] *Selling Flowers on Streets Here Is 20th Century Development*, CHARLESTON NEWS & COURIER, Mar. 6, 1944, at 8; J. W. Joseph, *Meeting at Market: The Intersection of African American Culture, Craft, and Economy and the Landscape of Charleston, South Carolina*, 50 HISTORICAL ARCHAEOLOGY 94, 107 (2016).

[53] HARRIS, *supra* note 7, at 126.

[54] *Buses May Run West of Ashley*, CHARLESTON NEWS & COURIER, Mar. 13, 1940, at 6; Flower *Women Reprimanded, Then Given Their Freedom*, CHARLESTON EVENING POST, Mar. 9, 1940, at 13.

[55] *Flower Women*, CHARLESTON NEWS & COURIER, Mar. 3, 1944, at 4; *The Last Outpost*, CHARLESTON EVENING POST, Feb. 28, 1944, at 4; *Flower Girls at Postoffice Against Moving to Market*, CHARLESTON EVENING POST, Feb. 22, 1944, at 2; *Flower Women Reprimanded, Then Given Their Freedom*, CHARLESTON EVENING POST, Mar. 9, 1940, at 13; *Flowers*, CHARLESTON EVENING POST, Dec. 10, 1937, at 6; *Flower Girls Protest Rule Banning Postoffice Shade*, CHARLESTON NEWS & COURIER, July 1, 1935, at 10; *The Flower Venders*, CHARLESTON EVENING POST, Dec. 18, 1934, at 13; *The Flower Women*, CHARLESTON NEWS & COURIER, Dec. 13, 1934, at 5.

The mood had shifted by 1944. The Depression was over, and the economy was recovering. There was a war on too, and some insisted the women should be "working on farms, raising food for the war effort." Besides, it was rumored the women were selling flowers bought from big growers rather than the ones they grew in their own yards. Perhaps this was viewed as less picturesque.[56]

So the police chief ordered the vendors to move into the city market. They balked. The market hall was bad for business, they said. It was dirty, dark, and poorly located. It closed too early. "No postoffice sidewalk, no flowers," they protested. But the Mayor supported his police chief. "We have had too many complaints," he said, "and they will have to move."[57]

The backlash was swift. "One by one many landmarks are being removed and traditional customs abandoned," read one letter to the editor of the *News & Courier*.[58] "Has anyone the heart to deprive our service men," another asked, "the fond hope of seeing again the flower women on the postoffice corner?" The editor agreed. "Picturesque items in the landscape that add color are part of the stock in trade of tourist town and Charleston is a tourist town." Ousting the flower vendors was a poor business decision.[59] Preservationist Susan Pringle Frost invited readers to sign a petition; they turned out in droves.[60]

A relative of Frost's proposed a compromise: the Garden Club, a private organization, could regulate the flower vendors.[61] Verner was one of the Club's leading members. Although she later claimed the proposal originated with the vendors themselves, she had first floated it in 1939.[62] This time it took. The Mayor and the Garden Club agreed that the Club — Verner, really — would register and license the flower women, regulate their conduct, keep them "mannersable," and ensure the sidewalks were kept clean. A Club

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[56] *Flower Women Against Moving*, CHARLESTON NEWS & COURIER, Feb. 23, 1944, at 7.
[57] *Flower Women Move March 1*, CHARLESTON NEWS & COURIER, Feb. 27, 1944, at 12; *Mayor Says Flower Women Must Move to Market March 1*, CHARLESTON EVENING POST, Feb. 26, 1944, at 5; *Flower Women Against Moving*, CHARLESTON NEWS & COURIER, Feb. 23, 1944, at 7; *Flower Girls at Postoffice Against Moving to Market*, Charleston Evening Post, Feb. 22, 1944, at 2.
[58] *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Mar. 1, 1944, at 4; *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Feb. 29, 1944; *50 to 1 for Vendors*, CHARLESTON NEWS & COURIER, Feb. 29, 1944, at 4; *Postoffice Flower Women*, Feb. 27, 1944, at 4; *Keep Flower Women*, CHARLESTON NEWS & COURIER, Feb. 23, 1944, at 4.
[59] *Organize for Sweeping Up*, CHARLESTON NEWS & COURIER, Feb. 27, 1944, at 4; *Let Flower Women Stay*, CHARLESTON NEWS & COURIER, Feb. 24, 1944, at 4.
[60] *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Feb. 25, 1944, at 4.
[61] *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Feb. 26, 1944, at 4.
[62] *Flower Licenses Proposed*, Charleston News & Courier, Nov. 17, 1939, at 14.

member would supervise the flower women each day and ensure there were no more than 20 present at any time.

The vendors were also banned from approaching motorists. The city assigned a policeman to monitor the vendors and arrest anyone who crossed a white line painted on the sidewalk. According to Joyce Coakley, whose grandmother was among the flower ladies, the "daily challenge was to see who could cross the white line without being seen by Patrolman Brown. Usually, there was a chase to arrest violators."[63] Violators were fined $10 for crossing the line — about a week's earnings.

