The
JOURNAL OF LAW

A PERIODICAL LABORATORY OF LEGAL SCHOLARSHIP

Volume 3, Number 2

containing issues of

THE JOURNAL OF LEGAL METRICS

THE POST

and

ALMANAC EXCERPTS

BOSTON • WASHINGTON
2013

The Journal of Law

The Journal of Law

Journals & Editors

Pub. L. Misc.
James C. Ho

Law & Commentary
Ross E. Davies

Chapter One
Robert C. Berring

The Post
Anna Ivey, Tung Yin, Tamara Piety & David Schleicher

The Journal of Legal Metrics
Adam Aft, Craig D. Rust, Joshua Cumby, Tom Cummins,
Thomas R. DeCesar & Rosanne Rust

 ISSN 2157-9067 (print) and 2157-9075 (online). Our Independence Hall logo is from the original *Journal of Law* (1830-31). *The Green Bag*, the "GB" logo, and the name of this journal are our registered trademarks.

About the Journal of Law: The *Journal of Law* looks like a conventional law review, but it is really a bundle of small, unconventional law journals, all published together in one volume. This approach saves money over separate publication. It also frees editors of the individual journals to spend more time finding and refining good material, and less time dealing with mundane matters relating to the printing of their work product. Thus the *Journal of Law*'s generic name: it is no one journal in particular, and it is not tied to any particular institution, subject, specialty, or method. The idea is that the *Journal of Law* will be an incubator of sorts, providing for legal intellectuals something akin to what business schools' incubators offer commercial entrepreneurs: friendly, small-scale, in-kind support for promising, unconventional ideas for which (a) there might be a market, but (b) there is not yet backing among established, deep-pocketed powers-that-be.

Recommended citation form: Author, *title of work*, volume # J.L.: Periodical Laboratory of Leg. Scholarship (specific journal parallel cite) page # (year). For example:

> Greg Abbott to Kay Bailey Hutchison & John Cornyn, Jan. 5, 2010, 1 J.L.: Periodical Laboratory of Leg. Scholarship (1 Pub. L. Misc.) 51 (2011).
>
> Bruce Ackerman, *Beyond Presentism*, 1 J.L.: Periodical Laboratory of Leg. Scholarship (1 L. & Comment.) 185 (2011).
>
> Alex B. Mitchell & Brian Rock, *2011 Draft Kit: A FantasyLaw Guide*, 1 J.L.: Periodical Laboratory of Leg. Scholarship (3 Cong. Rec., FL Ed.) 201 (2011).
>
> Robert C. Berring, *The Great Books: An Introduction to Chapter One*, 1 J.L.: Periodical Laboratory of Leg. Scholarship (1 Ch. One) 315 (2011).
>
> Lawrence B. Solum, *Legal Theory Lexicon: Legal Theory, Jurisprudence, and the Philosophy of Law*, Legal Theory Blog, Apr. 24, 2011, 1 J.L.: Periodical Laboratory of Leg. Scholarship (1 The Post) 417 (2011).
>
> Andrew Weber, *Tops in THOMAS*, 2 J.L.: Periodical Laboratory of Leg. Scholarship (1 J. Legal Metrics) 53 (2012).

Subscriptions: For now, the print version of the *Journal of Law* is available only as a gift distributed to individuals and institutions selected by the editors. To request a place on the list, please email us at editors@journaloflaw.us.

Submissions: Please send your work – articles, responses, letters, and the like – to an editor of the specific journal in which you would like to see that work appear.

Editorial policies: Each journal within the *Journal of Law* has its own editorial policies in addition to the ones you are reading now. Please see the front matter of the relevant journal for details.

Copyright: If a copyright notice appears in an author note, get permission to copy from the holder. The *Green Bag* holds all other copyrights. You may copy for classroom use items to which the *Green Bag* holds the copyright if you: (1) distribute them at or below the cost of reproduction; (2) identify the author, the *Journal of Law*, and the specific journal; (3) affix a proper copyright notice to each copy; and (4) tell us. All other copying requires advance written permission.

Correspondence: Please write to the *Journal of Law* at editors@journaloflaw.us or to an editor of a specific journal at an email address provided in that journal's front matter, and visit us at www.journaloflaw.us.

TABLES OF CONTENTS

Volume 3 • Number 2 • 2013

• JOURNAL OF LEGAL METRICS •

• THE POST •

• ALMANAC EXCERPTS •

OPENING REMARKS

FEEDING THE RIGHT STUFF

WOULD YOU CLERK FOR LEARNED HAND?

Ross E. Davies[†]

Being a feeder judge (that is, a judge whose clerks routinely go on to clerk for a Justice of the U.S. Supreme Court) must be difficult. Hard at the start of the process and, alas, sometimes even harder at the end. While a number of forthright scholars and judges have described the challenges at the start, information about difficult endings is in shorter supply. But not nonexistent.

At the start of the process, there is the matter of picking clerks who are not merely excellent law students, but also likely to be marketable to the Justices:

> "There are some judges who like to position themselves as feeders to the Supreme Court, since that's one way that a judge can make a reputation for him or herself," said Joan Larsen, a faculty clerkship adviser at the University of Michigan Law School. "I have had a feeder judge say to me, 'Yes, Joan, I'm sure he would be a great clerk, but I can't send him upstairs.'"[1]

For some feeder judges, there may be an even earlier start, namely, the picking of feeder professors, as Judge Alex Kozinski suggests:

> Just as the clerkship process is filled with lore about feeder judges, so every name-brand law school has its resident professor or professors who fancy themselves as feeders to prestigious court of appeals judges and even Supreme Court Justices. . . . [T]he repu-

---

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

[1] Catherine Rampell, *Judges Compete for Law Clerks on a Lawless Terrain*, N.Y. TIMES, Sept. 23, 2011.

> tation of being a feeder is somewhat self-sustaining; a feeder professor will attract the most accomplished and aggressive research assistants who are the kind of people that judges and Justices look for anyway. The aura of being a feeder therefore is a real benefit, and professors who have it work very hard to maintain it.[2]

And then there is the fact that the feeder judge is competing with his or her peers for those superstudents, as Judge Patricia Wald explains:

> And, candidly, there is another factor in the calculus of many appellate judges who lead the annual chase. A judge's reputation among his own colleagues may in part reflect his ability to garner the most highly-credentialed clerks under his banner so that he can maintain a reputation as a "feeder" of clerks to the Supreme Court. Correlatively, the stronger an appellate (or a district) judge's reputation for channeling clerks to the high court, the more attractive he will be to many understandably ambitious, qualified clerk applicants. Some judges have long friendships with justices so that their clerks have an edge simply by virtue of that relationship. Others become feeders because they consistently are able to recruit the law review editors and top students from prestigious schools; not surprisingly, they want to keep it that way. . . . Early identification of these "precious few" is sought and received from old-time friends in the law schools – usually before the interview season even begins.[3]

A "chase" it is, as numerous commentators have observed.

The pursuit wraps up quickly enough. A few promising students are set to clerk for feeder judges, the not-so-promising to clerk for non-feeder judges, and, eventually, all of them to serve their judges (and thus the public) in the adjudication of cases.

Immediately and simultaneously, the endgame begins. Feeder judges work to feed their clerks to Justices. Clerks interview with as many Justices as possible. But even those few promising clerks are more than enough to fill the available Supreme Court slots. Those who do not end up at the high court are doubly disappointing, having failed both themselves and their unsuccessful feeder judges.

---

[2] Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1729 (1991).

[3] Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 154-55 (1990).

Which brings us to the mysteries of the unhappy endings. The numbers make sense in a general musical chairs kind of way – too many accomplished and attractive backsides for too few desirable seats. But they make no sense on an individual basis. Every single fodder-clerk is a star. None would be working for a feeder judge were he or she not only a brilliant lawyer-to-be, but also suitable to be sent upstairs. And no one involved is happy about the bad results. Even the most forthright of feeder judges have little to say about their failures, and their disappointed clerks are similarly discreet.

It may well be, though, that all is well. Maybe these difficult endings are simply a result of judicial integrity. After all, discovering truth and dispensing justice are the main missions of judges, even feeder judges. Think about it: In the frantic annual chase for the "precious few," a judge simply cannot develop a deep understanding of a person he or she is hiring as a clerk.[4] Judge-clerk professional relations are, however, famously – even familialy – close.[5] Maybe, sometimes, upon really getting to know a clerk, a judge concludes that the clerk does not have the right stuff, and the judge communicates that sad truth (as opposed to something else) to the Justices.

One episode involving Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit might shed some light. Widely regarded as the greatest U.S. judge who never served on the Supreme Court,[6] he is less widely known as the original leading feeder judge. But that he was. Over a period of 20 years he fed 10 of his clerks to members of the Supreme Court. A .500 batting average[7] is not top-notch by modern standards,[8] but for Hand's day it was great.[9]

---

[4] *See, e.g.*, RICHARD A. POSNER, REFLECTIONS ON JUDGING 33-34 (2013).

[5] *See, e.g.*, Deanell Reece Tacha, *No Law Student Left Behind*, 24 STAN. L. & POL'Y REV. 353, 368 (2013); Douglas W. Swalina, *Hon. Maurice M. Paul*, FEDERAL LAWYER, July 1999, at 16.

[6] *See, e.g.*, Richard Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 511, 534-35, 540 (1994).

[7] Circuit judges in Hand's day were allowed one law clerk. *See* J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 325-26 (1988).

[8] *See, e.g.*, ARTMEUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES 82 (2006); David Lat, *Supreme Court Clerk Hiring Watch: Color Commentary on the October Term 2012 Class*, ABOVE THE LAW, June 15, 2012, abovethelaw.com.

[9] *See, e.g.*, TODD C. PEPPERS: COURTIERS OF THE MARBLE PALACE 31-34 (2006), *but see id.* at 131 (suggesting even more Hand clerks at the Supreme Court).

On June 20, 1945, Hand wrote two reference letters to Supreme Court Justice Wiley Rutledge. The first was on behalf of Hand's own clerk at that time, Robert H. Goldman. The second was for Richard F. Wolfson, who was clerking for Hand's Second Circuit colleague, Judge Thomas Swan. On June 26, Rutledge wrote back to Hand. Before you read Rutledge's letter, which is transcribed below, read the two Hand reference letters on pages 191 and 192. Make your own choice about which candidate to hire. Then come back here and read Rutledge's decision and opinion.

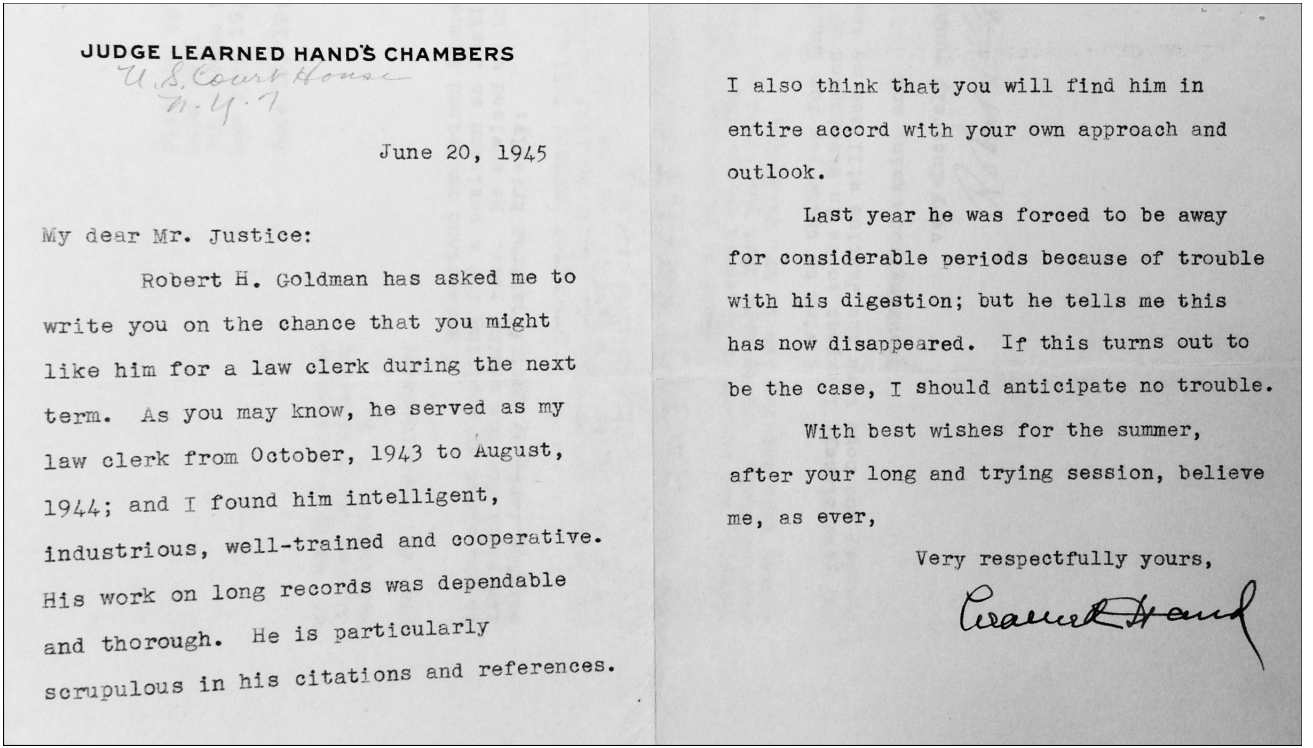
And now Rutledge's letter:

> Dear Judge Hand:
>
> I very much appreciate your taking the time and pains to write me concerning Mr. Richard [sic] Goldman and Mr. Richard Wolfson. I have seen both of these young men and have decided to tender the place to Mr. Wolfson.
>
> I like Mr. Goldman, agree with your judgment that he is intelligent and I have no doubt also well-trained and industrious. Nevertheless, the balance seemed to fall in Wolf-son's direction, perhaps slightly on all scores but more especially on the basis of general physical stamina. The grind here is so continuous that I cannot take any more chances than I have to on having a clerk who might be out occasionally for physical reasons.
>
> I trust that you are winding up the work of the term with leeway for a real period of rest and relaxation during the summer.[10]

The Hand-Rutledge correspondence invites at least four questions: (1) do modern feeder judges ever, in fact, hire clerks who should not be fed to the Justices; (2) if so, what do they do about it; (3) will we ever know; and (4) if you were one of today's "precious few" would you accept a clerkship with a feeder judge whose reference letters are not always perfectly glowing, and who might endorse a colleague's clerk over one of his or her own? In other words, would you clerk for Learned Hand?

---

[10] Wiley Rutledge Papers, box 120, Library of Congress, Manuscript Division; *see also* WARD & WEIDEN at 76-77. Do not worry about Goldman. He did just fine. He practiced in New York City for several years before settling in his home town of Lowell, Massachusetts, where he enjoyed a long and successful career in the law. *See Robert H. Goldman, 72: Lawyer, specialist in libel cases*, BOSTON GLOBE, Jan. 17, 1991.



JUDGE LEARNED HAND'S CHAMBERS

U.S. Court House
N.Y.C.

June 20, 1945

My dear Mr. Justice:

Robert H. Goldman has asked me to write you on the chance that you might like him for a law clerk during the next term. As you may know, he served as my law clerk from October, 1943 to August, 1944; and I found him intelligent, industrious, well-trained and cooperative. His work on long records was dependable and thorough. He is particularly scrupulous in his citations and references. I also think that you will find him in entire accord with your own approach and outlook.

Last year he was forced to be away for considerable periods because of trouble with his digestion; but he tells me this has now disappeared. If this turns out to be the case, I should anticipate no trouble.

With best wishes for the summer, after your long and trying session, believe me, as ever,

Very respectfully yours,

Learned Hand

JUDGE LEARNED HAND'S CHAMBERS

June 20, 1945

Dear Mr. Justice:

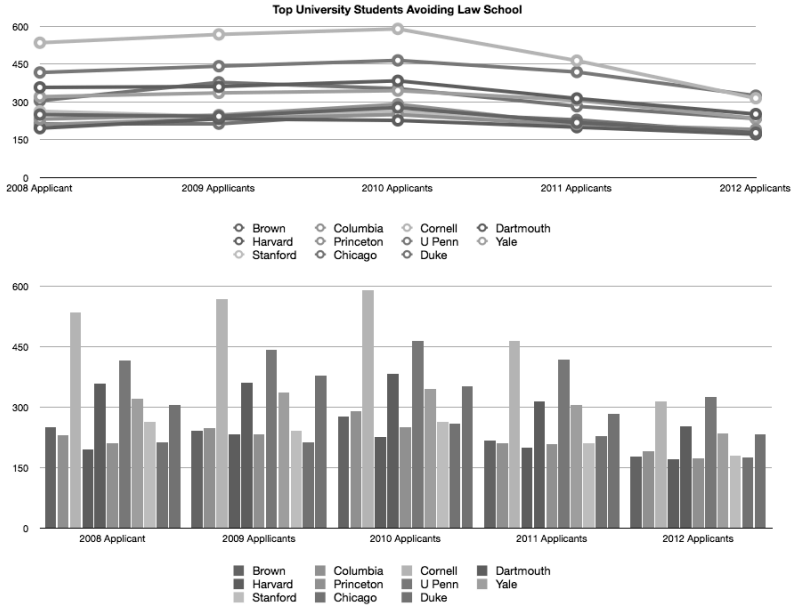
Since writing you today about Robert H. Goldman, Mr. Richard F. Wolfson, Judge Swan's law clerk, has also asked me to tell you what I know about him. It so chances that I had the opportunity of working with him for some weeks this winter upon an exceptionally heavy appeal, in which we had to substitute - most inadequately - for the Supreme Court: the case against the Aluminum Company. The law clerks of the three judges divided the extremely long record between them, and, as I had to write the opinion, I dealt with Wolfson for a substantial period. I can recommend him without reserve: he is accurate, exhaustive in his researches, fertile in suggestion, and reliable in his results. In particular, you will find him a most agreeable assistant, willing, anxious to help, not opinionated and not disposed to thrust his views upon you, though he has much independence of spirit. You will also find him thoroughly sympathetic with your own general background of feeling and belief.

Very respectfully yours,

Learned Hand

Journal of Legal Metrics

volume two, number two
2013



Journal of Legal Metrics

About the cover

Top University Students Avoiding Law School

By Keith Lee, founder and editor of the Associate's Mind blog (associatesmind.com). He is also the author of *The Marble and The Scupltor: From Law School to Law Practice*, published by the ABA. Keith practices law with Hamer Law Group in Birmingham, AL.

The *Journal of Legal Metrics* operates on the same terms as the *Journal of Law*. Please write to us at journaloflegalmetrics@gmail.com. ISSN 2157-9067 (print) and 2157-9075 (online).

CONTENTS

Volume 2 • Number 2 • 2013

CONSTITUTIONAL INTERPRETATION AND CONGRESSIONAL OVERRIDES

CHANGING TRENDS IN COURT-CONGRESS RELATIONS

Ryan Eric Emenaker[†]

I. INTRODUCTION

National policy in the United States is shaped through a complex process involving frequent interaction between the Supreme Court and Congress. The Court devotes the largest portion of its work to applying and interpreting congressional statutes.[1] Congress carefully considers these interpretations in future legislative action. The Court's use of judicial review to nullify acts of Congress is one of the most contentious and discussed aspects of this relationship. However, the subsequent interaction that occurs after judicial review is often ignored. When trying to understand Court-Congress relations, it is important to note that Congress *often overrides Court decisions that hold federal laws unconstitutional*. This post-judicial review activity is an increasingly important component to maintaining equilibrium between judicial and legislative powers.

