Almanac Excerpts

Selected works from the 2021 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

2021

EDITED BY

Ross E. Davies & Cattleya M. Concepcion

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Ethereal Version.

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Contents

Reader
of Exemplary Legal Writing 2020

Judicial Opinions

Recommendations from Our Respectable Authorities

Books

Recommendations from Our Respectable Authorities

ALMANAC
OF USEFUL & INTERESTING TIDBITS

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:

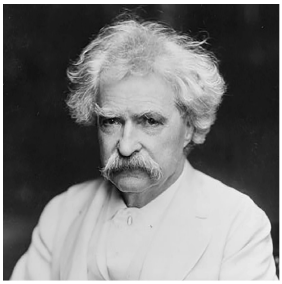
> I'm sorry to report that the scourge of errors continues to plague the *Green Bag Almanac & Reader*. On page 183, at footnote 30, the following appears: "See If Shiras was aware of the historic event that had just happened in his neighborhood, he did not mention it in his note to Fuller." It appears 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.

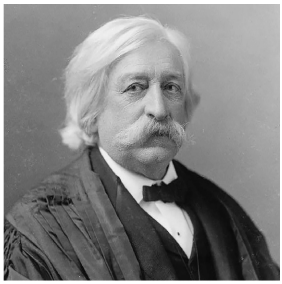
Lastly, we received a hilarious note from Professor G. Edward White.

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!

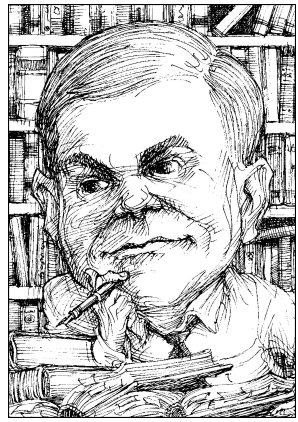
III.

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.

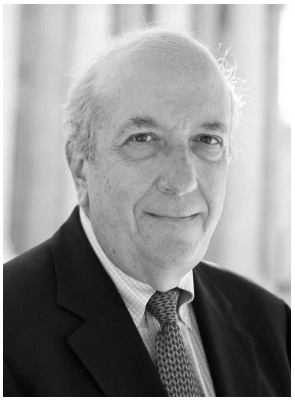
October 22: The Oregon Supreme Court in *Chernaik v. Brown* rebuffs a climate-change suit against the state and its governor contending that they are required to act as trustees under the public trust doctrine to protect various natural resources from substantial impairment by greenhouse gas emissions, 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

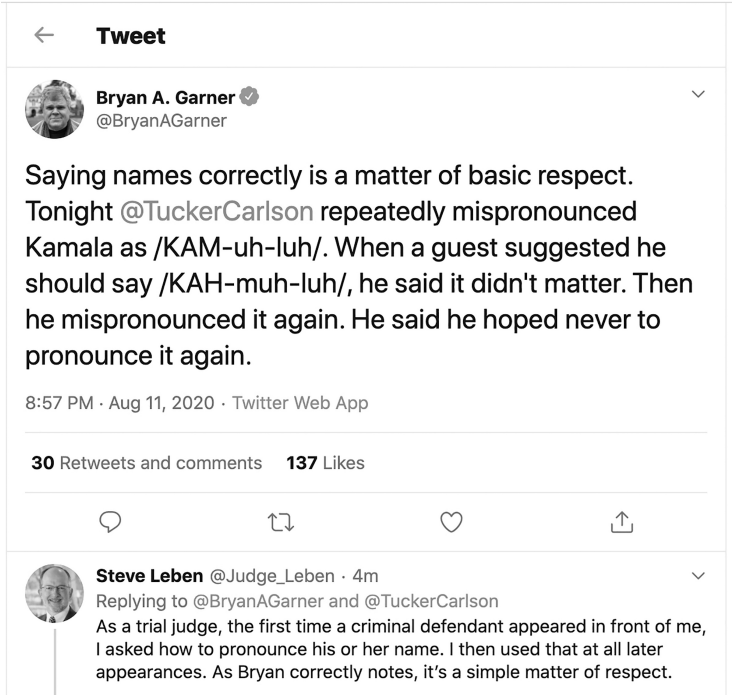
In a Los Angeles state court criminal trial a Black woman faced serious violence charges. There were only three Black prospective jurors. After two Black jurors were excused, the prosecutor exercised a peremptory challenge to Juror No. 16, leaving no Blacks. Notwithstanding No. 16's repeated state-

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

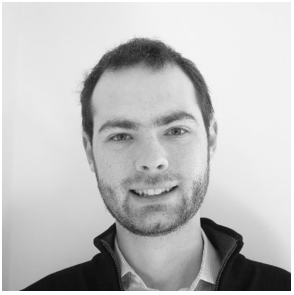
errors to be without merit. Although Tenants were represented by counsel at the trial court level, they were represented by Robert on appeal.[3] Robert's factual and legal inaccuracy in briefing before the court drew a pointed warning from the court and a reminder "to be more cognizant of his professional 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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88: Samuel Clemens (1907). Libr. of Cong. Prints and Photographs Div., repro. no. LC-USZ62-28768.

88: G. Edward White.

88: Melville Fuller (ca. 1905). Libr. of Cong. Prints and Photographs Div., repro. no. LC-USZ62-103889.

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111: Rakesh Kilaru, Kendall Turner, Sam Goldstein, and Betsy Henthorne.

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151: Catherine Gellis and Wendy Everette.

171: Susan Phillips Read.

174: Femi Cadmus and Ariel Scotese.

178: Harold E. Kahn.

182: Tweet (Aug. 11, 2020). Courtesy of Bryan A. Garner.

182: Tweet (Aug. 11, 2020). Courtesy of Steve Leben.

183: James C. Ho.

190: G. Edward White.

194: Charmiane G. Claxton.

200: Jed S. Rakoff and Lev Menand.

205: Stephen Dillard.