In her new role as regulator, Verner also gave the women brightly-colored kerchiefs to wear on their heads. This seemed too cheap a stunt even in a tourist town. "That proposal smacks of the artificial, and suggests a type of regimentation more like Hollywood and Miami than Charleston," the *Evening Post* cautioned. "The flowers ought to provide all the color that is needed to maintain the picturesqueness of the scene."[64]

Verner insisted it was all a misunderstanding, that the kerchiefs were just "a bit of pretty cloth" meant to make the Garden Club's "arduous task of laying down rules and regulations less harsh." She insisted that the "last thing the Garden Club of Charleston would wish is that these flower women be put in an artificial costume."[65] The kerchiefs were made optional (but pants were forbidden).[66]

This episode reemerged in 2020, when the South Carolina Arts Commission learned about Verner's "racially charged writings" and removed her name from its most prestigious award.[67] Verner's grandson insisted his grandmother had been a "sympathetic" friend to the vendors. "When the city tried to remove these women," he wrote, "she defended them and drew attention to what she described as their entrepreneurial spirit." They were

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[63] COAKLEY, *supra* note 12, at 52; *61 Flower Women Register; Will Wear Bright Bandanas*, CHARLESTON NEWS & COURIER, Mar. 1, 1944, at 12; *Garden Club Makes Appeal, Flower Women Get Reprieve*, CHARLESTON NEWS & COURIER , Feb. 28, 1944, at 12; Elizabeth O'Neill Verner, *Similarity of Homes and Streets Impresses Artist on Visit*, CHARLESTON NEWS & COURIER, Nov. 25, 1946, at 12; *Garden Club Has Flower Show at May Meeting*, CHARLESTON NEWS & COURIER, May 2, 1946, at 8; *'Flower Girls' Arrested for Passing Boundary*, CHARLESTON EVENING POST, Feb. 8, 1945, at 2; *Flower Women Forfeit Bonds*, CHARLESTON EVENING POST, May 20, 1944, at 10.

[64] *Cloths, Not Bandannas*, CHARLESTON NEWS & COURIER, Mar. 5, 1944, at 4; *Not Too Flowery*, CHARLESTON EVENING POST, Mar. 1, 1944, at 4; *Flower Women Work Orderly Under New Plan*, Charleston Evening Post, Feb. 29, 1944, at 10.

[65] *Cloths, Not Bandannas*, CHARLESTON NEWS & COURIER, Mar. 5, 1944, at 4.

[66] *Flower Women Buy Vendors' Licenses*, CHARLESTON NEWS & COURIER, Mar. 2, 1944, at 5.

[67] Maura Hogan, *Highest SC arts award removes name of Elizabeth O'Neill Verner*, CHARLESTON NEWS & COURIER, Aug. 24, 2020.

"proud to have been chosen by her for their portraits, and considered her to be their biggest ally and supporter."[68]

Coakley recalled that Verner and the flower ladies had related to each other "as women in business." As for the kerchiefs, she insists Verner was "only striving to protect her grandmother's and the others' rights as businesswomen and was not at all exploiting them." Her own book includes a full-page photo of Verner and describes the Garden Club as having "champion[ed] the cause of the flower ladies."[69]

Still, it's difficult to detach Verner from a movement that consciously objectified Charleston's Black community in service of marketing a sanitized antebellum fantasyland to tourists. Like Julien Binford in Richmond, Verner "wanted the flower women because I painted them and I needed them as models." The Mayor was ultimately convinced to let the flower ladies stay not because they were entrepreneurs but because Verner convinced him that they provided "local color" in publicity materials. Whatever relationship there was between Verner and the flower ladies, the city granted expansive regulatory authority over a group of Black businesspeople to a white artist who profited from their image. Verner already had "considerable control … over the way they were represented in the Charleston landscape," writes historian Stephanie Yuhl. After 1944, she also controlled how they earned a living.[70]

"Shame!"

The story of the Charleston flower ladies raises several questions. How do localities regulate flower vendors? Although some have tried to ban their business altogether, most operate through licensing schemes that raise the price of entry by requiring licenses, imposing qualifications for licenses, charging for them, and restricting their number. Some laws also restrict how vendors operate, say by limiting where they can sell flowers and how long they can stay in one place, restricting vendors from selling to certain customers, regulating their displays, and, in the case of the Charleston flower ladies, controlling even their appearance and demeanor.

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[68] *Verner attack*, CHARLESTON NEWS & COURIER, Sep. 4, 2020.

[69] DEBORAH C. POLLACK, VISUAL ART AND THE URBAN EVOLUTION OF THE NEW SOUTH (2015); COAKLEY, *supra* note 12, at 59.

[70] STEPHANIE E. YUHL, A GOLDEN HAZE OF MEMORY: THE MAKING OF HISTORIC CHARLESTON 85-86 (2005); *Licenses of Flower Women Are Suspended*, CHARLESTON NEWS & COURIER, Mar. 10, 1945, at 3.

Then there is the question of who enforces these laws, and what are the consequences for vendors accused of violating them?[71] In Charleston, the city government gave a private garden club primary regulatory responsibility over the flower vendors. Localities more commonly authorize police departments to enforce regulatory schemes and may prescribe criminal consequences for violators.