From a historical perspective, the Court rarely rules against Congress. For example, from 1803-2010 the Supreme Court de-

[†] The author is a Professor of Political Science at College of the Redwoods. Thank you to Dr. Ken Masugi, Dr. Alvin S. Felzenberg, and Frankie Clogson for reviewing early drafts of this paper, and for their invaluable research tips. Thank you also to James Eger and Mohamad Alnakhlawi for research assistance.

[1] Lawrence Baum & Lori Hausegger, *The Supreme Court and Congress: Reconsidering the Relationship*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 107 (Mark C. Miller & Jeb Barnes eds., 2004).

clared just 167 acts of Congress unconstitutional – an average of less than one per year.[2] With so few examples, it is not surprising that few quantitative studies have examined Congress's rate of response to these decisions. However, this type of interaction between the two branches has rapidly increased. Nearly 60 percent of all federal laws struck down by the Court have occurred in the last fifty years. The Rehnquist Court alone is responsible for nearly 25 percent of all nullified federal laws.[3] Understandably, the rapid acceleration in judicial activity has renewed fears of an imperial judiciary. These fears, however, are based partly on the incorrect assumption that the complex process of policy development suddenly ends with judicial review. Surprisingly, this recent flurry of Court activity has not spurred increased quantitative scholarship into the area of congressional overrides of constitutional-interpretation decisions. The results of this study indicate that *as the Court has become more active in striking down congressional acts, Congress has increasingly resorted to overriding these decisions.* In fact, this study illustrates that 29.3 percent of the congressional acts struck down by the Rehnquist Court were later overridden (at least in part) by future congressional legislation. This is a significantly higher percentage of overrides than found in previous studies examining constitutional-interpretation overrides. These results indicate that increased judicial activity nullifying federal law is suggestive of changing trends in Court-Congress relations rather than a sign of judicial finality. Indeed, this Article argues that judicial finality – the theory that the Supreme Court has the final word in constitutional interpretation – is incorrect. Congress and the Court interact in the policy making process even after judicial

[2] THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2008 SUPPLEMENT, S. Doc. No. 110-17, at 163-4 (2008), *available at* www.gpoaccess.gov/constitution/browse2002.html#04supp; THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION OF THE CONSTITUTION ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES, S. Doc. No. 108-17, at 2117-59 (2002), *available at* www.gpoaccess.gov/constitution/pdf2002/046.pdf. The Supreme Court Database: 2006-2010 Cases Declaring Federal Laws Unconstitutional, scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).

[3] *See Analysis Case Listing*, THE SUPREME COURT DATABASE, scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).

review. The increase in post judicial review activity shows that equilibrium in Court-Congress relations is still being maintained, however, this maintenance emanates from a process that is different from the one that occurred in previous decades.

This Article begins by examining some theories of Court-Congress relations. I argue that theories of judicial finality, the countermajoritarian nature of the Court, and "rational choice," as well as studies on court-curbing and decision reversals would all benefit from considering more fully constitutional-interpretation overrides. Since judicial review and constitutional-interpretation overrides are becoming increasingly common, the lack of study in this area limits understanding of modern Court-Congress relations. To assist scholarship in this area, this study generates a dataset of all congressional acts nullified by the Rehnquist Court based on constitutional grounds (Appendix I). This dataset is then compared with the frequency of nullified federal law between the Rehnquist, Brennan, and Warren Courts to identify emerging trends. The dataset is also examined for the presence of congressional overrides to Rehnquist Court decisions overturning federal law. Finally, the resulting data is used to further the dialogue regarding current Court-Congress theories and assist in understanding the changing nature of the Court-Congress relationship.

II.
EXPLORING SOME THEORIES ON COURT-CONGRESS RELATIONS

A.
Judicial Finality and the Countermajoritarian Dilemma

The Court's ability to rule congressional acts unconstitutional has led to claims of judicial supremacy or judicial finality. Supreme Court Justice Robert Jackson articulated this view when he declared "we are infallible only because we are final."[4] Chief Justice Charles Hughes also expressed this sentiment when he claimed "the Consti-

[4] Brown v. Allen, 344 U.S. 443 (1953).

tution is what the judges say it is."[5] Scholars Walter Murphy and C. Herman Pritchett wrote in 1961 that the "Courts are protected by their magic."[6] In Murphy and Pritchett's view, this "magic" essentially made Court decisions final, despite Congress's constitutional powers over the Courts. Modern scholarly advocates of judicial supremacy make claims ranging from normative arguments that judicial supremacy should exist, to empirical based observations that judicial review is the most important step in interpreting the Constitution.[7] In 2004, a longtime judicial affairs correspondent for the New York Times, Linda Greenhouse, argued that the Court's frequency in overturning acts of Congress in recent years empirically supports the existence of judicial finality.[8]

As Alexander Bickel described in *The Least Dangerous Branch*, there is a potential "countermajoritarian dilemma" posed by unelected judges wielding final interpretation of the Constitution.[9] Scholars contemplating this dilemma muse that the will of the majority, as represented through Congress, can be frustrated by an unelected Court overturning federal law.[10] Students of the US system of separated powers have long explored solutions to the countermajoritarian dilemma. Alexander Hamilton, in Federalist 78, famously penned there was little to fear from the "least dangerous"

---

[5] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1998).

[6] WALTER MURPHY ET AL., COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 554-55 (6th ed. 2005).

[7] Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981); Alexander & Schauer, *supra* note 5, at 1387; John Marini, *The Political Conditions of Legislative-Bureaucratic Supremacy*, www.claremont.org/publications/pageid.2592/default.asp ("Judicial Review has given way to judicial supremacy.").

[8] Linda Greenhouse, *"Because We are Final" Judicial Review Two Hundred Years After* Marbury, 148 AM. PHILOSOPHICAL SOCIETY 38, 52 (2004).

[9] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1986).

[10] Scholars point out that countermajoritarian dilemma holds true even if the majority will is frustrated to ensure protection of individual and minority rights. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. OF PUBLIC LAW 279, 283 (1957) ("[T]o affirm that the Court supports minority preferences against majorities is to deny that popular sovereignty and political equality, at least in the traditional sense, exist in the United States; and to affirm that the Court *ought* to act in this way is to deny that popular sovereignty and political equality *ought* to prevail in this country.").

branch; he denied that judicial review implied a superiority of judicial over legislative power. James Madison stated in Federalist 51 that the legislative branch necessarily predominates in a republican government. Abraham Lincoln argued the solution to the dilemma was inherent in Congress's authority as independent interpreter of the Constitution; he denied the *Scott v. Sanford* decision was binding on future congressional actions.[11]

B. Congressional Checks on the Court's Power

Modern scholars continue to envision resolutions to the countermajoritarian ramifications posed by judicial finality. In 1957 Robert Dahl argued the judicial appointment process largely constrained the anti-majoritarian nature of the Court.[12] Dahl observed that a new justice was, on average, appointed every twenty-two months; therefore, a president could expect to appoint two new justices each term. For Dahl this indicated – except for a certain lag time – the Court would typically remain in line with national majorities.[13] Dahl's theory could partially explain why the Court rarely rules against Congress, but it does not directly answer what happens when the Court does. Additionally, if Dahl's theory is correct, we should expect to see increased judicial activity striking down acts of Congress as the justices' terms (and therefore the lag time between appointments) increase. In the absence of other congressional checks on the Court, longer terms would equate to increased judicial power.

---

[11] Lincoln's First Inaugural Address March 4, 1861, *available at* avalon.law.yale.edu/19th_century/lincoln1.asp ("[I]f the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers.").

[12] Dahl, *supra* note 10, at 285.

[13] Dahl further backs up his argument that the Court is rarely countermajoritarian for long by using the example of Roosevelt and the New Deal hostilities over the Court rulings. Based on a new justice being appointed every twenty-two months, it stands that "[g]eneralizing over the whole history of the Court, the chances are about one out of five that a president will make one appointment to the Court in less than a year, better than one out of two that he will make one within two years, and three out of four that he will make one within three years. Mr. Roosevelt had unusually bad luck: he had to wait four years for his first appointment; the odds against this long an interval are four to one. With average luck, the battle with the Court would never have occurred." *Id.*

In the decades following Dahl's article, a handful of empirical studies highlighted Congress's ability to check the Court outside of the appointment process.[14] Often congressional checks on the Court are broken into two categories – Court curbing or decision reversals/congressional overrides. Court curbing is defined as congressional legislation that attempts to alter "the structure or functioning of the Supreme Court as an institution."[15] These types of actions may include the creation of new judgeships, shaping the jurisdiction and procedures of the courts, controlling compensation and appropriation, passing laws affecting sentencing, or requiring constitutional interpretation to have super majorities.[16] Thus, Court curbing actions are aimed at the institution, whereas decision reversals attempt to "modify the legal result or impact . . . of a specific Supreme Court decision."[17]

The judicial appointment process, combined with the ability of Congress to enact decision reversals, and Court curbing measures are often used to explain why the Court rarely rules against Con-

---

[14] *See* Harry P. Stumpf, *Congressional response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 95 (1965); Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 458 (1983); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L. J. 331, 455 (1991); Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, *in* GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S 224-247, (Herbert F. Weisberg & Samuel C. Patterson, eds. 1998); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 458 (1992); Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEG. STUDIES Q. 5, 28 (2005); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 371 (1994); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 750 (1991).

[15] Stumpf, *supra* note 14, at 382. Stumpf's definition has been used by several other studies focused on congressional overrides. Court curbing research has explored the variety of ways that Congress can check the powers of the courts. *See* Ignagni & Meernik, *supra* note 14 at 371. Some of the studies in the area of court curbing have focused on studying a specific check, such as jurisdiction stripping. See for example Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 922 (1984).

[16] COLTON C. CAMPBELL & JOHN F. STACK JR., CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 2 (2001); Stumpf, *supra* note 14, at 382.

[17] Stumpf, *supra* note 14, at 382.

gress. As noted earlier, there have only been 167 acts of Congress struck down by the Court from 1803-2010. This works out to an average of only 0.81 acts of Congress nullified per year.[18] However, the existence of congressional checks, which remains consistent throughout time, fails to explain why some time periods experience increased examples of overturned federal law, or how often these checks are employed. Dahl's "lag-time" theory and the necessity of congressional majorities to check the judicial branch probably help explain that the use of Court curbing measures and overrides are a product of certain conditions, not the mere existence of formalized powers.

Most Court checking literature claims that Court curbing actions are incredibly rare. This literature, with notable exceptions, cites decision reversals as the most common and effective means for Congress to check the Court.[19] There have been a handful of empirical studies focused on decision reversals. Some of these studies used quantitative analysis to detail both the frequency of successful overrides and the conditions most likely to produce them. These studies almost universally conclude that the vast majority of cases decided by the Court would not be overridden by Congress, although Congress monitors the Court closely. They also conclude that congressional responses to Court decisions are far from rare.[20]

---

[18] *See supra*, note 2. Some scholars argue that even this number is misleadingly high because many congressional acts struck down by the Court were enacted decades before the current Congress. Thus, the sitting Congress may have little support for the laws struck down by the Court – in fact Congress may even support the Court's use of judicial review to strip away laws the current majority disagrees with. This argument almost transforms the majority of Court nullifications of federal law into actions to implement Congress's will.

[19] RICHARD ALLEN PASCHAL, THE CONTINUING COLLOQUY (1992); Beth M. Henshen and Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J. L. & POL. 685 (1989); LAWRENCE BAUM, THE SUPREME COURT 202-08 (10th ed., 2010), all make a similar observation that Congress can use statutes to modify the Courts constitutional interpretations. For an opposing view see Tom Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 989 (2009). Clark argues that years that see more court curbing threats have been followed by years of decreased usage of judicial review of federal laws.

[20] *See* Eskridge, *supra* note 14, at 455; Hausegger & Baum, *supra* note 14, at 247; Solimine & Walker, *supra* note 14, at 458; Mikva & Bleich, *supra* note 14, 750. For an opposing view see Hettinger & Zorn, *supra* note 14, at 28.

William Eskridge's 1991 article "Overriding Supreme Court Statutory Interpretation Decisions," is arguably the most influential of this new collection of studies. In his article, Eskridge points out that from 1967-1990 an average of ten statutory decisions per Congress[21] were overridden. Eskridge's study, and most similar studies that followed, placed the percentage of Supreme Court statutory rulings[22] successfully overridden by Congress at between 2 and 7 percent.[23] These low percentages of successful overrides indicate that in the vast majority of cases, Congress would not override the Court – an important conclusion for developing theories on Court-Congress relations. One of the most recent studies following-up on Eskridge's work was conducted by election law expert Richard Hasen. Hasen noted that in the most recent years (2001-2012) there were a decreasing number of statutory overrides. Whereas from 1975-1990 Congress overrode six statutory cases per year, that number has decreased to less than 1.4 after 2000. Hasen surmises that this trend could indicate that the "dialogue model" of Court-Congress relations has broken down with the advent of increased congressional partisanship.[24] As

[21] "Congress" in this context includes the two one-year terms that each elected "Congress" serves.

[22] Statutory rulings rely on interpreting the words in a statute to determine the outcome of a case. For example if a statute limits the amount of damage awards "up to $10,000 for non-serious offences" the Court might have to interpret if a particular action falls under the category of "non-serious," thus falling under the $10,000 limit. If Congress disagrees with the outcome in a statutory interpretation case Congress can simply rewrite the statue to make its intent more clear, thus overriding the Court decision and preventing future Court decisions from having the same result. In constitutional interpretation cases the Court is interpreting the language of the Constitution to see if the statue itself is an allowable exercise of congressional power.

[23] Eskridge, *supra* note 14, at 338. After Eskridge's study several others explicitly used variations of his dataset and definitions while adding a few unique variables; not surprisingly many of the studies came to similar conclusions. Hausegger & Baum, *supra* note 14, at 228 use Eskridge's definition of "override" and concluded 5.6 percent of cases were overridden. Solimine and Walker concluded that 2.7 percent of the Supreme Court statutory cases that fit their study were successfully overridden, Solimine & Walker, *supra* note 14, at 458; and Hettinger and Zorn, concluded 6.9 percent of the cases they analyzed were overridden, Hettinger & Zorn, *supra* note 14, at 28. Notably, the differences in percentages between the studies likely stems from the fact that counting overrides is a difficult task. Indeed, the authors of the above-referenced studies acknowledge that fact and the likelihood that some overrides probably escaped their observation.

[24] Rick Hasen, *Scholarship highlight: End of the Supreme Court-Congress dialogue?*, SCO-

important as Eskridge's, Hasen's, and other similar studies are, their focus on overrides to statutory-interpretation decisions gives an incomplete picture of Court-Congress relations. Without exploring the differences between statutory and constitutional-inter-pretation overrides, resulting theories are incomplete.

C. Rational Choice Perspective & Strategic Interpretation

Starting in the 1990s a cadre of scholars explored Court-Congress relations from a rational choice perspective.[25] This perspective argued that justices and members of Congress act to maximize their policy preferences. Based on this premise, rational choice scholars argued justices resist basing a decision purely on their policy preferences for fear of provoking a congressional response – a response that could potentially push policy further from the justices' preferences. Therefore, rational choice scholars argue the Court's interpretation would be strategically positioned to prevent congressional overrides. This theory is partially supported by the relatively small percentage of successful overrides of statutory decisions. In the end most rational choice studies argue: when the Court does not want to be overridden, it rarely is.[26]

There are two important limitations to the rational choice approach when developing a theory of Court-Congress relations. One, if the Court is rarely overridden it becomes a re-argument of judicial finality. As long as the justices are competent at analyzing the preferences of other political actors they can avoid overrides when they choose. Thus, in most instances judicial decisions would be final. This points to the second major problem with rational choice perspectives on congressional-judicial relations; it often reduces the Court-

---

TUSBLOG (Jan. 29, 2013, 4:23 PM), www.scotusblog.com/2013/01/scholarship-highlight-end-of-the-supreme-court-congress-dialogue/.

[25] *See, e.g.*, Lee Epstein, Jack Knight, & Andrew D. Martin, *Constitutional Interpretation from a Strategic Perspective*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 170-188 (Mark C. Miller & Jeb Barnes, eds. 2004). Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 521 (1996).

[26] Hausegger & Baum, *supra* note 14 at 122. Further, some of these studies argue that the few overrides that do occur, occur because of the Court's desire, or its "invitations," to be overridden.

Congress game to a two-step process – a process that starts with the Court interpreting a statute and ends with Congress debating an override. Rational choice models are often built with the assumption that the Court will never get another chance to interpret an override, so the dialogue between the branches suddenly stops.[27] Like all models, rational choice theory simplifies reality to help explain reality. However, some components of the Court-Congress relationship might be so distorted by rational choice models that the distortion makes them counterproductive. The examination of constitutional-interpretation overrides helps expose some of these distortions.

D. Lack of Study of Constitutional-Interpretation Overrides

There are important differences between constitutional and statutory interpretation. In a statutory decision, for example, the power is presumed to be with Congress.[28] In a constitutional decision, it is often assumed that unless Congress works to amend the Constitution there is little it can do. Exemplifying this point is Justice Harlan's observation that: "Congress may not by fiat overturn the constitutional decisions of this Court."[29] More recently, Chief Justice Rehnquist stated that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[30] Given that the Court rarely overrules its precedent, and constitutional amendments are even rarer, there is an implication of judicial finality with constitutional-interpretation-decisions. The likelihood of congressional overrides to constitutional-interpretation-decisions could help accept or reject judicial finality.

Some case studies of Court-Congress relations have taken pains to show that even in instances of constitutional interpretation, congressional overrides do occur. For example, in Richard A. Paschal's

[27] If the Court has a policy preference it could be argued that the Court will base its initial decision on its most preferred outcome and if the decisions is overridden the court could overrule the new statute based on a strategic model. One is as able to start their assumptions here as with the assumptions inherent in rational choice modeling.

[28] *Id*. The authors state there is "clear legal and political superiority of Congress over the Court in statutory interpretation; the Court is the weaker partner in the relationship."

[29] Gidden Co. v. Zdanok, 370 U.S. 530, 541 (1962), *quoted in* Paschal, *supra* note 19, at 148.

[30] Dickerson v. United States, 530 U.S. 438 (2000).

oft cited article, "The Continuing Colloquy: Congress and the Finality of the Supreme Court," he states that statutes can change the "political or economic effects of the Court's opinions" even when the opinions are based on constitutional interpretation.[31] Like Paschal, other researchers have included case studies of constitutional-interpretation overrides in their works.[32] Louis Fisher in "Judicial Finality or an Ongoing Colloquy?" explores hot button social issues such as the death penalty, abortion, the right to die, and gay rights to provide examples of how the Court's exercise of judicial review is neither final nor definitive.[33] These case studies provide important examples of congressional responses to the Court's constitutional interpretation, proving they can and do happen. However, these case studies do not give a sense of how often overrides occur in constitutional interpretation cases. Thus, it is an open question as to whether these examples are common or rare exceptions. Without quantitative studies to complement these qualitative ones, judicial finality could be assumed to exist in most instances of constitutional interpretation.

Judicial finality, the countermajoritarian nature of the Court, and rational choice theories are all easier to justify if constitutional-interpretation overrides occur as rarely (or even less often, as many assume) as statutory interpretation overrides. The few studies focused on constitutional-interpretation overrides indicate, however, the exact opposite: *Constitutional-interpretation overrides occur more frequently than overrides to statutory interpretation decisions.*[34]

Robert Dahl's "Decision-Making in a Democracy" included a survey of certain constitutional interpretation cases from 1789-1957. He focused on Supreme Court decisions holding "major legislation" unconstitutional, within four years of enactment.[35] Of the

[31] Paschal, *supra* note 19, at 210. Henschen & Sidlow, *supra* note 19, at 687 makes a similar observation that Congress can use statutes to modify the Court's constitutional objections.
[32] Louis Fisher, *Judicial Finality or an Ongoing Colloquy?*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 153-69 (Mark C. Miller & Jeb Barnes, eds. 2004); Louis Fisher, *Congressional Checks on the Judiciary*, *in* Congress Confronts the Court 21-35 (Colton C. Campbell & John F. Stack Jr., eds. 2001); Baum, *supra* note 19, at 209.
[33] Fisher, *supra* note 32, at 169.
[34] Two of these studies are discussed in the following paragraphs.
[35] This limited the dataset from seventy-eight cases to thirty-eight.

thirty-eight cases that fit such criteria, Dahl noted that 50 percent were reversed by Congress.[36] This figure is several times higher than what statutory studies have shown.[37] However, since Dahl carefully selected cases holding "major-legislation" unconstitutional, it is hard to know how representative his results are of the entire universe of cases where overrides were possible. In 1994, Ignagni and Meernik completed a rare quantitative study purely focused on constitutional-interpretation overrides that examined all overrides based on constitutional interpretation from 1954-1990.[38] Ignagni and Meernik found that 20 percent of Supreme Court cases nullifying federal laws were later modified by Congress.[39] Again, the results of a constitutional-interpretation-override study deviated substantially from the results of statutory override studies. The results from these two studies, and the few like them, imply a rejection of judicial finality in constitutional interpretation cases, and they also challenge the notion that Congress has an easier time of overriding statutory interpretation cases. Additionally, these studies also contest the rational choice claim that justices have the desire or competency to avoid overrides.

The most important implications of the studies above: *theories of Court-Congress relations that ignore post-judicial review interactions, or theories based solely on statutory interpretation decisions, are incomplete.* Likewise, arguments claiming the Court rarely exercises judicial review ignore the increasing examples of congressional acts being struck down by the Court and fail to account for potential explana-

---

[36] Dahl, *supra* note 10, at 290.

[37] Part of the increased percentage could be attributed to him only looking at the cases most likely to be reversed. However, even if all seventy-eight cases of the Court ruling an act of Congress unconstitutional were included and there was not another example of a reversal, a reversal rate of 24 percent would still exist, which is four times higher than the results of most statutory studies.

[38] Ignagni & Meernik, *supra* note 14, at 353-71.

[39] They cite Congress responding to 29 percent and reversing 20 percent of Supreme Court cases that ruled acts of Congress unconstitutional from 1954 to 1990. These numbers are much more similar to Dahl's than to statutory studies. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004), notes that from 1954-1997 that 48 percent of the time Congress acted to restore policies that the Court had invalidated. Despite using very similar years to Ignagni and Meernik, Pickerill achieves a different response rate because he uses different criteria to count "responses."

tions for this change. If Congress regularly overrides constitutional-interpretation-decisions of the Court, then the Court is neither final nor supreme.

III.
SURVEY METHODOLOGY

The U.S. Government Printing Office maintains a list of "Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States."[40] This list was examined for all acts of Congress nullified during the Rehnquist Court (1986-2005). This examination generated a dataset of Court cases eligible for congressional overrides (*see* Appendix I). Using that dataset, this study first compares the rate of nullification of federal law during the Rehnquist Court with the frequency under the Burger and Warren Courts, as well as the rate throughout the Court's entire history. After comparing rates of nullification of federal law for each of the Courts, the analysis shifts to examine the congressional overrides for all acts of Congress that were struck down during the Rehnquist Court. All cases from this dataset were entered into GPO Access' new Federal Digital System database, FDSYS.[41] Using the "advanced search" function, all cases were checked for their appearance in "Congressional Bills," "Congressional Record," "History of Bills," and "Congressional Hearings." Each match was examined for bills intentionally introduced to respond to a Supreme Court case. Each identified bill number was then searched in the Library of Congress's database[42] to establish the bill's legislative history.[43]

By focusing on the Rehnquist Court, this study accomplishes two goals. First, it establishes 2005 as the cutoff date, providing Congress seven years to register a response. A more contemporary cutoff date would fail to provide Congress sufficient time to respond, causing missed overrides. Second, such a study is the first of its kind, i.e., a

[40] *See supra* note 2.

[41] U.S. GOVERNMENT PRINTING OFFICE, www.gpo.gov/fdsys/ (last visited Aug. 22, 2013).

[42] *THOMAS*, THE LIBRARY OF CONGRESS, thomas.loc.gov (last visited Aug. 22, 2013).

[43] It is expected that accidental overrides, legislation that was not primarily intended to override the Supreme Court, but still does, will be missed using this method. This is appropriate as the focus of the study is Congress being able to pass overrides when it intends.

quantitative analysis of congressional overrides for the entirety of the Rehnquist Court.[44] Focusing exclusively on the Rehnquist Court provides a dataset that can be used for comparison purposes. The comparison between the three Courts can then be used to identify current trends in Court-Congress relations that can assist in understanding the modern relationship between the two branches of government.

IV.
SURVEY RESULTS

A. Frequency of Judicial Review

Table 1: Average Number of Acts of Congress Nullified by the Supreme Court Per Year

Court	Years of Court	Acts Nullified	Acts Per Year
Warren	(1954-1969) 16 years	20	1.25
Burger	(1969-1986) 17 years	32	1.88
Rehnquist	(1986-2005) 19 years	41	2.16

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159.

Table 2: Average Number of Acts of Congress Nullified by the Supreme Court Per Year

Period	Acts Nullified	Acts Per Year
1803-1953 (151 years)	66	.44
1803-2010 (208 years)	167	.81
1954-2010 (57 years)	101	1.77

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159.

As shown in the tables above, the Rehnquist Court, compared with the two preceding it, nullified federal law more frequently. From 1986 to 2005, the Rehnquist Court struck down an average of 2.16 federal laws per year. The Burger Court nullified federal laws at a rate of 1.88 per year; whereas, the Warren Court did so at 1.25 per year (see table 1). The Court's overall average of nullifying federal

[44] Two previous studies looked at the first part of the Rehnquist Court but combined those years with the Warren and Burger Courts. Ignagni & Meernik, *supra* note 14, looks at 1954-1990 and Pickerill, *supra* note 39, looks at 1954-1997.

laws since *Marbury v. Madison* (1803) is less than one per year at .81. Before the four most recent Courts, the average number of congressional acts nullified per year was only .44 (see table 2). This indicates that the Warren Court struck down federal laws at nearly three times the Court's pre-1953 rate, the Burger Court at nearly four times that rate, and the Rehnquist Court at nearly five times that rate.

Table 3: Number of Acts of Congress Nullified by the Supreme Court, 1790-2008

Period	Number		Period	Number		Period	Number
1790-1799	0		1870-1879	7		1950-1959	5
1800-1809	1		1880-1889	4		1960-1969	16
1810-1819	0		1890-1899	5		1970-1979	20
1820-1829	0		1900-1909	9		1980-1989	16
1830-1839	0		1910-1919	6		1990-1999	23
1840-1849	0		1920-1929	15		2000-2010	20
1850-1859	1		1930-1939	13			
1860-1869	4		1940-1949	2		Total:	167

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159; The Supreme Court Database: 2006-2010 Cases Declaring Federal Laws Unconstitutional, SCDB, scdb.wustl.edu/analysisCaseListing.php?sid=1102-TICTAC-5332 (last visited July 29, 2011).

This rate of activity can be further broken down by decade. The period of 1990 to 1999 had the most federal laws stricken in a single decade with twenty-three (see table 3). Zeroing in on the eight-year period from 1995-2002, there were thirty-one federal laws invalidated by the Court – by far the most of any eight-year period. During these eight years, the Court struck down a record of 3.9 federal laws per year. This is a significantly higher rate compared to historic periods of turmoil between the Court and Congress. For example, from 1930 to 1939 only thirteen federal laws were nullified. The period from 1918 to 1936 – often seen as a time of some of the greatest conflict between the Court and Congress – saw twenty-nine federal laws overturned. This equates to 1.5 federal laws struck down per year, a rate lower than either the Burger or Rehnquist Courts. [45]

[45] *See supra* note 2.

B. Overruling Recently Enacted Federal Law

Table 4: Number of Years from Adopted Legislation to Court Nullification

Court	Nullified Acts	1-5 years	6-10	11-15	16 plus
Warren	21	2 (10.5%)	4	8	7 (33%)
Burger	32	11 (34%)	4	4	13 (41%)
Rehnquist	41	16 (39%)	9	5	11 (27%)

Sources: U.S. Senate, The Constitution: Analysis and Interpretation 2008 Supplement, 163-64; U.S. Senate, The Constitution: Acts of Congress Held Unconstitutional 2002, 2117-2159.

When evaluating the level of conflict between the two branches, the age of the legislation is relevant. It is often theorized that the Court is more willing to strike down older congressional legislation – giving deference to recently enacted laws.[46] This is justified on the basis that legislation passed by previous Congresses may no longer be supported by the current majority. Thus, it is thought, the Court is less likely to nullify laws recently adopted by Congress. The activity of the Rehnquist Court directly challenges this notion. Of the forty-one congressional acts struck down by the Rehnquist Court, 39 percent were adopted less than five years previously – only 27 percent were adopted more than fifteen years before the Court struck them down. This is in sharp contrast to the Warren Court where only 10.5 percent were recent acts of Congress with 33 percent adopted sixteen or more years before. Likewise, the Burger Court was more likely to strike down federal laws passed sixteen or more years before issuing its decisions, versus the laws enacted within five years of the Court writing its opinion. (see table 4). *Thus, the Rehnquist Court not only struck down more acts of Congress than any in history, it was far more likely than the two preceding Courts to strike down laws recently enacted by Congress.*

[46] *See, e.g.*, Dahl, *supra* note 10, at 290; Eskridge, *supra* note 14, at 455; Hettinger & Zorn, *supra* note 14, at 28; Ignagni & Meernik, *supra* note 14, at 371; Mikva & Bleich, *supra* note 14, at 750.

C. The Role of Judicial Appointments in Maintaining Equilibrium In Court-Congress Relations

Table 5: Average Length of Supreme Court Justices' Terms Appointed After a Particular Decade Excluding Those Yet to Retire

	Number appointed	Average term length
1940	24	16.6 years
1950	16	20.3 years
1960	11	20.1 years
1970	6	25.17 years

Source: www.supremecourt.gov/about/members_text.aspx

In 1957 Dahl observed that on average, throughout the history of the Court, a new justice was appointed every twenty-two months. Based on this rate of turnover Dahl viewed President Roosevelt's four year wait to appoint his first justice as unusually bad luck – the odds were four to one against such a long interval. For Dahl, this extended and unlikely interval helped explain the 1930s rift between the elected and appointed branches of the federal government.[47] A thorough examination of Supreme Court justices' terms over the last fifty years shows President Roosevelt's "bad luck" is now the norm. The average term for all justices appointed since 1940 is 16.6 years (see table 5). This is a similar term length to what Dahl observed from the beginning of the Court until 1957.[48] If the average term is examined for justices appointed after 1950, the average jumps to 20.3 years. This trend is even more pronounced when looking at all justices appointed since 1970; the average Supreme Court term since 1970 is 25.17 years.[49]

Since 1970 a new Supreme Court justice has been appointed, on average, every thirty-three and a half months. This is a 50 percent increase in the average from the first 167 years of the Court, when

[47] Dahl, *supra* note 10, at 85.
[48] Dividing 16.6 years by 9 (the number on the Court) equals 1.84 years or 22.1 months.
[49] *See supra* Table 5.

Dahl made his observations.[50] This increase in justices' terms provides the Congress and the President fewer opportunities to control the Court through the appointment process. The "lag time," or the interval of time Dahl described before current majorities could reshape the Court, is now significantly longer. Based on Dahl's theory, this should lead to a Court that is more often out of touch with current majorities in Congress. If Dahl's theory – that the appointment process is part of what reduced the likelihood the Court would rule against Congress – has any validity, then a significant increase in justices' terms would alter Court-Congress relations.

D. Congressional Overrides

During the Rehnquist Court, justices served longer terms and struck down more federal laws than anytime during the Court's history. As noted above, these longer terms provide Congress and the President fewer opportunities to control the Court through the appointment process. Perhaps not surprisingly, as members of the Court are less tied to national majorities through the appointment process, the Court has increasingly nullified federal laws. This is a significant reorganization in Court-Congress relations from what Dahl observed, and this striking change has renewed fears of judicial supremacy. Despite these trepidations, such trends may not indicate judicial supremacy; instead, these trends may indicate a new model for maintaining equilibrium between the Court and Congress: constitutional-interpretation overrides.

The "continuing dialogue" model asserts the Supreme Court does not have the final word in interpreting the Constitution; under this model the Court engages in "dialogues" with other political actors to shape constitutional interpretation. If the Court is being more assertive in striking down acts of Congress based on the justices' interpretation of the Constitution, then a logical conclusion under the "continuing dialogues" model is that Congress will respond to these

[50] Strikingly, the eleven-year period from 1994-2005 did not see a single new justice placed on the Court; the first time this has occurred since there have been nine members of the Supreme Court.

decisions and try to modify them. This in fact seems to be the case. Of the forty-one federal laws overruled during the Rehnquist Court, twelve were overridden by Congress. This represents 29.3 percent of all constitutional cases eligible for an override. This is an almost 10 percent higher rate (or a 50 percent increase in the percentage of overrides) than found in Joseph Ignagni's and James Meernik's study of constitutional-interpretation overrides from 1954-1990 (which includes the first five years of the Rehnquist Court).[51] This seems to indicate that *as the Court became more active, so did Congress.* In nearly one out of three cases, when the Rehnquist Court struck down a federal law on constitutional grounds, Congress did not accept this as the final word. Instead, Congress continued the constitutional dialogue.

The number of successful overrides during the Rehnquist Court highlights only part of post judicial review interaction between the Court and Congress. In addition to the twelve successful overrides, two additional override bills passed one chamber of Congress and another three bills died in committee (but even these unsuccessful attempts managed to attract a dozen or more co-sponsors). These unsuccessful override attempts indicate that congressional support to override the Court goes beyond the twelve that were successful. In fact, of the forty-one federal laws nullified by the Rehnquist Court only fourteen failed to generate an override bill.[52] Thus, even in cases where override legislation failed to become law, Congress was expending valuable time and effort on trying to override Court decisions. While some scholars may argue the Court possesses judicial finality over constitutional interpretation, numerous members of Congress seemed unwilling to agree.

During the Rehnquist Court, judicial review of federal law sparked a dialogue between the branches that went beyond override attempts. The Congressional Record shows that members of Congress cited almost all Rehnquist Court decisions nullifying federal

[51] Ignagni & Meernik, *supra* note 14, at 371.

[52] This is accurate as of July 2011. It is possible that in the last two years some of these fourteen decisions have seen override legislation introduced.

law.[53] In almost all forty-one cases from the dataset, Congress exhibited a familiarity with the Court's decisions and prominently cited these opinions in future legislative work.

E. Court Invitations to Congress

Some of the congressional overrides to the Rehnquist Court could best be described as responses to invitations received from the Court.[54] For example, in *Thomson v. Western States Medical Center*,[55] the Court struck down commercial speech restrictions as "more extensive than necessary to serve" the government's interest.[56] The Court's opinion did not close the door to all future commercial speech restrictions; rather, it offered boundaries for new restrictions. To describe an override in such a case as a direct attack on the Court would be overreaching. Judicial invitations indicate that not all legislative overrides, modifying the results of a Court decision, indicate hostility between the two branches. In fact, invitations and the resulting overrides may be a sign of a healthy dialogue between the two branches.

Override invitations also show the Court going beyond the role of deciding a case – or even ruling on the constitutionality of a statute. These invitations suggest the contours of future legislation. Such a process pulls the Court into the legislative realm. When Congress accepts that invitation, Congress, in a way, uses the Court as a partner in carrying out its purpose. Still, the Court does not directly draft new legislation. Instead, Congress must interpret both the Court decision overturning Congress's enacted legislation and

[53] A quick search of GPO Access' new Federal Digital System database, FDSYS, for the forty-one decisions of the Rehnquist Court nullifying federal law provides numerous examples of members of Congress giving impassioned speeches citing the nullification of federal law as examples of the Court treading on Congressional authority. Other results show Congress members citing many of these Court decisions in attempts to sway votes on new legislation, and in other cases, sponsors of bills cited how their proposed legislation was crafted to comply with Court decisions.

[54] An invitation for an override means that the Court provided Congress an option for future legislation.

[55] 535 U.S. 357 (2002).

[56] *See supra* note 2.

the Constitution to create new legislation. This process of: (1) the Court nullifying federal law with an invitation to override; (2) Congress accepting that invitation; and (3) the drafting of new legislation within those guidelines, indicates two branches sharing duties that are often defined as distinct. This seems to indicate support for Richard Neustadt's famous claim that the Constitution does not separate powers but instead creates "separate institutions sharing powers."[57]

F. Non-Invited Overrides

In some instances, the Court is overridden despite not having invited a congressional response. For example, in *Dickerson v. United States*, Rehnquist's opinion stated, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[58] Despite Rehnquist's admonishment, this is precisely what Congress did, and it took the Court thirty-two years to strike down Congress's override. In particular, the Court-Congress dialogue started in 1966 when the Supreme Court ruled in *Miranda v. Arizona*[59] that the accused had a right to be informed of their constitutional rights. Two years after that decision, Congress passed the Omnibus Crime Control and Safe Streets Act (OCCSSA) of 1968 which included an override of the *Miranda* decision.[60] In this instance, Congress's interpretation of the Constitution, one that directly overrode the Court's interpretation, was the final word – at least for several decades – in the Court-Congress dialogue on this topic. If Congress truly cannot legislatively supersede Court decisions, it still took the Court thirty-two years to assert its authority. Currently, the Court has the *last word,* but given the history of the dialogue between the Court and Congress is there any reason to believe that the Court's 2000 decision in *Dickerson* is the *final word* simply because the Court proclaimed it so?

Likewise, the Supreme Court's decision in *City of Boerne v. Flo-*

[57] RICHARD E NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1990).
[58] 530 U.S. 428, 437 (2000).
[59] 384 U.S. 436 (1966).
[60] *See supra* note 2.

res,[61] and the congressional override that followed, exemplify an ongoing struggle to claim superiority in defining the limits of the First Amendment's free exercise clause. This back and forth between the two branches started with the Supreme Court upholding an action by the State of Oregon government to deny unemployment benefits in *Employment Division, Department of Human Resources of Oregon v. Smith*.[62] In *Smith*, the Court stated that a law does not violate the First Amendment's free exercise clause as long as it is a "neutral law of general applicability" rather than a law specifically intended to target a particular religion.[63] In response, Congress passed the Religious Freedom Restoration Act (RFRA) of 1993 which stated that laws of general applicability – federal, state, and local – may substantially burden free exercise of religion *only* when furthering a compelling governmental interest and constituting the least restrictive means of doing so. The RFRA imposed a substantially higher burden for state legislation; many state laws that would be allowable under the *Smith* standard would be struck down under Congress's RFRA standard. But the second round of this dialogue was just the beginning. In *Boerne* the Court found the overriding statute, the RFRA, to be unconstitutional when applied to state governments. The story did not end there, however. In response to the *Boerne* ruling, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, which significantly modified the impact and reach of the *Boerne* decision.[64] The passage of the RFRA and RLUIPA shows that Congress was willing to modify Court decisions even without an invitation to do so.