The result has been uneven enforcement. Old newspapers are filled with anecdotes of police officers, mayors, clerks, judges, and juries who went easy on the flower vendors. After Washington, DC police arrested Fannie Kazlaskia and her three-year-old son in 1936 for selling flowers in a restricted area near the Veterans' Administration building, a judge suspended her fine when he learned she'd only been selling Memorial Day flowers picked in the country to support her family. When she was arrested a second time a few weeks later, another judge questioned "why a nice, clean-looking woman like Mrs. Kaslaskia should not be allowed to sell her flowers." She was released with a warning.[72]

Manuel Bartel stood trial in San Francisco that same year for obstructing the streets. The jury acquitted him within two minutes then "rushed forward, shook hands with him and urged him to carry on."[73]

Police arrested Abraham Gedefiar in 1938 for selling flowers without a license. It was his fiftieth arrest. A judged warned him he'd go to jail the next time.[74]

There was the "Greek violet king" of turn-of-the-century New York. "There was a time when the 'king' peddled posies without a license and was arrested thrice in a day," one paper recounted. "Once the judge told him to go over to First avenue on the East Side, and sell. That district then was less given to luxury than now, and the outdoor florist informed the bench that he was too good a business man to follow that advice. The judge laughed and discharged him."[75]

But for all these anecdotes, encounters with police could turn abusive or violent. A reporter for the *Evening World* observed in 1891: "If there is anything or anybody that these same flower peddlers stand in dread of it is a

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[71] Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2121 (June 1994).
[72] *Protest Against Arrest of Woman Flower Seller*, June 2, 1936, at 10; *Vendor Trial Delayed*, WASH. EVENING STAR, June 3, 1936, at 21; *Flower Vendor's Fine Suspended*, WASH. EVENING STAR, June 14, 1936, at 23; *Flower Vendor Warned and Freed*, WASH. EVENING STAR, Aug. 5, 1936, at 2.
[73] *Flower Vendor Upheld in Frisco*, READING TIMES, Dec. 25, 1936, at 10.
[74] *S.F. Flower Peddler Arrested 50 Times*, OAKLAND TRIBUNE, Oct. 29, 1938, at 13.
[75] *King Retains "Crown"*, WASH. EVENING STAR, Oct. 27, 1929, at 26.

New York copper. He keeps them moving all the time."[76] Another reporter observed: "Their eyes seem to be moving constantly, watching, not the approach of some fair customer but for the sudden appearance of the gentleman in a long blue coat and brass buttons." Vendors would flee from one policeman only to be threatened or beaten by another.[77]

A New York policeman once hauled a vendor into court for "annoying pedestrians." The officer testified the vendor had assaulted him. A man who had observed the incident objected: "Your Honor, this arrest was an outrage, and the officer should be punished instead of this prisoner." It was the officer who had assaulted the vendor — striking him on the head a dozen or more times and kicking him for no apparent reason — as onlookers cried "Shame!"[78]

More than a century later, in 1996, one flower vendor told a *New York Times* reporter, "The police haven't let us work. They enjoy humiliating us."[79] A few years later and 1000 miles south, a Miami jury found police had falsely arrested a licensed flower vendor eight times.[80] And just a few years ago, a video from Perris, California, went viral. It depicts an incident between officers and a group of flower vendors outside a high school graduation. An officer grabs a vendor's hair, wrestles her to the ground, covers her mouth with his hand, and kneels on her leg as she screams that she's in pain — all for the crime of selling flowers without a license.[81]

Flower vendors have challenged regulations and their enforcement since at least the nineteenth century. With some exceptions, the usual judicial refrain is that state and local governments may regulate their activities so long as there is a legitimate purpose for doing so, the regulatory means are reasonably calculated to achieve that purpose, and there are rules to guide the

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[76] *Lilac Merchants*, N.Y. EVENING WORLD, May 8, 1891, at 3.
[77] *Greeks in America*, BROOKLYN CITIZEN, Feb. 1, 1891, at 13.
[78] *Flower Man Had a Friend*, N.Y. EVENING WORLD, May 10, 1895, at 6.
[79] Alvarez, *supra* note 15.
[80] Miami-Dade Cty. v. Cardoso, 963 So.2d 825 (2007).
[81] Alejandra Reyes-Velarde, *Flower vendor sues Riverside County Sheriff's Department over alleged unlawful arrest due to her race*, L.A. TIMES, Nov. 20, 2018, www.latimes.com/local/lanow/la-me-ln-flower-vendor-lawsuit-20181120-story.html; Ruby Gonzales, *Lawsuit claims Riverside County Sheriff's deputy used excessive force, violated flower vendor's civil rights*, THE PRESS-ENTERPRISE (Nov. 19, 2018), www.pe.com/2018/11/19/lawsuit-claims-riverside-county-sheriffs-deputy-used-excessive-force-violated-flower-vendors-civil-rights/; Jessica Rice, *Video of Officer Arresting Woman Selling Flowers Near Graduation Causes Social Media Stir*, NBC L.A., July 18, 2017, www.nbclosangeles.com/news/national-international/flower-vendor-video-arrest-perris/20178/; Kayla Epstein, *Video of flower vendor's violent arrest in California sparks outrage*, WASH. POST (July 18, 2017).

exercise of regulators' discretion.[82] Although these holdings are almost certainly correct as a constitutional matter, a valid law isn't always a good or an equitable one. Whatever the intent of ordinances regulating flower vendors — earnest or malicious — and no matter their lawfulness, their effects have always disproportionately affected marginalized communities.