The Metropolitan Washington Airports Act (MWAA) of 1986 is the beginning of another back and forth policy exchange between the Court and Congress without Congress being offered an invitation. The MWAA transferred operating control of two Washington, D.C. area airports from the Federal Government to a regional air-

[61] 521 U.S. 507 (1997).
[62] 494 U.S. 872 (1990).
[63] *Id.* at 1015-16.
[64] *Id.* at 1073-1075. Unlike the RFRA, which required religious accommodation in virtually all spheres of life, RLUIPA only applies to prisoner and land use cases. But the RLUIPA was a direct attempt to blunt the decision of *City of Boerne v. Flores*, *see supra* note 61.

port authority. However, that transfer was conditioned on the establishment of a board of review, composed of Members of Congress with veto authority over actions of the airports authority's board of directors. The Court ruled the MWAA unconstitutional because it violated separation of powers principles.[65] After the Supreme Court struck down the MWAA, Congress changed its tactics but retained its goal of controlling the operation of the airports. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 maintained a board of review for the airports but conceded members of Congress would no longer be directly on the Board. However, the Board's members were now to be chosen from lists provided by the Speaker of the House and President pro tempore of the Senate. Most significantly, if the Airport Authority approved an action opposed by the Board of Review, the proposed action could not be implemented until Congress was provided sixty legislative days to pass a joint resolution disapproving it.[66] Congress members were no longer on the Board, but Congress was able to achieve its goals through other means. In other words, the Court nullification of federal law did not substantially affect the ultimate aims of Congress.

The cases above show that Congress is willing to pass overriding legislation even when the Court does not offer an invitation to do so. The cases also illustrate that the interaction between the Court and Congress is more complicated than the Court nullifying federal law and Congress contemplating an override – this process can sometimes go multiple rounds. This seems to pose a challenge to the notion that justices always act strategically, or at least always successfully, to avoid overrides. This process shows that judicial finality is a myth, and the process also indicates that increased judicial activi-

[65] Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 255 (1991).

[66] H.R. Rep. No. 104-596. Despite these changes, a federal court again found that the Board of Review was a congressional agent exercising significant federal power in violation of separation of power principles in *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir 1994). Thus, Congress passed the Metropolitan Washington Airports Amendments Act of 1995 which gave the president the right to appoint members of the MTAA with advice and consent of Senate, the MTAA would be reviewed by the Federal Advisory Commission of the Airports Authority.

ty nullifying federal law does not automatically signal judicial supremacy. If Congress is increasing its rate of constitutional-interpretation overrides in reaction to increased Court activity, this is a sign of Congress shifting its constraints on the Court from before-the-fact appointment controls (as described by Dahl) to after-the-fact overrides of Court decisions. While this signifies a change in Court-Congress relations, it does not signal a move towards judicial supremacy.

V.
CONCLUSION

This Article identifies and examines the forty-one acts of Congress nullified during the Rehnquist Court (see Appendix I). These forty-one federal laws represent the greatest number of federal statutes overturned in any nineteen year period in U.S. history and represent the highest rate of judicial activity striking down federal law in U.S. history. Equally noteworthy, the Rehnquist Court saw 29.3 percent of its decisions nullifying federal law overridden by Congress, a rate of successful overrides nearly 50 percent higher than seen in a previous study examining such overrides during 1954-1990 (which includes the first five years of the Rehnquist Court). Thus the Rehnquist Court displays an increase in both judicial review and congressional overrides to constitutional-interpretation-decisions. The high rates of both nullifications and overrides are indicative of a changing relationship between Congress and the Court and have important implications for testing and developing theories of judicial-congressional relations.

There are three major trends that emerge from this study: (1) Supreme Court justices are sitting for increasingly longer terms providing the president and the Senate fewer opportunities to control the Court through the appointment process; (2) the Court has been significantly more active in nullifying federal law in the last fifty years, with each of the last three Courts more active than the previous; and (3) Congress has reduced the impact of these nullifications by overriding these constitutional-interpretation-decisions at a rate that is substantially higher than previous studies identified.

The first major trend observed in this study is the increasing length of time the Supreme Court justices hold their seats. The average term for a Supreme Court justice from the beginning of the Republic until the late 1950s was 16.6 years. Term lengths have now expanded to 25.17 years. This means that on average, a Supreme Court justice appointed after 1970 serves a 50 percent longer term than a justice appointed before 1950. As the length of Supreme Court terms increase, Congress and the President have fewer opportunities to shape the Court through the appointment process. In light of this change, theories that primarily rely on the appointment process as a control on the countermajoritarian nature of the Court should be reexamined.

Since Supreme Court justices appointed after 1950 are serving longer terms, it may not be surprising that the Warren, Burger, and Rehnquist Courts were more likely than previous Courts, to strike down acts of Congress. Up until 1950, the Court only invalidated 0.44 federal laws per year. Under the Rehnquist Court, that number has increased more than fivefold to 2.16 per year. The Rehnquist Court expanded a trend that started with the Warren Court. The Warren Court struck down federal statutes at a rate three times that of the Court prior to 1953. This was followed by the Burger Court that nullified federal law at four times the pre-1953 rate. In all, the Rehnquist Court struck down forty-one federal laws, the greatest total of federal statutes overturned in any nineteen-year period. These forty-one statutes represent nearly 25 percent of all acts of Congress overturned in U.S. history. During one eight-year period, the Rehnquist Court was striking down nearly four acts of Congress a year. In 39 percent of cases where the Rehnquist Court struck down a federal law, the law had been adopted within the last five years. The actions of the Warren, Burger, and especially the Rehnquist Court, show a significant departure from the precedent of the Court rarely overruling Congress.

A third trend identified by this Article is the increased number of successful overrides to Court decisions nullifying federal law. In most instances when federal law was nullified, bills were proposed to modify the decision. In 29.3 percent of cases invalidating federal

law, during the Rehnquist Court, Congress successfully overrode the Court decision. The rate of overrides found in this study is significantly higher than the rate found in a previous study of constitutional-interpretation overrides. This rate of overrides is also significantly higher than what has been found in studies focused on statutory overrides. Obviously, the low override rates found in studies focusing on statutory interpretation decisions fail to reflect the commonality of constitutional-interpretation overrides. This may indicate – despite commonly held beliefs – that it is actually easier for Congress to override a decision based on constitutional interpretation than it is a decision based on statutory interpretation. This frequency of overrides also directly challenges the belief that the Court has the final word in interpreting the Constitution. Further, the results of this study negate the notion that Congress's only option after the Court nullifies federal law based on constitutional grounds is amending the Constitution. Clearly, Congress can, and does, simply pass statues to modify constitutional-interpretation-decisions. Indeed, a review of the above information, indicates that interactions between the Court and Congress do not end with judicial review. It also signifies that theories of Court-Congress relations that do not account for constitutional-interpretation overrides are incomplete. It is important to note that the high rate of nullifications of federal law based on constitutional grounds, and the high rate of congressional overrides, both observed during the Rehnquist Court, do not necessarily reflect hostility between the two branches. In some instances, the Court struck down acts of Congress by inviting a congressional override. This clearly supports theories that the justices do not always seek to avoid being overridden. Override invitations suggest it is too simplistic to conclude that Court action nullifying federal law, or congressional attempts to override, automatically indicate strained relations between the branches.

At the same time, it is also important to note that not all congressional overrides are based on invitations. Supreme Court justices sometimes fail to avoid uninvited overrides. If the justices are acting strategically to avoid overrides, as rational choice scholars suggest, they often miscalculate. The interactions between the

Rehnquist Court and Congress also highlight a process involving multiple rounds of constitutional interpretation. As the process in the Metropolitan Washington Airports Act and *Boerne* show, interactions between Congress and the Court can continue after the first instance of judicial review. Current rational choice models fail to diagram this level of complexity, oversimplifying the interactions of the two branches. Overall, the three trends identified in this study seem likely to continue. Therefore, they should feature prominently in future theories on Court-Congress relations.

APPENDIX I

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART DURING THE REHNQUIST COURT[67]

(* Decisions marked with an asterisk were later overridden by Congress.)

1) Act of June 19, 1934, ch. 652, 48 Stat. 1088, § 316, 18 U.S.C. § 1304.
Greater New Orleans Broadcasting Ass'n v. United States (1999) – Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

2) Act of Aug. 29, 1935, ch. 814 § 5(e), 49 Stat. 982, 27 U.S.C. § 205(e).
Rubin v. Coors Brewing Co. (1995) – The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the "overall irrationality" of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

3) Act of Feb. 15, 1938, ch. 29, 52 Stat. 30.
Boos v. Barry (1988) – District of Columbia Code § 22-1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute," violates the First Amendment.

4) Act of Aug. 16, 1954, ch. 736, 68A Stat. 521, 26 U.S.C. § 4371(1).
United States v. IBM Corp. (1996) – A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

5) Act of June 19, 1968 (Pub. L. 90-351, § 701(a)), 82 Stat. 210, 18 U.S.C. § 3501.

---

[67] All information regarding acts held unconstitutional was taken directly from: *The Constitution: Analysis and Interpretation 2008 Supplement*, and , *The Constitution: Acts of Congress Held Unconstitutional 2002*, *supra* note 2. All cases from this dataset were entered into GPO Access' new Federal Digital System database called FDSYS. Using the "advanced search" function, all cases were checked for their appearance in "Congressional Bills," "Congressional Record," "History of Bills," and "Congressional Hearings." Each match was examined for bills intentionally introduced to respond to a Supreme Court case. Each identified bill number was then searched in the Library of Congress's database (Thomas.loc.gov) to establish the legislative history of the bill.

Dickerson v. United States (2000) – A section of the Omnibus Crime Control and Safe Streets Act of1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations before the Court's decision in *Miranda v. Arizona*, 384 U.S. 486 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by *Miranda* are constitution-based rules. While the *Miranda* Court invited a legislative rule that would be "at least as effective" in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.

6) Act of June 19, 1968 (Pub. L. No. 90-351, § 802), 82 Stat. 213, 18 U.S.C. § 2511(c), as amended by the Act of Oct. 21, 1986 (Pub. L. No. 99-508, § 101(c) (1)(A)), 100 Stat. 1851.
Bartnicki v. Vopper (2001) – A federal prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied to a talk show host and a community activist who had played no part in the illegal interception, and who had lawfully obtained tapes of the illegally intercepted cellular phone conversation. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern." Although the disclosure prohibition well serves the government's "important" interest in protecting private communication, in this case "privacy concerns give way when balanced against the interest in publishing matters of public importance."

7) Act of Apr. 8, 1974, Pub. L. 93-259, §§ 6(a)(6), 6(d)(1), 29 U.S.C. §§ 203(x), 216(b).
Alden v. Maine (1999) – The Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

8) Act of Apr. 8, 1974 (Pub. L. No. 93-259, §§ 6(d)(1), 28(a)(2)), 88 Stat. 61, 74; 29 U.S.C. §§ 216(b), 630(b).
Kimel v. Florida Bd. of Regents (2000) – The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is "so out of proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

9) Act of May 11, 1976 (Pub. L. 94-283, § 112(2)), 90 Stat. 489; 2 U.S.C. § 441a(d)(3).
* *Colorado Republican Campaign Comm. v. FEC (1996)* – The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures

by a political party "in connection with the general election campaign of a [congressional] candidate," violates the First Amendment when applied to expenditures that a political party makes independently without coordination with the candidate. Congress responded with a series of bills on campaign finance. This includes the Campaign Reform and Election Integrity Act of 1998, the Campaign Reform and Citizen Participation Act of 2001, the Bipartisan Campaign Finance Reform Act of 1999, and the Bipartisan Campaign Finance Reform Act of 2002.

10) Act of May 11, 1976, Pub. L. 92-225, § 316, 90 Stat. 490, 2 U.S.C. § 441b.
* *FEC v. Massachusetts Citizens for Life, Inc. (1986)* – Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions placed into a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union. Congress responded through the Bipartisan Campaign Reform Act of 2002.

11) Act of Oct. 19, 1976 (Pub. L. 94-553, § 101(c)), 17 U.S.C. § 504(c).
Feltner v. Columbia Pictures Television (1988) – Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, "in a sum of not less than $500 or more than $20,000 as the court considers just," does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

12) Act of Jan. 12, 1983 (Pub. L. 97-459, § 207), 96 Stat. 2519, 25 U.S.C. § 2206.
* *Hodel v. Irving (1987)* – Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's takings clause by completely abrogating rights of intestacy and devise.

13) Act of Apr. 20, 1983, 97 Stat. 69 (Pub. L. No. 98-21 § 101(b)(1) (amending 26 U.S.C. § 3121(b)(5)).
United States v. Hatter (2001) – The 1983 extension of the Social Security tax to then-sitting judges violates the Compensation Clause of Article III, § 1. The Clause "does not prevent Congress from imposing a non-discriminatory tax laid generally upon judges and other citizens . . . , but it does prohibit taxation that singles out judges for specially unfavorable treatment." The 1983 Social Security law gave 96% of federal employees "total freedom" of choice about whether to participate in the system, and structured the system in such a way that "virtually all"" of the remaining 4% of employees – except the judges – could opt to retain existing coverage. By requiring then-sitting judges to join the Social Security System and pay Social Security taxes, the 1983 law discriminated against judges in violation of the Compensation Clause.

14) Act of Oct. 30, 1984, (Pub. L. 98-608, § 1(4)), 98 Stat. 3173, 25 U.S.C. § 2206.
* *Babbitt v. Youpee (1997)* – Section 207 of the Indian Land Consolidation Act, as amended in 1984, affects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cure the constitutional defect. Congress responded with the Indian Land Consolidation Act Amendments of 2000. Subsequent congressional actions include the American Indian Probate Reform Act of 2004 amending the Indian Land Consolidation Act to require interest in land, or trust, subject to applicable federal law, that is not disposed of by a valid will shall descend through a tribal probate code, and remove the limitations of inheritance by a living Indian spouse.

15) Act of Jan. 15, 1985, (Pub. L. 99-240, § 5(d)(2)(C)), 99 Stat. 1842, 42 U.S.C. §2021e(d)(2)(C).
New York v. United States (1992) – "Take-title" incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators' damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legislative and regulatory processes of the states, nor may it force a transfer of generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

16) Act of Oct. 27, 1986 (Pub. L. 99-570, § 1366), 100 Stat. 3207-35, 18 U.S.C. § 981(a)(1).
* *United States v. Bajakajian (1998)* – Statute requiring full civil forfeiture of money transported out of the United States without amounts in excess of $10,000 being reported violates the Excessive Fines Clause of the Eighth Amendment when $357,144 was required to be forfeited. Congress responded to *Bajakajian* in the USA PATRIOT Act by inserting a criminal forfeiture provision of property that it believed would constitutionally permit the full forfeiture of currency despite the Court's $10,000 limit in *Bajakajian*.

17) Act of Oct. 30, 1986 (Pub. L. 99-591, title VI, § 6007(f)), 100 Stat. 3341, 49 U.S.C. App.§ 2456(f).
* *Metropolitan Washington Airports Auth v. Citizens for Abatements of Aircraft Noise (1991)* – The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the federal government to a regional airports authority, violates separation of

powers principles by conditioning that transfer on the establishment of a board of review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors. Congress responded by passing the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991. Congress members were no longer on the Board of Review, however all members were now to be chosen from lists provided by the Speaker of the House and President pro tempore of the Senate. Additionally, if the Airport Authority approved an action opposed by the Board of Review, the proposed action could not be implemented until Congress was provided sixty legislative days to pass a joint resolution disapproving it.

18) Act of Nov. 17, 1986 (Pub. L. 99-662, title IV, § 1402(a)), 26 U.S.C. §§ 4461, 4462.
United States v. United States Shoe Corp. (1998) – The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125% of cargo value on commercial cargo shipped through the nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

19) Act of Apr. 28, 1988 (Pub. L. 100-297 § 6101), 102 Stat. 424, 47 U.S.C. § 223(b) (1).
* *Sable Commn'cns of Cal. v. FEC (1989)* – Amendment to Communications Act of 1934 imposing an outright ban on "indecent" but not obscene messages violates the First Amendment, since it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages. Congress responded by passing the Helms Amendment of 1989 (P.L. 101-166), which amended section 223(b) of the Communications Act of 1934 to ban indecent dial-a-porn, if used by persons under 18. The Helms Amendment broadened the application of section 223(b) from the District of Columbia or in interstate or foreign communications, to apply to all calls within the United States.

20) Act of Oct. 17, 1988 (Pub. L. 100-497, § 11(d)(7)), 102 Stat. 2472, 25 U.S.C. § 2710(d)(7).
Seminole Tribe of Fla. v. Fla. (1996) – A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a state in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate states' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), is overruled.

21) Act of Oct. 28, 1989 (Pub. L. 101-131), 103 Stat. 777, 18 U.S.C. § 700.
United States v. Eichman (1990) – The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.

22) Act of Nov. 30, 1989 (Pub. L. 101-194, § 601), 103 Stat. 1760, 5 U.S.C. app. § 501.
United States v. Nat'l Treasury Employees Union (1995) – Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS-16. The ban is limited to expressive activity and does not include other outside income, and the "speculative benefits" of the ban do not justify its "crudely crafted burden" on expression.

23) Act of July 26, 1990 (Pub. L. No. 101-336, Title I), 104 Stat. 330, 42 U.S.C. §§ 12111-12117.
Bd. of Trustees of Univ. of Ala. v. Garrett (2001) – Title I of the Americans with Disabilities Act of 1990 (ADA), exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities. Rational basis review applies, and consequently states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." The legislative record of the ADA fails to show that Congress identified a pattern of irrational state employment discrimination against the disabled. Moreover, even if a pattern of discrimination by states had been found, the ADA's remedies would run afoul of the "congruence and proportionality" limitation on Congress's exercise of enforcement power.

24) Act of Nov. 28, 1990 (Pub. L. No. 101-624, Title XIX, Subtitle B), 104 Stat. 3854, 7 U.S.C. §§ 6101 et seq.
United States v. United Foods (2001) – The Mushroom Promotion, Research, and Consumer Information Act violates the First Amendment by imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales. The mushroom program differs "in a most fundamental respect" from the compelled assessment on fruit growers upheld in *Glickman v. Wileman Brothers & Elliott* (1997). There the mandated assessments were "ancillary to a more comprehensive program restricting marketing autonomy," while here there is "no broader regulatory system in place." The mushroom program contains no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the

antitrust laws, and nothing else that forces mushroom producers to associate as a group to make cooperative decisions. But for the assessment for advertising, the mushroom growing business is unregulated.