But there are signs of change. About a year after the Perris incident, California passed the Safe Sidewalk Vending Act. The statute requires local governments to offer "objective health, safety or welfare concerns" when they regulate street vendors. ("Perceived community animus" and "economic competition" don't count.) The statute also establishes minimum standards for regulating street vendors and prohibits local governments from imposing criminal penalties on violators.[83]

New York announced in June 2020 that the city's police department would no longer have primary responsibility for enforcing street vendor regulations.[84] And legislation was introduced in New York and Washington, DC, that would recognize street vending as legitimate work that can benefit vendors and cities alike, decriminalize it, and regulate it more humanely and less arbitrarily.[85]

We've begun to reimagine cities. As thoroughfares become farmers' markets and curbsides become streateries, street commerce is increasingly seen as a positive good, enlivening public spaces and invigorating urban environments. At the same time, we should remain cautious of falling too deep into the trap of the picturesque. Through any efforts at regulation or deregulation, it's important to remember the interests of the flower vendors themselves, who have sought in selling flowers a chance at opportunity.

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[82] *See, e.g.*, Membreno v. City of Hialeah, 188 So. 3d 13 (Ct. App. Fla., 3d Dist. 2016); Bobka v. Town of Huntington, 143 A.D.2d 381 (N.Y. 1988); Russell v. Town of Pittsford, 94 A.D.2d 410 (N.Y. 1983); Whiting v. Salisbury, No. C.A. 78-68 (Sup. Ct. R.I. Aug. 1, 1978).

[83] Joseph Pileri, *Essential but Excluded: Vending in the Time of Corona*, NULR OF NOTE (May 1, 2020); Jess Bird, *Street vendors are part of the fabric of city life. Why do cities make their work harder?*, WASH. POST (Dec. 4, 2019).

[84] Tim Philpott & Fernanda Echavarri, *Why Do Street Vendors Have to Deal With Armed Cops?*, MOTHER JONES (June 24, 2020); Chris Crowley, *Bill de Blasio Says NYPD Won't Be Involved in Street Vendor Enforcement Anymore*, GRUB STREET (June 8, 2020).

[85] Collen Grablick, *D.C. Councilmember Reintroduces Bills Bolstering Street Vendor Protections*, DCIST.COM (Feb. 3, 2021); www.nysenate.gov/legislation/bills/2021/s1175; John Rennie Short, *Street Vendors Make Cities Livelier, Safer, and Fairer — Here's Why They Belong on the Post-COVID-19 Urban Scene*, UMBC MAG. (July 8, 2020).

FIVE RECOMMENDATIONS

Harold E. Kahn[†]

Commonwealth v. Cosby
252 A. 3rd 1092 (PA 2021)
opinion for the court by Associate Justice David Wecht

What is a reviewing court to do when faced with sexual assault convictions of an incarcerated reviled world-renowned comedian based in substantial part on the defendant's incriminating statements made in a civil case where he was required to testify after he had been told by the District Attorney that he would not be criminally prosecuted? To the dismay of many, the answer, according to Pennsylvania Supreme Court Justice Wecht, is to uphold the defendant's due process rights by compelling "specific performance" of the DA's non-prosecution decision, vacating the defendant's convictions, and releasing him from prison. The defendant, of course, is Bill Cosby.

In 2005 Andrea Constand accused Cosby of giving her pills to facilitate unconsented sex. After determining that his office would be unable to convict and desiring to assist Constand in her civil suit against Cosby by removing Cosby's ability to assert his Fifth Amendment right not to testify, the elected DA announced that Cosby would not be prosecuted. Forced to testify in the civil case, Cosby stated at his deposition that he had given Quaaludes to other women with whom he desired to have sex. Cosby paid over $3 million

[†] Judge, Superior Court of California, County of San Francisco (Retired).

to settle Constand's civil suit. Notwithstanding the DA's non-prosecution announcement, years later another elected DA in the same county charged Cosby with sexually assaulting Constand. The trial included Cosby's admissions about Quaaludes and testimony from five women in addition to Constand that Cosby had drugged them to obtain unconsented sex. Cosby was convicted, and imprisoned.

Writing for a bare majority of four justices, Wecht explained that "specific performance of [the non-prosecution decision] … is the only remedy that comports with society's reasonable expectations of its elected prosecutors and our criminal justice system … Anything less under these circumstances would permit the Commonwealth to extract incriminating evidence from a defendant who relies on the elected prosecutor's words … and then use that evidence against that defendant with impunity." Wecht concludes: to do anything other than vacate Cosby's convictions and bar future prosecution of Cosby based on Constand's accusations "would violate long-cherished principles of fundamental fairness. It would be antithetical to, and corrosive of, the integrity and functionality of the criminal justice system that we strive to maintain."

Estate of Michael J. Jackson v. Commissioner of Internal Revenue
121 T.C.M. (CCH) 1320 (2021)
opinion for the court by Tax Court Senior Judge Mark Holmes

The Hollywood Reporter called it the "Tax Court Trial of the Century." Michael Jackson's Estate petitioned for a redetermination of the assessed estate tax as a result of the King of Pop's untimely death. The parties disputed the fair market value of Jackson's image and likeness and his ownership interests in music composed by him and others. In an exhaustive book-length opinion, Judge Holmes provides a delightful mini-biography of Jackson's remarkable life and dissects, and at times eviscerates, the parties' competing experts' opinions.

Holmes relished the task of valuing the disputed Estate assets. Stripped of the color and details of Jackson's life, the legal and factual issues Holmes had to decide were dry stuff such as discount rates and hypothetical cash flows, and the applicability of an arcane concept called "tax affecting." Holmes did not shy from these necessary matters, including plenty of equations and tables to satisfy any math nerd. Yet, Holmes' eye for detail, his tell-it-like-it-is style, and his obvious delight in literary allusions, apt metaphors, and clever puns make for a fun read.

The opinion confronts the central tension that, while Jackson was enormously famous (at one point "the most famous person in the world") and

able to sell out large concert halls in minutes, his severely tarnished reputation was toxic to concert tour sponsors and merchandisers. Holmes painstakingly describes how the parties' experts dealt with this dilemma and convincingly explains which portions of the experts' testimony he agrees with and which portions he finds lacking.

Holmes' opinion would make a great law school course on the dos and don'ts of expert testimony. When one expert was caught fibbing, Holmes didn't pull any punches: "That was a lie." Holmes batted away another expert's opinion that Jackson's interest in Beatles songs had little value: "The idea that ownership interest … to 175 Beatles songs isn't marketable seems like a stretch." When an expert refused to admit an obvious point, Holmes wrote that "stubbornness receives no reward." When he found both sides' experts of no help, he said that "This left us with a mess." My favorite: in rejecting the view of the Commissioner's expert that the Neverland Ranch, Jackson's Santa Barbara County residence, could be used as a theme park, Holmes wrote: "Neverland was more of a recent crime scene than a future wonderland … a home owned by an alleged child molester where the alleged molestation took place would be less than an ideal spot for a theme park for children."

King v. Whitmer
556 F.Supp.3d 680 (E.D. MI 2021)
opinion for the court by District Judge Linda Parker

Unwilling to accept that Michigan's official count showed that Biden received 150,000 more votes than President Trump, attorneys associated with the Trump campaign filed a lawsuit alleging numerous violations of Michigan election laws. The complaint prayed for an order requiring Michigan election officials to certify that Trump won Michigan's electoral votes. As did all others of its ilk, the lawsuit failed. Though the plaintiffs eventually dismissed all of their claims and several pending appeals, the dismissals did not end the case. District Judge Linda Parker still had to rule on motions seeking sanctions against plaintiffs' attorneys.

Parker's opinion excoriates the Trump attorneys for filing a political lawsuit devoid of any factual or legal support. After exhaustively detailing a lengthy set of abuses committed by the Trump attorneys in filing and pursuing the lawsuit, Parker succinctly summed up her views: "This lawsuit should never have been filed." The complaint alleged an array of very serious election frauds including that "hundreds of thousands of illegal votes" were counted. Parker evaluated each fraud allegation and found all of them frivolous, asserted only to advance a political, not legal, agenda. Parker wrote:

> this case was never about fraud — it was about undermining the People's faith in our democracy and debasing the judicial process to do so … It is not acceptable to support a lawsuit with opinions, which ... no reasonable person would accept as fact … Nor is it acceptable to use the federal judiciary as a political forum to satisfy one's political agenda. Such behavior by an attorney in a court of law has consequences.

Those consequences, meted out by Parker, included ordering the Trump attorneys to pay defendants' fees and costs and to attend legal education courses on pleading standards and election law, as well as "referring the matter [to attorney disciplinary agencies] for investigation and possible suspension or disbarment."

While Parker recognizes that heavy sanctions should be reserved only for highly egregious misconduct, her careful opinion persuasively demonstrates that "Plaintiffs' attorneys … scorned their oath, flouted the rules, and attempted to undermine the integrity of the judiciary along the way."

People v. Alatorre
70 Cal. App. 5th 747 (2021)
opinion for the court by Associate Justice William Dato

Carlos Alatorre came to the United States from Mexico when he was four years old. When he was 24, Alatorre pled guilty to the crime of conspiracy to possess cocaine for sale. Three years later Alatorre sought to become a naturalized citizen "which had the unintended but very predictable consequence of alerting immigration authorities to his criminal conviction," resulting in his deportation. Several years after Alatorre was deported, new California legislation permitted a noncitizen who pled guilty to a crime without fully understanding the immigration consequences to file a motion to vacate his conviction. While living in Mexico, Alatorre learned about the new statute when he renewed his efforts to become a naturalized U.S. citizen. Alatorre's motion to vacate his conviction was denied as untimely by the trial court based on the finding that Alatorre had not acted with "reasonable diligence" because he had not filed his motion shortly after the new statute became effective.

In an opinion that deftly analyzes the text, purpose and history of the statute, Justice Dato determined that the trial court erred by applying the legal fiction that everyone is presumed to know the law. Dato explained:

> the Legislature has expressed its particular concern for immigrants who suffer convictions without understanding that it will in the

> future result in their deportation … It is a highly unique statute in that failure to understand the law is the essential predicate for relief. To insist … that petitioners are irrebuttably presumed to be aware and appreciate the significance of a new change in the law — despite all evidence to the contrary — would deny relief by substituting reliance on one legal misunderstanding for another in contravention of a manifest legislative intent.

Considering Alatorre's circumstances, Dato wrote that "the presumption that Alatorre could or should have known about [the statute] … as of the date of its enactment, of his own accord, and without the aid of a lawyer and without some event that would prompt him to retain one, borders on the absurd." Quoting from a New Hampshire decision, Dato added that "the law is not so senseless as to make absurd presumptions of fact." Apart from being a fine example of statutory interpretation, Dato's opinion stands out as paean to common sense.