25) Act of Nov. 29, 1990 (Pub. L. 101-647, § 1702), 104 Stat. 4844, 18 U.S.C. § 922q.
* *United States v. Lopez (1995)* – The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." Possession of a gun at or near a school "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." In response, Congress adopted the nearly identical Gun Free School Zones Amendment Act of 1995; however, in this Act Congress cited that its authority to regulate the possession of firearms on school campuses was based on the premise that firearms and their components have been moved in interstate commerce.

26) Act of Dec. 19, 1991 (Pub. L. 102-242 § 476), 105 Stat. 2387, 15 U.S.C. § 78aa-1.
Plaut v. Spendthrift Farm, Inc. (1995) – Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the authority to render dispositive judgments.

27) Act of Oct. 5, 1992 (Pub. L. 102-385, §§ 10(b) and 10(c)), 106 Stat. 1487, 1503; 47 U.S.C. § 532(j) and § 531.
* *Denver Area Educ. Tel. Consortium v. FCC (1996)* – Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels, also violates the First Amendment. Congressional override with S.652, the Telecommunications Act of 1996.

28) Act of Oct. 24, 1992, Title XIX, 106 Stat. 3037 (Pub. L. 102-486), 26 U.S.C. §§ 9701-9722.
Eastern Enterprises v. Apfel (1998) – The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal indus-

try who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

29) Act of Oct. 27, 1992, Pub. L. 102-542, 15 U.S.C. § 1122.
College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd. (1999) – The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) "under the eleventh amendment . . . or under any other doctrine of sovereign immunity," did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a "property right" protected by the Due Process Clause.

30) Act of Oct. 28, 1992, 106 Stat. 4230, Pub. L. 102-560, 29 U.S.C. § 296.
Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank (1999) – The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are "out of proportion to a supposed remedial or preventive object."

31) Act of Nov. 16, 1993 (Pub. L. 103-141), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4.
* *City of Boerne v. Flores (1997)* – The Religious Freedom Restoration Act (RFRA), which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under Section 5 to "enforce" the Fourteenth Amendment by "appropriate legislation" does not extend to defining the substance of the Amendment's restrictions, which the RFRA appears to define. RFRA "is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Congress responded by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 employing Congress's spending power and its power over interstate commerce to apply a strict scrutiny test on state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's free exercise of religion.

32) Act of Nov. 30, 1993 (Pub. L. 103-159), 107 Stat. 1536.

Printz v. United States (1997) – Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between federal and state governments. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

33) Act of Sept. 13, 1994 (Pub. L. 103-322, § 40302), 108 Stat. 1941, 42 U.S.C. § 13981.
United States v. Morrison (2000) – A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate "noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

34) Act of Feb. 8, 1996, 110 Stat. 56, 133-34 (Pub. L. 104-104, title V, § 502), 47 U.S.C. §§ 223(a), 223(d).
* *Reno v. ACLU (1997)* – Two provisions of the Communications Decency Act of 1996 – one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age – violate the First Amendment. Congress responded by enacting the Child Online Protection Act (COPA) of 1998, which banned "material that is harmful to minors" on websites that have the objective of earning a profit.

35) Act of Feb. 8, 1996 (Pub. L. 104-104, § 505), 110 Stat. 136, 47 U.S.C. § 561.
United States v. Playboy Entm't Grp., Inc. (2000) – Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the government did not establish that the less restrictive alternative found in section 504 of the Act – that of scrambling a channel at a subscriber's request – would be ineffective.

36) Act of Apr. 9, 1996, 110 Stat. 1200 (Pub. L. 104-130), 2 U.S.C. §§ 691 et seq.

Clinton v. City of New York (1998) – The Line Item Veto Act, which gives the President the authority to "cancel in whole" three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President "the unilateral power to change the text of duly enacted statutes." This Line Item Veto Act authority differs in important respects from the President's constitutional authority to "return" (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

37) Act of Apr. 26, 1996 (Pub. L. No. 104-134 § 504(a)(16)), 110 Stat. 1321-55.

Legal Services Corp. v. Valazquez (2001) – A restriction in the appropriations act for the Legal Services Corporation (LSC) that prohibits funding for any organization that participates in litigation that challenges a federal or state welfare law constitutes viewpoint discrimination in violation of the First Amendment. Moreover, the restrictions on LSC advocacy "distort [the] usual functioning" of the judiciary, and are "inconsistent with accepted separation-of-powers principles." "An informed, independent judiciary presumes an informed, independent bar," yet the restriction "prohibits speech and expression on which courts must depend for the proper exercise of judicial power."

38) Act of Sep. 30, 1996 (Pub. L. No. 104-208, § 121), 110 Stat. 3009-26, 18 U.S.C. §§ 2252, 2256.

* *Ashcroft v. Free Speech Coalition (2002)* – Two sections of the Child Pornography Prevention Act of 1996 that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real children violate the First Amendment. These provisions cover any visual image that "appears to be" of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that "conveys the impression" that it depicts a minor engaging in sexually explicit conduct. The rationale for excepting child pornography from First Amendment coverage is to protect children who are abused and exploited in the production process, yet the Act's prohibitions extend to "virtual" pornography that does not involve children in the production process. Congress responds to the Court's ruling with the PROTECT Act of 2003 which continued to prohibit computer-based child pornography, but not other types of child pornography not produced with actual minors.

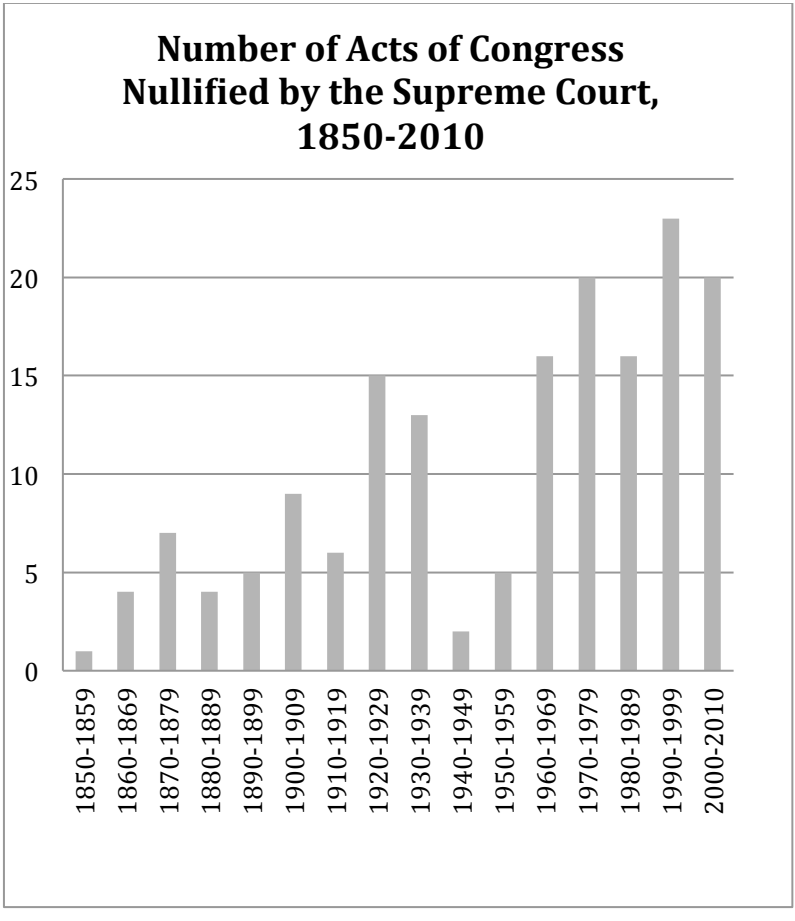
39) Act of Nov. 21, 1997 (Pub. L. 105-115, § 127), 111 Stat. 2328, 21 U.S.C. § 353a.

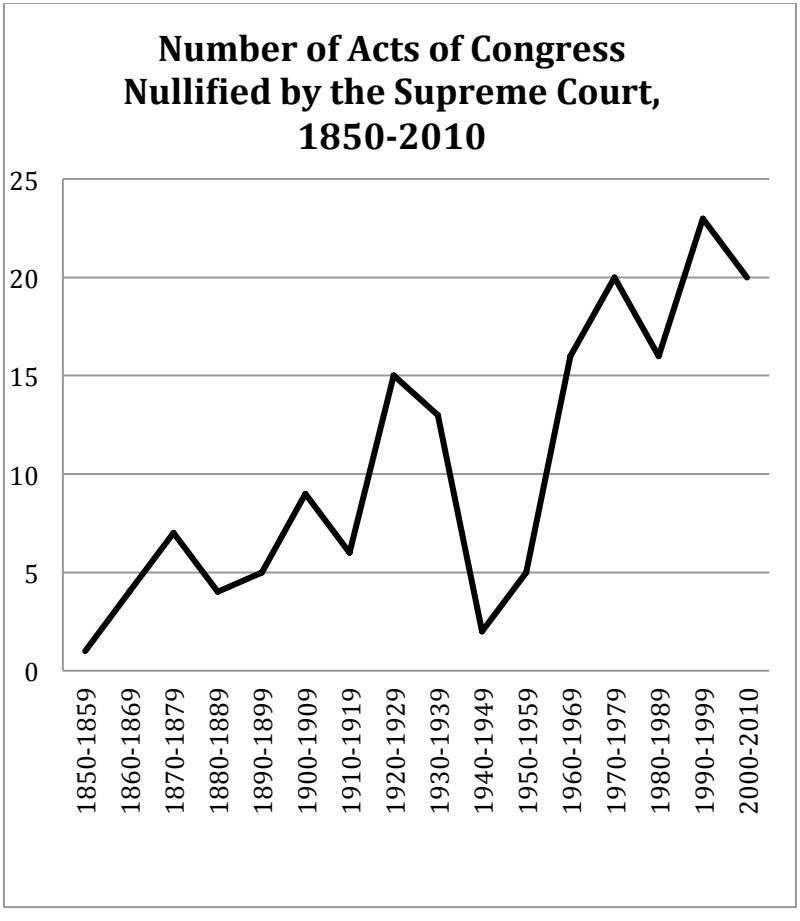
Thompson v. Western States Med. Ctr. (2002) – Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt "compounded

drugs" from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates the First Amendment. The advertising restriction does not meet the *Central Hudson* test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction is "not more extensive than is necessary" to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. There are several non-speech means by which the government might achieve its objective.

40) Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 213, 318; 2 U.S.C. §§ 315(d) (4),441k.
McConnell v. FEC (2003) – Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' rights to make unlimited independent expenditures. Section 318 of BCRA, which amended FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

41) Act of April 30, 2003, Pub. L. 108-21, §§ 401(a) (1), 401(d)(2),117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e).
United States v. Booker (2005) – Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory, and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to a jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.


Number of Acts of Congress Nullified by the Supreme Court, 1850-2010
25
20
15
10
5
0
1850-1859
1860-1869
1870-1879
1880-1889
1890-1899
1900-1909
1910-1919
1920-1929
1930-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1989
1990-1999
2000-2010


Number of Acts of Congress Nullified by the Supreme Court, 1850-2010
25
20
15
10
5
0
1850-1859
1860-1869
1870-1879
1880-1889
1890-1899
1900-1909
1910-1919
1920-1929
1930-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1989
1990-1999
2000-2010

# # #

A MAGIC MIRROR FOR STUDENT LOANS

Sarah C. Zearfoss, Joseph D. Pollak & Lorraine Lamey[†]

Early in 2013, the University of Michigan Law School created and published an online tool designed to allow current and prospective students to compare student loan repayment outcomes under a variety of potential postgraduate conditions. The idea came from a student. In a conversation with an admissions officer, a student said that she wished that she had a visual presentation of her student loan amortization schedule so that she could see what her repayment obligations would look like month-to-month. That simple idea led to more discussion with students and law school administrators, and the Law School's admissions office launched a far more ambitious project: the Debt Wizard.[1] The Debt Wizard helps students to visualize their postgraduate personal finances by balancing multiple factors and helps them anticipate the potential consequences of various career choices on their ability to manage educational debt.

I. BACKGROUND AND MOTIVATION

In the last two years, prospective students have begun asking for more, and more detailed, information about funding, and they do so progressively earlier in the admissions process. Students are in-

[†] The authors are admissions officers of the University of Michigan Law School. Sarah C. Zearfoss is Senior Assistant Dean for Admissions, Financial Aid and Career Planning. She received her J.D. from the University of Michigan Law School. Joseph D. Pollak is Assistant Director of Admissions. He received his J.D. from the George Washington University Law School. Lorraine Lamey is Assistant Director of Admissions. She received her J.D. from the University of Michigan Law School.

[1] *See Welcome to Michigan Law's Debt Wizard!*, UNIV. OF MICHIGAN LAW SCHOOL, www.law.umich.edu/financialaid/debtwizard (last visited Aug. 8, 2013).

creasingly told by a variety of sources that they should eschew all other criteria and focus exclusively on choosing a law school with the lowest cost of attendance; minimizing debt is often touted as the most risk-averse course. With the national media providing nightmare scenarios of unemployed graduates[2] who will "never fully pay off their law school debt,"[3] it is no wonder that prospective students shrewdly consider finances. In the current economic climate, it is the rare candidate for whom cost is not a central factor in choosing a law school, and our conversations with prospective students almost always touch upon themes of educational debt and the impact of debt upon careers. Yet, despite the increased awareness of the importance of funding, many students tell us that they feel anxious about navigating their finances. Some students come to law school with a fair degree of financial sophistication, but many lack the experience, information, or propensity to vigorously investigate their options.

Although our primary concern was developing the Debt Wizard for prospective and current students of Michigan Law, the Debt Wizard is equally usable by students who are considering other law schools. As a public institution, with a broad mission of public service, we were committed to making the Debt Wizard available and accessible. And in an effort to achieve maximum transparency, the underlying data model relies on publicly available datasets, and all underlying assumptions are disclosed and discussed in detail in the Debt Wizard's instructions.

II.
MODEL DATA

To provide information that could be individually tailored to a student's personal choices, we used three main data sets: income, housing, and debt repayment. As a student adjusts the Debt Wizard's variables, the display updates to show how her choices for career type, location, salary, and repayment interact. Based on the user's selections, the Debt Wizard calculates and displays estimated

[2] John J. Farmer Jr., *To Practice Law, Apprentice First*, N.Y. TIMES, Feb. 18, 2013, at A17.
[3] Brian Z. Tamanaha, *How to Make Law School Affordable*, N.Y. TIMES, June 1, 2012, at A27.

monthly housing and student debt expenses, as well as after-tax income. Because almost 90% of Michigan Law graduates leave the state following graduation, we sought data with a national scope so that we could present accurate regional cost-of-living comparisons that were relevant for the cities where our graduates most commonly go.

A. Income

We assumed that our user was single, without dependents, and took standard income tax deductions and exemptions. We used an online paycheck calculator to calculate net income after federal and state income taxes (and city taxes for New York).

We used twelve income intervals ranging from $40,000 to $160,000, which approximate what a new lawyer is likely to earn. We chose the specific intervals based on the National Association for Legal Career Professionals ("NALP") salary survey for the class of 2010.[4] We attempted to simulate realistic salaries through interpretation of NALP's data. For example, when "public interest" is selected as the entry-level postgraduate employment option, the Debt Wizard "grays out" salaries of more than $75,000, making them unselectable in the interface, because there were virtually no entry-level public interest lawyers anywhere in the country in 2010 making more than $75,000.[5]

B. Housing

We used the Department of Defense's Basic Allowance for Housing ("BAH") as the starting point for our housing budget values. Service members receive BAH as a tax-exempt supplemental payment to account for rent in civilian areas, renter's insurance, and utilities, calculated according to service grade.[6]

We assumed that a lawyer with a high salary may spend more on housing than a lower-salaried attorney, so we settled on two levels of

---

[4] *Starting Salaries - What New Law Graduates Earn - Class of 2010*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC. (Nov. 2011), www.nalp.org/starting_salaries_-_what_new_law_graduates_earn_-_class_of_2010.

[5] A future update to the Debt Wizard will include a customizable salary field.

[6] *Basic Allowance for Housing (BAH)*, DEFENSE TRAVEL MANAGEMENT OFFICE, DEPARTMENT OF DEFENSE, www.defensetravel.dod.mil/site/bah.cfm (last visited August 18, 2013).

housing allowances corresponding to the BAH for service members who make $60,000 and $80,000. Military service grade increments do not correspond exactly with the round numbers that we selected, so we had to recalculate some of the values for an approximation.

The Debt Wizard's calculations suggest that some graduates – those with very low salary and very high debt – simply cannot afford to pay for both their monthly debt and housing allowance if they live in New York City. And yet we know that in actuality, our graduates are able to find housing in New York City and pursue public interest work even at low salaries: anecdotal information suggests a number of strategies for reducing living expenses, including sharing housing costs with a spouse, partner, or roommate. We considered trying to account for various living arrangements, but including them would have excessively complicated our tax and Income-Based Repayment ("IBR") calculations.[7]

We considered but ultimately rejected including living expenses other than housing (along with taxes and debt repayment) in our income calculations. Food, clothing, transportation, and medical costs are obvious recurring expenses, but we had trouble finding reliable and locally calibrated data for these costs. Plus, these costs are highly variable between individuals, so adding expenses might have had the perverse effect of making our model less accurate and more difficult to interpret. Likewise, the addition of spouses, partners, and children, and the modeling of salary increases, would have made our tax and IBR calculations far more complex. We ultimately decided in favor of simplicity, and excluded these additional factors in order to focus on the most reliably determinable expenses and repayment options.

C. Debt Service

The Debt Wizard includes debt intervals between $60,000 and $250,000. We chose these intervals based on typical amounts that

[7] Under IBR, a graduate's monthly debt payment is limited to a percentage of her income with certain allowances for basic living expenses. *See* 34 C.F.R. § 685.221 (2013). Currently, monthly IBR payment is calculated as follows: 15% ([Adjusted Gross Income] - 150% [Poverty Rate]).

are borrowed by Michigan Law students. Among graduates with law school educational debt, the lowest total at graduation that our financial aid office typically sees is $60,000, while the highest amount that a hypothetical student could borrow is about $250,000, based on the current student budget. The average law school debt for a recent Michigan Law graduate was $117,000.[8] The Debt Wizard displays the four debt repayment options that Michigan Law alumni most commonly choose from: standard, 10-year repayment; extended, 25-year repayment; IBR; and Michigan Law's Debt Management Program.

The default repayment schedule for federal student loans requires equal monthly payments over 10 years. Graduates with more than $30,000 in student loan debt can elect an extended repayment schedule with a fixed, monthly payment for 25 years. Under both the 10-year schedule and 25-year schedule, the monthly payment amount is a fixed amount based on the graduate's debt balance.

IBR allows a graduate to cap her monthly payment at 15% of her disposable income.[9] The graduate must reapply for IBR annually and, in order to qualify, she must demonstrate a "partial financial hardship" – essentially, the IBR payment must be lower than her payment would be under the 10-year repayment schedule. We used gross income as an approximation for Adjusted Gross Income ("AGI") and plugged that figure into a nonprofit website's online IBR calculator to determine monthly IBR payment.[10] Since we used an approximation for AGI, the resulting calculations are just estimates, but we think that our model provides a more precise and accurate estimate than many students are likely to calculate on their own.

Recent Michigan Law graduates can receive repayment assistance

[8] Average debt at Michigan Law compares favorably to the average debt incurred by law students at peer schools and is among the lowest average debt loads at graduation for the Top 14 law schools according to data reported to the American Bar Association. In 2012, only 5 of the Top 14 law schools (including Michigan Law) reported average debt between $110,000 and $120,000. The lowest average debt in the Top 14 was $110,000, while the highest was $157,000.