Uzuegbunam v. Preczewski
141 S.Ct. 792 (2021)
dissenting opinion by Chief Justice John Roberts

If you asked most Supreme Court observers which Justice is the least likely to pen a solo dissent, a large majority would likely say the Chief. And for good reason: John Roberts' John Marshall-esque desire for consensus is legendary. As of the middle of his 16th term on the Court, Roberts had not written solo. No longer.

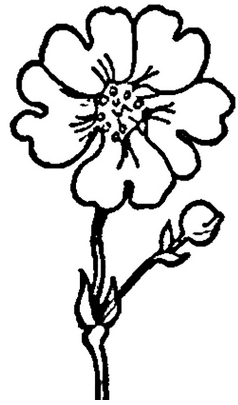
Plaintiffs initially filed their federal lawsuit seeking to enjoin free speech restrictions imposed by a college. Once the college eliminated the restrictions, plaintiffs acknowledged that they could no longer seek injunctive relief, while arguing that their request for nominal damages allowed them to maintain their lawsuit. The eight Justice majority agreed, holding that a plaintiff who seeks only nominal damages for a past constitutional violation may pursue a claim in federal court. Roberts dissented, stating that he places "a higher value on Article III" and a "fight over farthings" does not support federal court jurisdiction. Per Roberts,

> The case is moot because a federal court cannot grant … [plaintiffs] "any effectual relief whatever" … an award of nominal damages does not change their status or condition at all. Such an award instead represents a judicial determination that the plaintiffs' interpretation of the law is correct — nothing more. The court in such a case is acting not as an Article III court, but as a

> moot court deciding cases "in the rarified atmosphere of a debating society."

Roberts chides the majority as "seeing no problem with turning judges into advice columnists" and requiring "federal courts [to] open their doors to any plaintiff who asks for a dollar." While Roberts bemoans "the Court's sweeping exception to the case-or-controversy requirement," he observes that "the defendant should be able to end the case by" paying a dollar to the plaintiff. While Roberts describes the dollar payment as a "welcome caveat" that "may ultimately save federal courts from issuing reams of advisory opinions … it also highlights the flimsiness of the Court's view of separation of powers."

Although Roberts had never before issued a solo dissent, a parenthetical in his dissent suggests that he was not discomfited by being on the wrong side of an 8-1 decision. In the course of criticizing the majority's reliance on a 1703 dissent by Lord Holt, Roberts noted that "Holt was alone in dissent … (no shame there)."



> If a man could pass through paradise in a dream, and have a flower presented to him as a pledge that his soul had really been there, and if he found the flower in his hand when he awoke — Aye! and what then?
>
> Samuel Taylor Coleridge
> *Anima Poetae* (n.d., published 1895)

AN ARRANGEMENT OF ARBITRATION WEEDS

Nancy S. Kim[†]

Brett Long purchased flowers from ProFlowers.com.[1] He looked forward to receiving a lovely arrangement like the one he saw advertised on the website as a "completed assembled product." But what he received was a "do-it-yourself kit in a box" that required assembly.[2] Unhappy with the delivery, he sued Provide, the owner of the ProFlowers.com website, claiming violations of California's Consumer Legal Remedies Act and Unfair Competition Law. Provide moved to compel arbitration as required by its online contract. Long argued that he never saw the arbitration clause and so couldn't be bound by it. He wanted his day in court.

Ordinarily, a consumer with a legal dispute against a company may bring a claim in court. But if that consumer has purchased the product online, as Long did, then that consumer has undoubtedly been subjected to the retailer's Terms of Service or Terms of Use. In many cases, the TOS or TOU harbor mandatory arbitration clauses. The Proflowers website was no exception. Its TOU was a type of wrap contract known as a browsewrap and was viewable via hyperlink displayed at the bottom of each page of the website.[3] The words "TERMS OF USE" were capitalized, underlined, and nestled on the bottom of every page. The hyperlink was in light green typeface on the website's lime green background and "situated among 14 other capitalized and underlined hyperlinks of the same color, font and size."[4] When Long completed his order information, he had to input information and click buttons in a "bright white box set against the website's lime green background."[5] The hyperlink to the TOU was again at the bottom of the page and obscured by other hyperlinks and notices. After he placed his order, Long received an emailed order confirmation with marketing information for other product offerings, banner advertisements, account management notification hyper-

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[1] *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855 (2021).

[2] *Id.* at 859.

[3] *Id.* at 859-61.

[4] *Id.*

[5] *Id.*

links, logos, and then a paragraph in "small grey typeset" with two hyperlinks, one to "Privacy Policy" and the other to "Terms."[6]

Long declared that he did not notice any of the references to the TOU. However, if he had *and* if he had clicked on the hyperlink, he would have been taken to a different web page. On that page, was a heading labeled *Dispute Resolution* which contained the arbitration clause. But Long was neither a fine print-reading aberration of a human being nor an "especially observant Internet consumer"[7]; rather, he was an ordinary person, a reasonably prudent person, and that's all that the law requires somebody to be when they shop online. The court concluded that the notices were simply not sufficiently conspicuous to put a "reasonably prudent Internet user" on inquiry notice.[8]

In other words, Long did not need to be on his guard, scrolling down to the bottom of each page to check for any hidden notices. Even if Long had noticed the hyperlink to the TOU at the bottom of the pages, he would have had some assembling to do. Because like the advertised flowers, the terms were not what they seemed, and just as the kit required Long to put together his own arrangement, a user of the ProFlowers.com website had to assemble the terms by clicking on the hyperlink and traveling over to the page with the actual terms. Even then, viewing the arbitration clause required scrolling down to the bottom and finding the clause in the section labeled, *Dispute Resolution*.

To require a user to engage in this type of contract assembly is unreasonable. Even if Long had seen the hyperlink to the TOU, he probably wouldn't have clicked on the hyperlink, and even if he had clicked, scrolled down, and read the relevant paragraph, would he have understood what "arbitration" means?

Like flowers, words have roots. The word *arbitration* shares the same Latin roots as *arbiter*, which means an "eyewitness" or someone "appointed to settle a dispute." In the not-too-distant past, courts generally refused to enforce arbitration clauses. But state legislatures passed laws expressly permitting arbitration and so did Congress. Yet, courts were skeptical and scrutinized arbitration clauses carefully, often finding that they were unconscionable.[9] Even when the contract was between sophisticated international businesses, they often refused to enforce them.[10] But then the U.S. Supreme

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[6] *Id.* at 861.
[7] *Id.* at 865.
[8] *Id.* at 859.
[9] *Arnod v. United Companies Lending Corp.,* 511 S.E.2d 854 (1998); *Carmona v. Lincoln Millenium Car Wash*, 226 Cal. App. 4th 74 (2014).
[10] *Sibcoimtrex, Inc. v. American Foods Group, Inc.*, 241 F. Supp. 2d 104, 110 (2003) (arbitration provision on reverse side of seller's invoice was not enforceable); *Coastal Industries, Inc. v. Automatic Steam Products*

Court heard several cases involving arbitration clauses, and with each of its rulings upholding a clause under the Federal Arbitration Act, the Court made it increasingly difficult for lower courts to invalidate arbitration clauses.[11]

The English word *arbiter* means judge and an arbitration is a private hearing where one acts as a judge, so the shared roots provide nourishment to words in the same family. Yet, as the trusty Merriam-Webster online dictionary notes, it also shares the same roots as *arbitrary*, which is "seemingly at random or by chance or as a capricious and unreasonable act of will."[12] The good people at Merriam-Webster find this puzzling as it is "quite a bit different in meaning from the two words" and thus, suspect the word has strayed off the genealogical path.

But evolution is aberration, so this divergence was only natural and even predictable. It was foreseeable that there would be arbiters in arbitrations who would issue inexplicable judgements and that eventually, their capricious decisions would result in a natural adaptation. Although sharing the same roots as its cousins, *arbiter* and *arbitration*, *arbitrary* evolved such that it became a criticism and a refutation of its origins, a shunning of its well-intentioned family. It was a flower that bloomed differently but which still shared the same root system with its cousins.

Not all flowers belong in the same garden, even when they come from the same family. Some flowers are weeds. A weed, of course, is simply a plant that is growing somewhere it is not wanted. What matters is *why* it is not wanted. Some weeds are unwanted simply because they are different from the other flowers; however, other weeds are unwanted because they are destructive, steal nutrients from other plants, harm grazing animals, and interfere with human activities.[13]

Corp., 654 F.2d 375, 379 (under New York law, for purposes of Section 2-207, "the unilateral insertion of an arbitration clause constitutes a per se material alteration of a contract."); *but see Aceros Prefabricados, S.A. v. TradeArbed, Inc.,* 282 F.3d 92, 100 (2nd Cir., 2002) (finding that arbitration agreements do not, as a matter of law, constitute material alterations but require examining materiality under a case by case basis.).

[11] AT& T Mobility, LLC v. Concepcion, 563 U.S. 333, 352 (2011) (finding that state law that found class arbitration waivers unconscionable was preempted by the Federal Arbitration Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612 (2018); *see also* David Horton, *Infinite Arbitration Clauses,* 168 U. of Penn. L. Rev. 633, 638-39 (2020) (noting that in the 1980s, the U.S. Supreme Court "dramatically expanded" the Federal Arbitration Act's application, and that since 2010, the Justices "have gone further, issuing a rash of opinions that encouraged businesses to use arbitration as a shield against class actions.").

[12] Arbitration Definition & Meaning, Merriam-Webster.

[13] Introduction to Weeds: What are Weeds and Why do we Care? (psu.edu); 10 Types of Flowering Weeds, Petal Talk (1800flowers.com).

In mass consumer form contracts, an arbitration clause is a weed. This is not to say that arbitration is always destructive or unwanted. To the contrary, arbitration can be efficient, fair, and provide a speedy and private resolution of a messy contractual dispute. In valid contracts between large companies engaged in a commercial transaction, arbitration clauses generally should be enforceable. There is nothing wrong with arbitration clauses *per se*, but the garden where they belong is a negotiated agreement between two sophisticated businesses. Like a wildflower in a rose garden, mandatory arbitration clauses and class action waivers simply do not belong in a unilaterally imposed, mass consumer adhesive form. This is essentially what the California Court of Appeal in *Long v. Provide Commerce* concluded — that a consumer who orders an arrangement of flowers does not have to accept a delivery of weeds.

Say it with flowers.