[9] *See supra* note 7.

[10] *Income-Based Repayment Calculator (15% version)*, FINAID, www.finaid.org/calculators/ibr.phtml (last visited Aug. 18, 2013).

through the Michigan Law Debt Management Program.[11] Michigan Law covers all or a portion of the student's IBR payments on a sliding scale based on income for up to 10 years. Other law schools offer similar school-sponsored loan repayment programs, but some school-sponsored programs have significant barriers to entry or exit, are restricted to lawyers in qualifying public interest careers, only cover a fraction of law school loans, or have other qualification requirements. Qualification under the Michigan Law program is straightforward: any recent graduate with relatively low-income and legal employment is eligible to participate.[12] We used the monthly IBR payment generated by our IBR calculations to estimate the Michigan Law Debt Management Program payment.

The 25-year repayment and IBR options both reduce a graduate's monthly payment while extending the term of repayment. However, graduates who pursue qualifying public service employment and make on-time monthly payments for 10 years can apply for Public Service Loan Forgiveness from the federal government.[13] So, for graduates who are pursuing public service careers, it might make sense to minimize the monthly payment while waiting for forgiveness. For graduates in the private sector, loan forgiveness occurs at 25 years.[14]

III.
FUTURE DEVELOPMENTS

Although we have detailed cost-of-living information from the BAH rate data, we were unable to find career data of comparable breadth. Anecdotally, of course we know that a recent graduate in a secondary legal market probably has a lower income than her

[11] Michigan Law first implemented a Debt Management Program in 1985, and it has been through several iterations. Our current income-based Debt Management Program replaced a prior version that is still utilized by graduates of earlier years. *See Debt Management/Loan Repayment Assistance Program*, UNIVERSITY OF MICHIGAN LAW SCHOOL, www.law.umich.edu/alumniandfriends/giving/Pages/DebtManagementProgram.aspx (last visited Aug. 18, 2013).

[12] Graduates must first enter the program within five years of graduation. *See id.*

[13] *See* 34 C.F.R. § 685.221 (2013).

[14] *Id.*

counterpart in a larger city. But, to what extent are salaries lower in secondary markets? What is the degree of variation? While many law firms report salary data, comprehensive market-based salary data is hard to come by outside of the private legal practice context. The only distinction that we were able to derive from the available data was national, not market-specific: virtually no recent graduates find a public interest job making more than $75,000. However, beyond this basic distinction for public interest salaries, the Debt Wizard cannot tell a student how likely she is to receive a particular salary in a particular market. Unfortunately, NALP does not publish comprehensive salary data broken down by job type and location. This means that although the BAH data shows that, for example, students should expect housing in New York City to be more expensive than in Detroit, the available data does not tell us whether public interest lawyers are paid more in New York than in Detroit. The trend toward law schools publishing comprehensive, transparent graduate employment reporting[15] may well lead to the availability of more refined data in the future.

One challenge for maintaining the relevance of an undertaking like the Debt Wizard is the constantly evolving regulatory framework. New loans issued after July 1, 2014, will be eligible for a lower, monthly IBR payment capped at 10% of disposable income as opposed to the current 15% calculation. Additionally, debt forgiveness for graduates in the private sector will occur after 20 years instead of 25 years.[16] As a stopgap measure for 2012 and 2013, President Obama issued an executive order creating a new Pay As You Earn ("PAYE") program, which uses a 10% income-based monthly payment similar to the expected changes to IBR.[17] But, PAYE is a temporary program and, for future law students, it is unclear whether PAYE will be available as a separate program or be

[15] *See*, *e.g.*, Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012); Kyle P. McEntee & Patrick J. Lynch, *Take This Job and Count It*, 2 J. of L. (1 J. LEGAL METRICS) 309 (2012).

[16] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 2213 (2010); *see also* 20 U.S.C. § 1098e(e).

[17] *See* Tamar Lewin, *President to Ease Student Loan Burden for Low-Income Graduates*, N.Y. TIMES, Oct. 26, 2011, at A15.

merged into the existing IBR program after the statutory changes take effect in 2014. Many current law students appear to be eligible for lower monthly payments under these two programs, but the details of how these programs will be administered in the long-term are not settled. Once the government promulgates new regulations governing these changes, we will update the Debt Wizard to include a 10% option.

IV. CONCLUSION

Students have long had difficulty visualizing how student loan payments will affect their post-graduate financial outlook. Many students are planning to move to a new city after graduation, and compounding that uncertainty, a professional lifestyle is totally unfamiliar territory: some are expecting to be financially independent for the first time in their lives. This issue is not exclusive to law students, either. The U.S. Consumer Financial Protection Bureau has an initiative to educate student borrowers about their loan options and to encourage colleges and universities to provide plain-language counseling information precisely because some students have a hard time understanding their options.[18] Certainly many financial aid offices, including Michigan Law's, offer individual counseling to address concerns about budgets and funding, but the Debt Wizard creates a self-service option that allows students to grapple with the issues in fairly simple terms from the earliest stages of the process.

Still, while the financial outlay for tuition and living expenses is without question a key factor, it is but one aspect of a complicated picture. Focusing exclusively on the outlay ignores the opportunities of law school. Even from a purely financial perspective, many law school graduates come out ahead, because lawyers tend to earn more money than workers without law degrees. Of course, graduates of highly regarded law schools have higher earning potential: the median salary for a 2011 Michigan Law graduate was $147,500

[18] Richard Cordray, *Prepared Remarks in a Press Call about the "Financial Aid Shopping Sheet"*, CONSUMER FINANCIAL PROTECTION BUREAU (July 23, 2012), *available at* www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-in-a-press-call-about-the-financial-aid-shopping-sheet/.

for the first year of employment, compared to the national median starting salary for any law school graduate of $60,000.[19] However, even this relatively low median starting salary for all law school graduates is greater than $55,432, which is the national median for full-time, salaried workers with a bachelor's degree at *any experience level*.[20] Simply put, the outlay for law school can be daunting, but law school graduates potentially earn a lifetime of higher earnings.[21]

Further, an exclusive focus on the worst case financial scenario ignores important considerations for prospective students choosing whether to go to law school. A career in the law can be stimulating and fulfilling in a way that few fields can challenge – and for a student attracted to the relatively unique work of lawyering, the necessary first step is to attend law school. We encourage students to consider finances when making their decisions along with postgraduate career outcomes, student culture, fit, academic reputation, strength of alumni network, and other criteria which affect students' success in law school and in their future careers.

The Debt Wizard is only one tool for students to use in envisioning their futures. And, given the inherent uncertainties, the best that we can offer is an estimate of how we think things will look in those students' futures. However, we created the Debt Wizard because, despite its flaws, we think that it provides a more accurate and reliable model of debt repayment than other online tools that are currently available to students.

# # #

[19] *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC. (Aug. 2012), www.nalp.org/august2012research.

[20] *Earnings and unemployment rates by educational attainment*, BUREAU OF LABOR STATISTICS (May 22, 2013), *available at* www.bls.gov/emp/ep_table_001.htm.

[21] For a more robust discussion on this point, *see* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree* (Apr. 13, 2013) (working paper), *available at* ssrn.com/abstract=2250585.

THE INCREASINGLY LENGTHY LONG RUN OF THE LAW REVIEWS

LAW REVIEW BUSINESS 2012 – CIRCULATION AND PRODUCTION

Ross E. Davies[†]

This article is the latest in a series of simple annual studies of the sales of some leading law reviews, undertaken with an eye to getting an admittedly rough and partial sense of the state of publishing in the legal academy. Over the years, the data itself has turned out to be a little bit interesting in spots. More interesting (perhaps), and more amusing and worrisome (certainly), have been the continuing small discoveries that some law reviews report relatively low paid circulation numbers to the U.S. Postal Service (which appear only in tiny-type government forms buried in the rarely read front- or back-matter of the reporting law review), but then tout higher sales numbers in promotional sections of their websites. It is reminiscent of the way some law schools have number-fudged their presentation of other kinds of data to, for example, *U.S. News & World Report*.[1]

The law review-school comparison might prompt the reader to wonder light-heartedly how many law school deans were once law review editors. But answering that question would be too easy, and

---

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*. Thanks to Cattleya Concepcion.

[1] *See, e.g.*, Ross E. Davies, *Law Review Circulation 2011: More Change, More Same*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 179 (2012); Ross E. Davies, *The Dipping Point: Law Review Circulation 2010*, *in* 2011 GREEN BAG ALM. 547; Ross E. Davies, *Law Review Circulation 2009: The Combover*, *in* 2010 GREEN BAG ALM. 419; *Law Review Circulation*, *in* 2009 GREEN BAG ALMANAC 164.

TOP 10 STUDENT-EDITED LAW REVIEWS
BASED ON TOTAL PAID CIRCULATION IN 2012

Harvard Law Review	1722
Yale Law Journal	1508
Cornell Law Review	1150
Columbia Law Review	1047
Michigan Law Review	925
University of Chicago Law Review	801
Stanford Law Review	727
Texas Law Review	663
Vanderbilt Law Review	650
NYU Law Review	599

too far afield from the focus here on publishing in the legal academy. There is, however, another question whose answer might be more interesting, and more likely to lead to intriguing comparisons. The question: How have the size and composition of law review editorial staffs changed over time, in absolute terms and in terms of their relationship to the product they put out? Possible comparisons will probably suggest themselves.

This year's report covers the usual ground relating to paid circulation and associated editorial behavior. It also offers a limited and tentative first take on the production question.

I.
TOTAL PAID CIRCULATION: EXCEPTION AND ACCURACY

Both circulation numbers and editorial behavior in 2012 generally suggest that neither the trend in circulation nor the character of editorial culture is changing much – with one small but notable exception on the circulation front.

But first a note about the presentation of circulation data. Appendix A at pages 259 to 262 below contains the usual "Total Paid Circulation" tables.[2] The coverage in those tables is not as comprehensive as it was last year. The tables are there simply to track trends and identify anomalies. For those purposes, limiting coverage to the past few decades (40 years this time around) and a substantial number of leading journals (18 this time around) seems – based on a few years' experience – like a reasonable way to keep an eye on trends without needlessly wasting paper and straining eyes with an excess of extra and extra-tiny names and numbers.

A.
The Notable Exception: Michigan

The bottom few rows of the "Total Paid Circulation" tables in Appendix A show that for most law reviews, the downward trend continues, mostly slowly and almost entirely without pause. But for one leading journal, 2012 saw a large uptick – large in proportion to 2011, not large in total quantity of issues sold, of course, in this world of scholarly journals with small total circulations. Nevertheless, small numbers can make a difference in things like rankings. (See, for example, the rankings of law schools by *U.S. News*.)

The *Michigan Law Review*, the flagship student-edited journal at the University of Michigan Law School, saw its paid circulation jump from 777 to 925 – a 19% increase – between 2011 and 2012. There is no obvious explanation for this development, but it is quite clear that the jump did not come from paid subscriptions. It came, oddly enough, from a separate category that tends to be at or near zero for most law reviews in most years: "Paid Circulation Outside the Mails Including Sales Through Dealers and Carriers, Street Ven-

[2] The tables are labeled "Total Paid Circulation" even though the caption of the line on U.S. Postal Service Form 3526 from which the data in the tables is drawn was changed to "Total Paid Distribution" a while ago. "Circulation" just seems like the more generally understood term for sales of a periodical. And it is the term that readers of this study are accustomed to using in this context. In any event, the USPS's changed terminology and this study's unchanged terminology do not affect the numbers themselves.

dors, Counter Sales, and Other Paid Distribution Outside USPS." Glance for a moment at Appendix B at pages 263 to 265 below, where details from the *Michigan Law Review*'s USPS Form 3526s for 2011 and 2012 are reproduced. The circled numbers boil down to this:

	2011	2012
Regular paid subscriptions	718	681
Sales through dealers, carriers, street vendors, etc.	59	244
Total paid sales	777	925

So, while the *MLR*'s regular paid subscriptions continued to decline in line with the overall law review market, its other sales moved counter to the market, and dramatically so. They more than quadrupled in a single year.

It will be interesting to see if this extraordinary little development is an early sign of a rebound in the market for ink-on-paper legal scholarship generally, or if the rebound is geographically limited – perhaps just to Michigan, or even just to Ann Arbor. And it might be equally interesting to learn just who has had so much success selling non-subscription copies of the *MLR*. Barnes & Noble? Amazon? Publishers Clearing House? Airport newsstands? Street vendors? Just imagine: "Extra! Extra! Read all about it! First-rate legal scholarship hot off the presses!" It sounds very good to me.

B.
The Elusiveness of Accuracy: Virginia and Stanford

Struggles with forthrightness persisted in 2012 at some top law reviews.

The *Virginia Law Review*, for example, continued to claim that it "has a circulation of over 1,700" despite the fact that its paid circulation has been less than that for more than a decade.[3] Indeed, the *VLR* has not even published, let alone sold, that many issues of itself since

[3] *See, e.g.*, Davies, *The Dipping Point*, note 1 above, at 547.

2002. Could it be a violation of the University of Virginia's justly famous code of honor for a student group to persistently post false data about itself – data contradicted by the student group's own federally mandated annual filings with the U.S. Postal Service – on a university website?[4] Unlikely, at least in this case. In order to be sanctionably dishonorable, a lie must be "[s]ignificant,"[5] and law review circulation data probably isn't. In addition, the offense must be an "[a]ct,"[6] and it seems likely that current and recent *VLR* editors are guilty of, at worst, the inaction of failing to correct a claim that was false when it was first made in 2005 and has merely been made more obviously false by the passage of time and the corresponding decline in the *VLR*'s paid subscriptions.[7]

But even if it is just an insignificant little lie, why do it? Besides, the increasing extremity of the "circulation of over 1,700" puffery (the real number for the year 2012 was 304) suggests that the editors are moved by a truthy sense of the extent to which high sales of

---

[4] *Compare, e.g.*, Appendix A at page 261 below (compilation of data drawn from reports published in the *Virginia Law Review* about the *Virginia Law Review*'s paid distribution), *with* Appendix C at pages 266 to 267 below (reproducing details from the *Virginia Law Review*'s website from 2010, 2012, and 2013), *then see Overview, University of Virginia Honor Committee*, UNIVERSITY OF VIRGINIA, www.virginia.edu/honor/overview/ (last visited Aug. 17, 2013):

> By today's standard, an Honor Offense is defined as a Significant Act of Lying, Cheating or Stealing, which Act is committed with Knowledge. Three criteria determine whether or not an Honor Offense has occurred:
>
> - Act: Was an act of lying, cheating or stealing committed?
> - Knowledge: Did the student know, or should a reasonable University student have known, that the Act in question was Lying, Cheating, or Stealing?
> - Significance: Would open toleration of this Act violate or erode the community of trust?
>
> Although a student should always conduct himself honorably, a student is only formally bound by the Honor System in Charlottesville and Albemarle County, and elsewhere at any time when he identifies himself as a University of Virginia student in order to gain the reliance and trust of others.

[5] *Id.*

[6] *Id.*

[7] *See* Appendix C. Reasonable minds can and do differ, however, about whether inaction is subject to regulation. *See, e.g.*, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (all four opinions).

the print edition of their journal are evidence of its importance and influence. And that makes them seem silly, not weighty.

And then there is the *Stanford Law Review*. Early in 2012, the *Wall Street Journal*'s *Law Blog* published a story about the 2011 edition of this study. The *WSJ Law Blog* reported that:

> this latest study[] tweaks the Stanford Law review, which says on its website that about "2,600 libraries, attorneys, judges, law firms, government agencies, and others subscribe to the print edition."
>
> But according to U.S. Postal Service records, the law review has a total paid distribution of 974 and has been printing a total of 1,206 copies.

The blog then quoted a response from the *Stanford Law Review*, whose president said

> the figure was "simply out of date." It has since been removed from our website.[8]

Alas, the *SLR* president's statement was half true, but also half false. The 2,600 figure was indeed gone from the *SLR*'s website. But it was not "out of date." It had never been up-to-date – had never been accurate – in the first place. According to the *SLR*'s own reports to the U.S. Postal Service, published in the *SLR*'s own pages, the *SLR*'s paid circulation has never exceeded 2,350 (which it reached, briefly, in the early 1980s), except for one wildly anomalous and almost certainly erroneous report of 8,850 subscribers in the year 2000. (The 8,850 count, if it were real, would have been more than twice the *Harvard Law Review*'s circulation at that time and more than triple the *Yale Law Journal*'s, as well as being both (a) not 2,600 and (b) more than triple the highest total the *SLR* has reported in any other year, before or since. For a chance to figure out what happened at the *SLR* in the year of the 8,850, see Appendix D at pages 268 to 269 below.) In other words, the 2,600 figure

[8] Joe Palazzolo, *Law Review Circulation: A New Low*, WSJ LAW BLOG (Feb. 29, 2012, 10:35 AM), http://blogs.wsj.com/law/2012/02/29/law-review-circulation-a-new-low/ (odd placement of quotation marks in the original).

was an exaggeration – and quite possibly a perfectly innocent, mistaken one – from the moment it came from wherever it came from to the moment it was removed from the *SLR*'s website.[9]

It might have been better for the *SLR* president to say something like, "I have no idea how we screwed up, but we did, and now we've fixed it." If the *WSJ Law Blog* does a follow-up story, one can only hope that its new president will give an answer of that sort (or even better, a plausible explanation for the mysterious 2,600), but will not then declare that the old president's earlier statement is now inoperative.[10]

Law reviews are famously and valuably committed to accuracy. They make vast investments of human resources in the checking and correcting of even the smallest and most peripheral of factual and legal claims in the articles they publish. (We law professors, all of whom are less than perfect and many of whom are aware of that fact, should be grateful.) Perhaps every law review with a website, or an obligation to report circulation data to the U.S. Postal Service, or both, should assign one editor responsibility for giving the journal's own reports and website the same kind of careful fly-specking that it bestows on the work of its authors. It would be a small price to pay (and a price paid in unpaid labor at that) to improve the accuracy of the journal's self-portrayal and reduce the chances of an embarrassing episode or two of inaccuracy.

II.
LAW REVIEW PRODUCTION:
A FIRST QUICK LOOK AT 1890 TO 2010

Speaking of the law reviews' extravagant investments of editorial time in the articles they publish, the data relating to law review productivity tabulated in Appendix E at pages 270 to 273 below seems to indicate that those investments have been at an all-time

[9] *See* Davies, *Law Review Circulation 2011*, note 1 above, at 182-84.

[10] *See* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 346 (5th ed. 2008) ("inoperative"); *see also, e.g.*, Michael J. Towle, *On Behalf of the President: Four Factors Affecting the Success of the Presidential Press Secretary*, 27 PRESIDENTIAL STUD. Q. 297, 307-10 (1997).

high in recent years. Based on what is certainly a too-small sample – just ten leading law reviews, and just one year of numbers out of each decade for each journal since its founding – it appears that average student membership ballooned between 1960 and 1990, and has steadied since then. (See *Fig. 1: Law Review Size (staff), 1890-2010*, on the facing page.) During roughly the same period of time, the average size of the law reviews themselves – measured by simple page counts – appears to have trended upward pretty steeply as well, although not as steeply as staff size. (See *Fig. 2: Law Review Size (pages), 1890-2010*.)

With so little data to consider at the moment – and with so much more data likely to be available for next year's study – it would be a mistake to make any strong claims now. A few tentative observations, however, might not be out of order. Here are three:

1. Who should get the credit, or the blame? The shape of *Fig. 2* – the graph of journal size – suggests that the people primarily responsible for the great enlargement of law reviews are those who were editors during the period from the 1950s to roughly 1990. It appears, however, that the relatively junior folks who have edited the law reviews in recent years have managed to slow, even slightly reverse, that very long run of law review lengthening.

Whether responsibility for the great law review enlargement should be considered an honor or a source of embarrassment depends on your views about the form and content of modern legal scholarship. These sketchy initial results might be considered a caution, then, to those aging alumni of elite law reviews who are prone to complain about the profligacies of modern legal scholarship in general and law review culture in particular. It may be that next year's more detailed study will show that those gray-haired former law review editors met the enemy back in the good old days, and it was themselves.[11]

---

[11] *Cf.* WALT KELLY, THE POGO PAPERS 1 (1953):

> There is no need to sally forth, for it remains true that those things which make us human are, curiously enough, always close at hand. Resolve then, that on this very ground, with small flags waving and tinny blasts on tiny trumpets, we shall meet the enemy, and not only may he be ours, he may be us.

FIG. 1: LAW REVIEW SIZE (STAFF), 1890-2010

The average size – by students on mastheads – of flagship law reviews at the Penn, Harvard, Yale, Columbia, Michigan, Boalt, Virginia, NYU, Chicago, and Stanford law schools, based on a one-year sample from each decade.

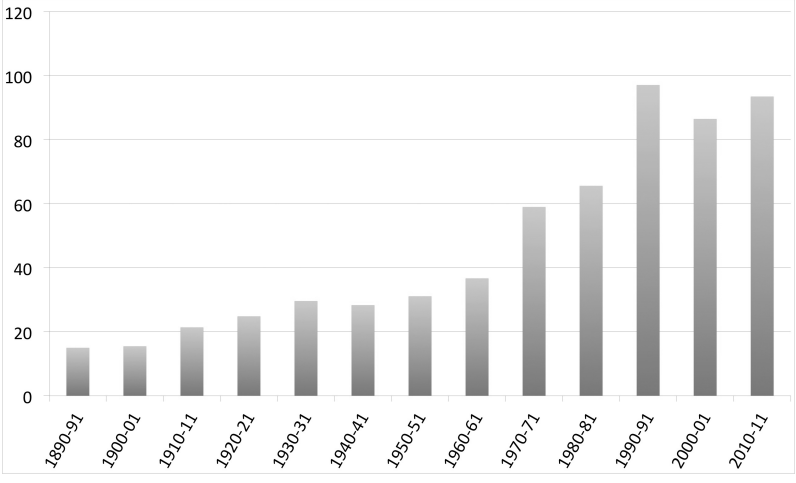
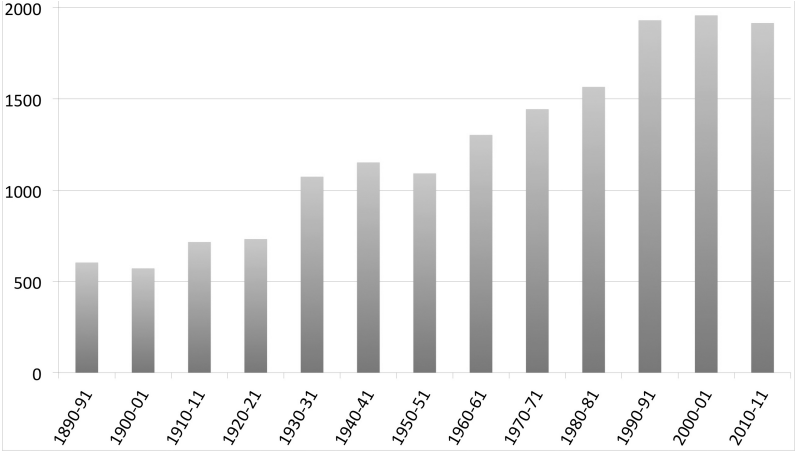


FIG. 2: LAW REVIEW SIZE (PAGES), 1890-2010

The average length – in pages – of flagship law reviews at the Penn, Harvard, Yale, Columbia, Michigan, Boalt, Virginia, NYU, Chicago, and Stanford law schools, based on a one-year sample from each decade.

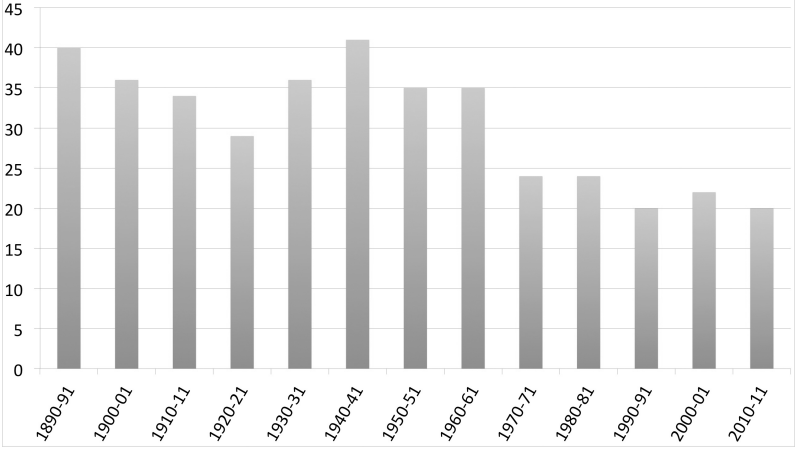


2. How much help is too much? It does not take a math whiz to figure out that if page counts are growing quickly, but staff sizes are growing even faster – as the graphs on the previous page show – then the ratio of pages to staff is going to decrease. That is, the average number of law review pages produced by the editorial effort of the average law review staffer will drop. And so it seems to have done, for most of the second half of the 20th century.

In 1940, it took on average 28 students to publish 1,152 pages of legal scholarship – about 41 pages per law review student staff member. In 1990, it took on average 97 students to publish 1,930 pages – about 20 pages per staffer. As the graph below – *Fig. 3: Law Review Efficiency, 1890-2010* – indicates, efficiency rates seem to have steadied in recent years. And so it may be that next year's more detailed study will show that middle-aged lawyers who remember the days when their lean law review boards worked long nights and weekends to publish their journals are misremembering the leanness, if not the long nights and weekends.

FIG. 3: LAW REVIEW EFFICIENCY, 1890-2010

The average pages published per member by flagship law reviews at the Penn, Harvard, Yale, Columbia, Michigan, Boalt, Virginia, NYU, Chicago, and Stanford law schools, based on a one-year sample from each decade.



Just as an increase in law review pages published can be good or bad (depending on your opinion of what is printed on those pages), so too an increase in the amount of staff resources law reviews devote to each page published can be a good or bad (depending on your opinion of the value of student editorial assistance).

3. What is, and who was, a law review editor? Measuring and comparing law review circulation is pretty easy (although actually finding the data can be a pain in the neck): a subscriber is a subscriber is a subscriber. Much the same can be said about law review size: a page is a page is a page (although the number of words on a page can vary substantially, depending on page size and type size, and a page that consists largely of footnotes filled with superfluous citation strings is different from a page that contains an original and useful thought).

The same cannot be said for law review staff size. An editor is not an editor is not an editor. For example, the much higher editorial productivity that shows up in patches before 1970 might be at least in part due to genuine faculty support for a law review – that is, faculty who actually pulled laboring oars as editors.[12] For another example, what are we to make of the separate "Editorial Board" and "Business Board" in the mastheads of the *Virginia Law Review* from the late 1950s to the late 1960s?[13] Both boards counted among their members highly accomplished students, or at least students who would go on to become highly accomplished lawyers. And how much does the work done by those old *VLR* Business Board members have in common with the work done by more recent law review members with titles that sound operational, such as the Treasurer and Social Chair of volume 101 (2001) of the *Columbia Law Review*? Finally, for yet one more example, how about the *NYU Law Review*'s long-gone "Evening Staff"?[14]

More research should and shall be conducted relating to all of these matters. Next year.

---

[12] *See, e.g.*, Michigan Law Review, *About Us: History*, at www.michiganlawreview.org/information/about/history (vis, Aug. 18, 2013).

[13] *See* 44 VA. L. REV. masthead (1958) *through* 54 VA. L. REV. masthead (1968).

[14] *See, e.g.*, 36 NYU L. REV. masthead (1961).

III.
ERRATA

Law review editors are not the only people who make mistakes. If you find any inaccuracies in the data presented here, or any errors in the analysis, please say so. Email corrections to rdavies@greenbag.org. Errors will be flagged and fixed in the next study, with credit given where credit is due.

APPENDIX A

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

Many law reviews take advantage of the U.S. Postal Service's low rates for qualifying periodicals. In return, they must share some "Ownership, Management, and Circulation" information:

> The publisher of each publication authorized Periodicals mailing privileges . . . must publish a complete statement of ownership, containing all information required by Form 3526, in an issue of the publication to which that statement relates . . . .

USPS, Domestic Mail Manual § 707.8.3.3. It is not difficult. Form 3526 is straightforward, and a journal can simply paste its completed form into the back of an issue. The tables on pages 260 to 262 below contain the "Total Paid Circulation" (aka "Total Paid Distribution") data from Form 3526s published in some leading law reviews. As the tables show, some journals are more compliant than others. The price of non-reporting can be substantial:

> If a publisher does not comply with the filing or publishing standards of 8.3 . . . [the USPS] may suspend or revoke the Periodicals mailing privileges, as appropriate.

USPS, Domestic Mail Manual § 707.8.3.4. On the other hand, we know of no case in which a law review has been sanctioned. So maybe negligent law reviews can rest easy, at least until they hear from a postmaster. For law review editors whose noncompliance goes beyond negligence, however, the price of false reporting could be higher and more personal under, for example, 18 U.S.C. § 1722:

> Whoever knowingly submits to the Postal Service or to any officer or employee of the Postal Service, any false evidence relative to any publication for the purpose of securing the admission thereof at the second-class rate, for transportation in the mails, shall be fined under this title.

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Penn	Harvard	Yale	Columbia	Michigan	Boalt
1972-73	*	9608	4200	*	*	*
1973-74	*	*	4200	3907	2947	2723
1974-75	*	10193	4250	3831	*	*
1975-76	2000	9374	4275	3828	3038	2734
1976-77	2000	9559	4273	3780	3069	2716
1977-78	2200	10100	4330	3746	3020	2637
1978-79	2250	9064	4462	4014	2998	2497
1979-80	2176	8760	*	3795	2950	2549
1980-81	2150	8836	4051	3790	2979	2342
1981-82	2150	9767	4126	3790	2985	2342
1982-83	1900	8389	4199	3561	2844	2342
1983-84	2080	8762	4092	4046	2771	2200
1984-85	1996	7390	3950	3227	2727	2168
1985-86	*	7705	3755	3164	2657	2014
1986-87	1708	7694	3755	2938	2604	1990
1987-88	1762	7325	3700	2947	2535	1990
1988-89	1628	6995	3700	2337	2481	1816
1989-90	1864	7016	3700	2913	2426	*
1990-91	1719	7768	3700	2676	2382	1740
1991-92	1781	6517	3700	2798	2332	1694
1992-93	1673	6070	3600	2525	2263	1690
1993-94	1673	6018	3500	2463	2256	1701
1994-95	1551	5204	3300	2381	2227	1696
1995-96	1446	5029	3300	2497	2125	1595
1996-97	1408	5454	3300	2365	*	1507
1997-98	1334	4367	3300	2273	1925	1422
1998-99	1347	4574	3300	2227	2010	1639
1999-00	1191	4223	2705	2147	1841	*
2000-01	1043	4013	2705	2082	1697	1305
2001-02	1293	3735	2677	2069	1654	1253
2002-03	1233	3491	2577	2029	1571	1196
2003-04	1180	3451	2579	1875	1419	1045
2004-05	1056	2945	2712	1743	1207	1040
2005-06	1101	2837	2296	1638	925	992
2006-07	1093	2853	1782	1578	862	1178
2007-08	923	2610	1915	*	783	884
2008-09	844	2029	1725	1364	711	820
2009-10	669	2021	1615	1140	902	910
2010-11	569	1896	1520	1076	777	719
2011-12	478	1722	1508	1047	925	593

* Form 3526 report not found for this year.

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Virginia	NYU	Chicago	Stanford	Cornell	Duke
1972-73	*	*	*	1576	*	*
1973-74	3249	*	2009	1795	3496	1200
1974-75	3000	2222	1975	*	3378	1200
1975-76	2850	2179	1951	*	3410	*
1976-77	2750	2143	2033	*	3650	1200
1977-78	2650	*	2068	*	3350	1215
1978-79	2506	2105	2068	1546	3350	1326
1979-80	*	2100	2068	*	3350	1326
1980-81	2396	2173	1827	*	3350	1296
1981-82	2387	2092	1993	2056	*	1411
1982-83	2443	2074	2150	2350	3603	1440
1983-84	2400	2069	2300	*	*	1378
1984-85	2161	*	2617	*	*	1412
1985-86	*	*	*	*	3682	1445
1986-87	2200	*	*	*	*	1469
1987-88	2029	*	*	*	*	1335
1988-89	1958	*	*	*	*	1295
1989-90	*	*	2229	*	*	1268
1990-91	1882	*	2205	*	*	1255
1991-92	*	*	2454	*	*	1253
1992-93	1840	*	*	*	*	1187
1993-94	1680	*	1979	*	3250	*
1994-95	1670	*	2048	*	3252	*
1995-96	1550	*	1959	*	2958	*
1996-97	1552	*	1922	*	2890	*
1997-98	1536	1362	1875	*	2803	*
1998-99	*	1222	1872	*	2805	*
1999-00	*	1200	1870	8850	2859	*
2000-01	*	1183	2062	*	2845	*
2001-02	1849	1159	1769	1434	2816	*
2002-03	1068	1211	1845	1280	2288	*
2003-04	644	1209	*	1112	1766	*
2004-05	616	867	*	1112	1827	*
2005-06	483	999	*	1112	1712	*
2006-07	526	990	*	1089	1497	*
2007-08	530	956	1525	1008	1458	957
2008-09	542	763	1525	961	1319	790
2009-10	443	706	1485	974	1237	917
2010-11	428	662	951	915	1183	583
2011-12	304	599	801	727	1150	537

* Form 3526 report not found for this year.

TOTAL PAID CIRCULATION

1972-2012 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Georgetown	Vanderbilt	UCLA	Texas	Minnesota	Boston U
1972-73	*	1700	*	*	*	*
1973-74	1743	1775	1750	*	2130	*
1974-75	1766	2100	1850	2000	2342	4882
1975-76	1981	1984	*	2150	1732	4844
1976-77	1973	1995	1900	2275	1724	4699
1977-78	2100	1995	1351	2135	1608	4790
1978-79	3130	2046	1520	2220	1621	*
1979-80	3197	1995	1536	2349	1527	4691
1980-81	3058	2046	1563	2349	1501	4559
1981-82	2950	2046	1277	2347	1513	3749
1982-83	3100	1995	1251	2396	1421	3540
1983-84	3200	1995	1361	2396	1378	3433
1984-85	3000	2001	1400	*	1373	3961
1985-86	1116	2020	1400	1960	1345	2274
1986-87	1116	1996	*	1684	1282	2801
1987-88	*	1550	1192	*	1258	2767
1988-89	*	1359	1192	*	1262	2617
1989-90	3043	1253	1192	*	1230	3340
1990-91	2782	1281	1134	1548	1217	2701
1991-92	2260	1330	1192	1489	1251	2574
1992-93	3955	1220	1083	1407	1202	183
1993-94	1514	1252	940	1261	1163	1860
1994-95	1462	1252	940	881	1023	1636
1995-96	*	1267	990	1137	1184	784
1996-97	1536	1287	1000	1123	1053	602
1997-98	1487	1265	1000	1645	1014	550
1998-99	1471	1165	1000	1628	947	621
1999-00	*	952	921	1526	782	549
2000-01	1398	960	922	1488	757	879
2001-02	*	855	695	1449	868	547
2002-03	*	*	650	1372	802	538
2003-04	*	800	563	1125	768	538
2004-05	*	850	648	1056	728	538
2005-06	1027	850	520	963	1778	538
2006-07	924	850	521	963	732	538
2007-08	1068	850	684	941	690	538
2008-09	*	850	632	860	661	533
2009-10	546	650	435	804	609	533
2010-11	*	650	542	748	581	483
2011-12	*	650	529	663	527	*

* Form 3526 report not found for this year.

APPENDIX B

THE 925 MICHIGAN LAW REVIEWS

The next two pages contain details from the *Michigan Law Review*'s U.S. Postal Service Form 3526s for 2011 and 2012. The 2011 form shows a "Total Paid Distribution" of 777, which includes an unusually large (compared to most leading law reviews) 59 issues – roughly 8% of the total – sold via channels other than paid subscriptions. The 2012 form, however, is much more unusual. It shows a "Total Paid Distribution" of 925, which includes 244 issues – roughly 26% – sold via channels other than paid subscriptions.

UNITED STATES POSTAL SERVICE®

Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title	2. Publication Number	3. Filing Date
Michigan Law Review	3 4 5 - 2 0 0	July 18, 2011
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Monthly Except Jan, July, Aug, and Sept	8	$60.00/Domestic $70.00/Foreign

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)* — Contact Person: Maureen Bishop; Telephone *(Include area code)*: 734-763-6100

625 South State Street, Ann Arbor (Washtenaw County) MI 48109-1215

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

625 South State Street, Ann Arbor, MI 48109-1215

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Michigan Law Review Association, 625 S State Street, Ann Arbor, MI 48109-1215

Editor *(Name and complete mailing address)*

Amy Murphy-625 South State Street, Ann Arbor, MI 48109-1215

Managing Editor *(Name and complete mailing address)*

Charles Weikel-625 South State Street, Ann Arbor, MI 48109-1215

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Michigan Law Review Association	625 S State Street, Ann Arbor, MI 48109-121
By the Regents of the University of Michigan	

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☒ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
Michigan Law Review	June 2011 (Vol. 109, No.8)

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			1120	1100
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	718	724
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	59	65
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®)	None	None
c. Total Paid Distribution *(Sum of 15b (1), (2), (3), and (4))*			777	789

UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

1. Publication Title	2. Publication Number	3. Filing Date
Michigan Law Review	3 4 5 - 2 0 0	July 18, 2012
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Monthly Except Jan, July, Aug, and Sept	8	$60.00/Domestic $70.00/Foreign

7. Complete Mailing Address of Known Office of Publication *(Not printer)* *(Street, city, county, state, and ZIP+4®)*: 625 South State Street, Ann Arbor (Washtenaw County) MI 48109-1215 — Contact Person: Maureen Bishop — Telephone *(Include area code)*: 734-763-6100

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*: 625 South State Street, Ann Arbor, MI 48109-1215

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*: Michigan Law Review Association, 625 S State Street, Ann Arbor, MI 48109-1215

Editor *(Name and complete mailing address)*: Kimberly Ang, 625 South State Street, Ann Arbor, MI 48109-1215

Managing Editor *(Name and complete mailing address)*: Jack Morgan, 625 South State Street, Ann Arbor, MI 48109-1215

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Michigan Law Review Association by the Regents of the University of Michigan	625 South State Street, Ann Arbor, MI 48109-

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates)* *(Check one)*
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☒ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
Michigan Law Review	June 2012 (Vol. 110, No.8)

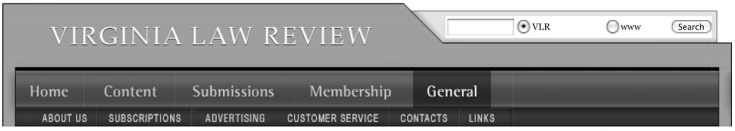
15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			1088	1080
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	681	685
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	244	240
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®)	None	None
c. Total Paid Distribution *(Sum of 15b (1), (2), (3), and (4))*			925	925

APPENDIX C

THE 1,700 VIRGINIA LAW REVIEWS

The next page contains details from three screen shots of the "About VLR" page on the *Virginia Law Review*'s website made in December 2010 (top), January 2012 (middle), and August 2013 (bottom). The claim that the journal "has a circulation of over 1,700" is the same on all three. In fact, the whole text block of which that claim is a part seems to have been unchanged at least during the time covered by these three screen shots. It may be that the opening line of the paragraph in which the "1,700" claim appears is an indicator of the last time this "About VLR" material was revised: "In 2005, the *Virginia Law Review* entered its ninety-first academic year as one of the most respected student legal periodicals in the country. . . ." (The "1,700" claim was not accurate even in 2005, when the VLR had a paid circulation of 616.) Perhaps 2013 would be a good year in which to change "ninety-first" to "ninety-ninth" – and "1,700" to "300."