Society of American Florists

FOUR RECOMMENDATIONS

Stephen Dillard[†]

Ricks v. State
507 Mich. 387 (2021)
opinion for the court by Chief Justice Bridget Mary McCormack

Presidents typically keep the identities of the judges and justices on their Supreme Court shortlists close to the vest; and those lists are usually dominated by members of the federal judiciary. (The last state-court jurist named to the Supreme Court was Sandra Day O'Connor 40-plus years ago.) But if there are state judges on President Biden's SCOTUS short list for future vacancies, I strongly suspect Chief Justice Bridget Mary McCormack of the Michigan Supreme Court is one of them (or at least should be). Chief Justice McCormack is a judicial star; a well-respected scholar; a fervent champion of government transparency, access to justice, and criminal justice reform; and an extraordinary writer. Indeed, this is McCormack's second time appearing in these hallowed pages for her sparkling, conversational, and empathetic prose. And her considerable writing skills are on full display in *Ricks v. State*, a challenging (and interesting) statutory construction case involving an exception to Michigan's Wrongful Imprisonment Compensation Act. It's a fascinating read, and a perfect example of McCormack's Kaganesque ability to explain a complicated matter of statutory interpretation in a thoughtful and accessible manner.

[†] Presiding Judge, Court of Appeals of Georgia.

Kokesh v. Curlee
14 F4th 382, 398 (5th Cir. 2021)
dissenting opinion by Judge Don R. Willett

Judge Don Willett of the U.S. Court of Appeals for the Fifth Circuit appears yet again in the *Almanac and Reader*. In fact, Willett — a finalist to fill the Scalia vacancy on the Supreme Court — is singlehandedly building a strong case for *The Green Bag* to issue an SNL-inspired satin and velvet smoking jacket to its most frequent honorees. By my count, this is Willett's *seventh* recognition for exemplary writing. As I've noted before, he's just that good. Judge Willett has a distinctive, engaging, and breezy writing style, and his judicial opinions are often lauded as examples of splendid writing by appellate judges and lawyers of all stripes. One such opinion is Willett's dissent in *Kokesh v. Curlee*, in which he respectfully, but firmly disagrees with the majority's decision to grant qualified immunity to a Louisiana state trooper. In doing so, Willett describes *Kokesh* "as a strange case, even by New Orleans' standards," and then goes to explain his compelling reasoning for why "a jury of Trooper Curlee's peers should decide if he acted constitutionally — not us." This dissent is another of Willett's important and thoughtful contributions to the nation's ongoing, hotly contested debate over the appropriate scope and application of qualified immunity — a debate in which Willett has become the status quo's most prominent and influential judicial critic.

Kowall v. Benson
18 F4th 542 (6th Cir. 2021)
opinion for the court by Judge Amul R. Thapar

In his fourteen-year judicial career, Judge Amul Thapar of the U.S. Court of Appeals for the Sixth Circuit has established himself as one of the most well-respected jurists in the nation. Judge Thapar was appointed as a federal district court judge in 2008 at the tender age of 38, and his performance swiftly vaulted him to Supreme Court short-lister status. Thapar has authored almost 200 majority opinions and numerous concurrences and dissents (in addition to the countless opinions he wrote while sitting by designation as a district court judge), and he is widely considered to be one of the most thoughtful and scholarly judges in the federal judiciary. His exceptional writing prowess is evident in *Kowall v. Benson*, a case involving a claim by a bipartisan group of veteran legislators that "Michigan's Constitution violates their federal First and Fourteenth Amendment rights by barring experienced candidates from running for state legislative office." It's a succinct and erudite opinion, bursting with crisp, elegant prose, and yet another example of Thapar's prodigious writing skills.

Judge Patrick J. Bumatay
Rojas v. Federal Aviation Administration, 989 F3d 666, 693 (9th Cir. 2021)
opinion concurring in part and dissenting in part

It's a considerable achievement to be appointed as a federal appellate judge at any age, but to receive such an honor at 41 is nothing short of remarkable. Judge Patrick Bumatay of the U.S. Court of Appeals for the Ninth Circuit did just that in 2019, and he's wasted no time in establishing himself as one of the federal judiciary's most outstanding young jurists. In just over two years, he has authored 20 majority opinions and a slew of concurrences and dissents. Bumatay has a pithy, conversational, and eminently readable writing style, and he is already having a significant impact on the nation's largest federal circuit court. Indeed, his steadfast commitment to textualism is notable in a circuit that has often been out of step with the Supreme Court and known for going its own way on such matters. Consider, for example, Judge Bumatay's recent dissent in *Rojas v. Federal Aviation Administration*, in which he takes the majority to task for ignoring the plain meaning of Exemption 5 of the Freedom of Information Act,[1] and rewriting it to "bestow[] on us a supposedly better law." It's a textualist masterpiece with a myriad of well-turned quotes for statutory interpretation enthusiasts.

Consider the lilies of the field, how they grow;
they toil not, neither do they spin:
And yet I say unto you, That even Solomon in
all his glory was not arrayed like one of these.

Matthew

[1] 5 U.S.C. § 552 (b)(5).

Credits

(See also the table of contents at the front of this book.)

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309: Showing posies before the judges at the Old Bailey in 1750. Charles Gordon, The Old Bailey and Newgate 166 (1902).

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376: "Flower-sellers in the market at Washington, D.C." Harper's Weekly (June 4, 1870) (drawn by A.L. Jackson)

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