Virginia Law Review 12/19/10 11:41 AM



ABOUT VLR

On March 15, 1913, a meeting was held in Minor Hall at the University of Virginia to consider establishing a law journal, to be published by the students of the Law School. On April 23, 1913, the *Virginia Law Review* was permanently organized. Volume I carries this forward:

> With this number the *Virginia Law Review* begs to introduce itself to an indulgent public. The editorial work is entirely in the hands of . . . students, not one of whom has had previous experience with work of this character. It is hoped that the crudities of this first effort in the line of published comment on the work of the courts may be less glaring in the future numbers when the editors have become more experienced.

In 2005, the *Virginia Law Review* entered its ninety-first academic year as one of the most respected student legal periodicals in the country. Its objective is to publish a professional periodical devoted to law-related issues that can be of use to judges, practitioners, teachers, legislators, students, and others interested in the law. Only in the legal profession do students have the responsibility for publishing a majority of the contributions to the professional literature. The *Law Review* currently has a circulation of over 1,700 and, when the pass-along readership rate is added, surpasses 17,000. In addition, the *Law Review* appears in electronic databases, including Westlaw, LexisNexis, and HeinOnline.

Currently in Print:
Vol. 96, November 2010, Issue 7

The National Convention Constitutional Amendment Method: Defects, Federalism Implications, and Reform
by Michael Rappaport

Multiple Gatekeepers
by Andrew Tuch

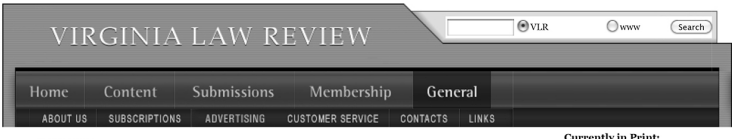
The Hidden Function of Takings Compensation
by Gideon Parchomovsky & Abraham Bell

Taking "Due Account" of the APA's Prejudicial Error Rule
by Craig Smith

***In Brief*:**
Recently Published Items

Schrödinger's Cross: The Quantum Mechanics of the Establishment Clause
Essay by Joseph Blocher

Virginia Law Review 1/20/12 10:55 PM



ABOUT VLR

On March 15, 1913, a meeting was held in Minor Hall at the University of Virginia to consider establishing a law journal, to be published by the students of the Law School. On April 23, 1913, the *Virginia Law Review* was permanently organized. Volume I carries this forward:

> With this number the *Virginia Law Review* begs to introduce itself to an indulgent public. The editorial work is entirely in the hands of . . . students, not one of whom has had previous experience with work of this character. It is hoped that the crudities of this first effort in the line of published comment on the work of the courts may be less glaring in the future numbers when the editors have become more experienced.

In 2005, the *Virginia Law Review* entered its ninety-first academic year as one of the most respected student legal periodicals in the country. Its objective is to publish a professional periodical devoted to law-related issues that can be of use to judges, practitioners, teachers, legislators, students, and others interested in the law. Only in the legal profession do students have the responsibility for publishing a majority of the contributions to the professional literature. The *Law Review* currently has a circulation of over 1,700 and, when the pass-along readership rate is added, surpasses 17,000. In addition, the *Law Review* appears in electronic databases, including Westlaw, LexisNexis, and HeinOnline.

Currently in Print:
Vol. 97, December 2011, Issue 8

Globalized Corporate Prosecutions
by Brandon L. Garrett

A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause
by Barry Friedman and Daniel T. Deacon

The Myth of Efficient Breach: New Defenses of the Expectation Interest
by Daniel Markovits and Alan Schwartz

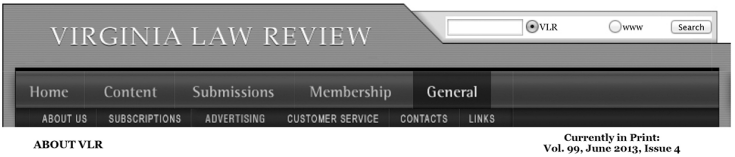
Reclaiming the Legal Fiction of Congressional Delegation
by Lisa Schultz Bressman

Securing Sovereign State Standing
by Katherine Mims Crocker

***In Brief*:**
Recently Published Items

PPACA in Theory and Practice: The Perils

Virginia Law Review 8/14/13 8:32 AM



ABOUT VLR

On March 15, 1913, a meeting was held in Minor Hall at the University of Virginia to consider establishing a law journal, to be published by the students of the Law School. On April 23, 1913, the *Virginia Law Review* was permanently organized. Volume I carries this forward:

> With this number the *Virginia Law Review* begs to introduce itself to an indulgent public. The editorial work is entirely in the hands of . . . students, not one of whom has had previous experience with work of this character. It is hoped that the crudities of this first effort in the line of published comment on the work of the courts may be less glaring in the future numbers when the editors have become more experienced.

In 2005, the *Virginia Law Review* entered its ninety-first academic year as one of the most respected student legal periodicals in the country. Its objective is to publish a professional periodical devoted to law-related issues that can be of use to judges, practitioners, teachers, legislators, students, and others interested in the law. Only in the legal profession do students have the responsibility for publishing a majority of the contributions to the professional literature. The *Law Review* currently has a circulation of over 1,700 and, when the pass-along readership rate is added, surpasses 17,000. In addition, the *Law Review* appears in electronic databases, including Westlaw, LexisNexis, and HeinOnline.

Currently in Print:
Vol. 99, June 2013, Issue 4

Constitutional Privileging
by Michael Coenen

A Constitutional Theory of Habeas Power
by Lee B. Kovarsky

The Dark Side of Town: The Social Capital Revolution in Residential Property Law
by Stephanie M. Stern

The Principal Problem: Towards a More Limited Role for Fiduciary Law in the Nonprofit Sector
by Natalie Brown

***In Brief*:**
Recently Published Items

The Trouble With Dignity And Rights Of Recognition
Essay by Neomi Rao

Noel Canning v. NLRB - Enforcing Basic

APPENDIX D

THE 8,850 STANFORD LAW REVIEWS

The image on the following page is a detail from the U.S. Postal Service Form 3526 published in the back of the October 2000 issue of the *Stanford Law Review*. The caption at the top of the first column containing hand-written quantities is:

Average No. Copies Each Issue
During Preceding 12 Months

The caption at the top of the second column containing hand-written quantities is:

No. Copies of Single Issue
Published Nearest to Filing Date

The caption at the left of the sixth row is:

Total Paid and/or Requested Circulation . . .

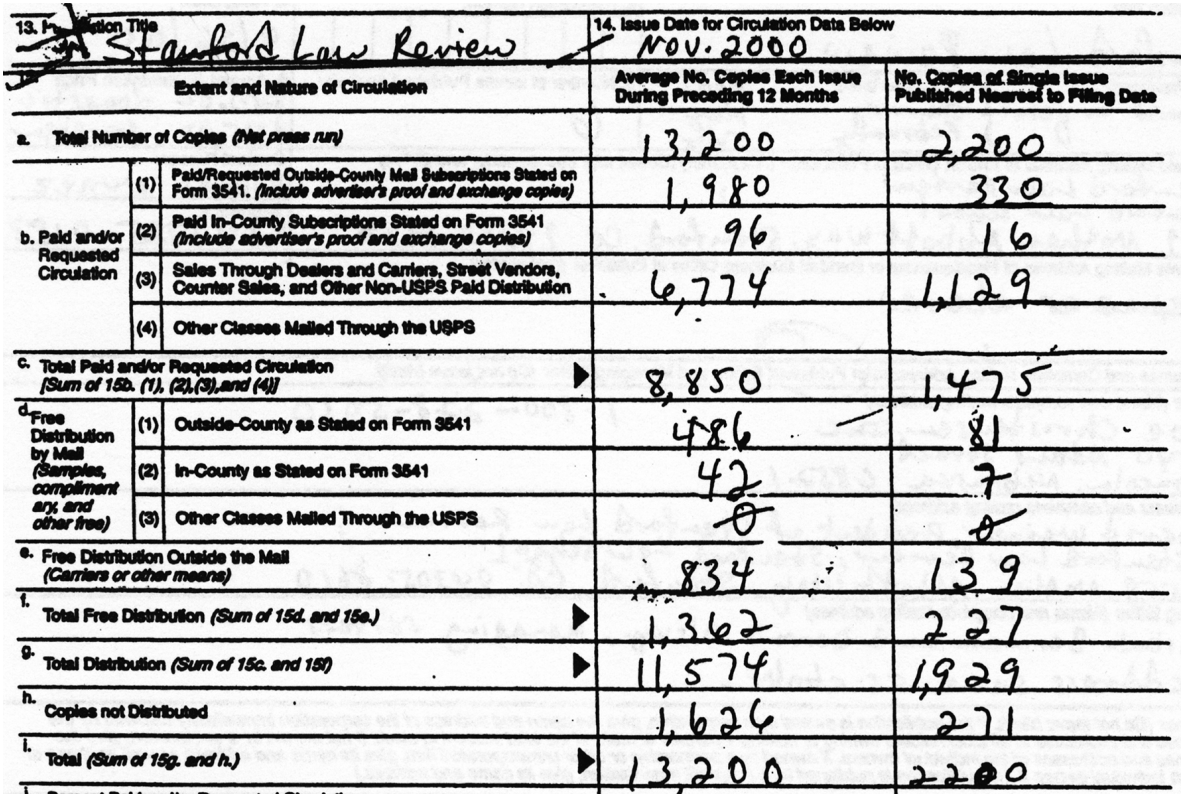
The quantity written in the sixth row of the first column is:

8,850

The quantity written in the sixth row of the second column is:

1,475

With that information about the form, and the knowledge that the *Stanford Law Review* published at that time (and still publishes today) six issues per year, the reader can probably figure out what happened.



13. Publication Title: Stanford Law Review			14. Issue Date for Circulation Data Below: NOV. 2000	
Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)			13,200	2,200
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies)	1,980	330
	(2)	Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)	96	16
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	6,774	1,129
	(4)	Other Classes Mailed Through the USPS		
c. Total Paid and/or Requested Circulation (Sum of 15b. (1), (2),(3),and (4))			8,850	1,475
d. Free Distribution by Mail (Samples, complimentary, and other free)	(1)	Outside-County as Stated on Form 3541	486	81
	(2)	In-County as Stated on Form 3541	42	7
	(3)	Other Classes Mailed Through the USPS	0	0
e. Free Distribution Outside the Mail (Carriers or other means)			834	139
f. Total Free Distribution (Sum of 15d. and 15e.)			1,362	227
g. Total Distribution (Sum of 15c. and 15f)			11,574	1,929
h. Copies not Distributed			1,626	271
i. Total (Sum of 15g. and h.)			13,200	2200

APPENDIX E

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

The tables on the following pages are a first take of a larger project to collect and present information on (1) the size, composition, and other key features of law review editorial staffs, and (2) the characteristics of the products law reviews put out. Here there is only a very sparse collection of data – just one year out of each decade since the late 19th century from ten of the most prominent law reviews now in existence, showing just the most basic of measures of:

- staffing (total headcount of student members of the law review, as listed on the masthead of the last – or best otherwise available – issue of each volume),
- output (total page count, as indicated by the last numbered page of the last substantive work in the last issue of each volume), and
- productivity (output divided by staffing).

It is a simple, crude, and incomplete presentation. But it is a start, and it does shed at least a glimmer of dim light on some of the essential features of the first commercial legal enterprise in which most of the participating students have been involved.

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

year	U. PENN. LAW REVIEW				HARVARD LAW REVIEW			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	39	*	808	*	4	15	399	27
1900	49	12	748	62	14	20	632	32
1910	59	19	664	35	24	28	687	25
1920	69	17	401	24	34	29	903	31
1930	79	43	1165	27	44	34	1325	39
1940	89	35	1125	32	54	40	1432	36
1950	99	44	1252	28	64	58	1408	24
1960	109	33	1194	36	74	57	1680	29
1970	119	57	1087	19	84	79	1976	25
1980	129	76	1540	20	94	89	1927	22
1990	139	91	1760	19	104	80	1964	25
2000	149	92	2191	24	114	82	2586	32
2010	159	106	2252	21	124	87	2134	25

year	YALE LAW JOURNAL				COLUMBIA LAW REVIEW			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	10	17	336	20	1	13	570	44
1910	20	18	675	38	11	22	807	37
1920	30	30	878	29	21	27	836	31
1930	40	35	1345	38	31	29	1399	48
1940	50	35	1516	43	41	36	1481	41
1950	60	27	1452	54	51	44	1077	24
1960	70	50	1414	28	61	26	1540	59
1970	80	64	1711	27	71	64	1557	24
1980	90	52	1904	37	81	67	1738	26
1990	100	156	2812	18	91	85	2122	25
2000	110	94	1545	16	101	88	2084	24
2010	120	105	2212	21	111	90	1932	21

year = year in which a volume began; **volume** = volume number; **staff** = number of students on the masthead; **pages** = last numbered page of last substantive work in a volume; **rate** = pages divided by staff; ***** = data not available.

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

year	MICHIGAN LAW REVIEW				CALIFORNIA LAW REVIEW			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	*	*	*	*	*	*	*	*
1910	9	20	746	37	*	*	*	*
1920	19	21	906	43	9	17	520	31
1930	29	20	1129	56	19	24	659	27
1940	39	29	1444	50	29	13	799	61
1950	49	20	1265	63	39	12	618	52
1960	59	35	1289	37	49	42	1019	24
1970	69	38	1575	41	59	67	1591	24
1980	79	64	1619	25	69	71	1763	25
1990	89	76	2328	31	79	93	1642	18
2000	99	92	2061	22	89	91	1950	21
2010	109	96	1578	16	99	119	1743	15

year	VIRGINIA LAW REVIEW				NYU LAW REVIEW[†]			
	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	*	*	*	*	*	*	*	*
1910	*	*	*	*	*	*	*	*
1920	7	33	679	21	*	*	*	*
1930	17	31	858	28	8	21	707	34
1940	27	33	1116	34	18	14	632	45
1950	37	25	1185	47	26	33	1069	32
1960	47	51	1514	30	36	38	1596	42
1970	57	78	1650	21	46	69	1234	18
1980	67	57	1562	27	56	63	1313	21
1990	77	90	1673	19	66	88	2017	23
2000	87	90	2081	23	76	90	1897	21
2010	97	94	2101	22	86	87	2111	24

year = year in which a volume began; **volume** = volume number; **staff** = number of students on the masthead; **pages** = last numbered page of last substantive work in a volume; **rate** = pages divided by staff; ***** = data not available.

[†] The odd numbering of early *NYU Law Review* volumes was due to some doubling up on years during World War 2.

LAW REVIEW PRODUCTION

1890-2010 FOR FLAGSHIP LAW REVIEWS AT SEVERAL FINE SCHOOLS

	U. CHICAGO LAW REVIEW				STANFORD LAW REVIEW			
year	volume	staff	pages	rate	volume	staff	pages	rate
1890	*	*	*	*	*	*	*	*
1900	*	*	*	*	*	*	*	*
1910	*	*	*	*	*	*	*	*
1920	*	*	*	*	*	*	*	*
1930	*	*	*	*	*	*	*	*
1940	8	20	819	41	*	*	*	*
1950	18	17	830	49	3	*	758	*
1960	28	13	782	60	13	22	994	45
1970	38	26	885	34	23	48	1166	24
1980	48	57	1094	19	33	60	1192	20
1990	58	65	1540	24	43	147	1445	10
2000	68	61	1510	25	53	85	1667	20
2010	78	59	1685	29	63	92	1402	15

year = year in which a volume began; **volume** = volume number; **staff** = number of students on the masthead; **pages** = last numbered page of last substantive work in a volume; **rate** = pages divided by staff; ***** = data not available.

The Post

GOOD SCHOLARSHIP FROM THE INTERNET

VOLUME 3 • NUMBER 2 • SUMMER 2013

The Post

VOLUME 3 • NUMBER 2 • SUMMER 2013

The Post operates on the same terms as the *Journal of Law*. In the interests of fidelity, and to preserve the real-time spirit of blogging, *The Post* does not correct typos in the original blog posts, and also refrains from sprinkling [sic]'s throughout. Please write to *The Post* at post@annaivey.com, and visit us at www.journaloflaw.us. ISSN 2157-9067 (print) and 2157-9075 (online).

INTRODUCTION

Anna Ivey[†]

I think the *Journal of Law*'s focus on scholarship that appears on blogs is helpful in identifying the kinds of work that is appropriate for blogs – work that is suggestive rather than definitive, quick takes, or in an area that's moving quickly. But I still have the nagging question: are law blogs relevant?

– Alfred Brophy, *Are Law Blogs (Still) Relevant?*, The Faculty Lounge blog, June 19, 2013

//

"Every day I check *SCOTUSblog* and *How Appealing* and *The Volokh Conspiracy*."

– Supreme Court Justice Elena Kagan, Aspen Ideas Festival, June 29, 2013

//

Alfred Brody asks a fair question, and *The Post* is intrigued by Justice Kagan's comments at the Aspen Ideas Festival.

Her remarks are nice evidence of judicial awareness of good blogging, and perhaps even of its influence, but they do not give us much of an idea of how judges view posts: Are they scholarship? Are they journalism? Are they more reliable for a sense of where scholarship is today because they reflect the current thoughts of scholars, while the law reviews reflect the thoughts those scholars had a year or two ago? Are they more reliable than journalism because they are more susceptible to correction and part of a culture that is more

[†] President, Ivey Consulting, Inc.

likely to confess – or at least flag – errors than, say, the *New York Times*? In other words, what do judges think they are reading when they read a blog post? *The Post* will keep its ear to the ground.

Are you inspired to celebrate more legal blog posts that can sometimes get buried in the avalanche of life on the internet? We welcome submissions from astute readers who know good legal blog posts when they see them. (Our parameters: (1) The blog post should be about law or laws; (2) it should be written by legally trained people for legally trained people or aspiring lawyers rather than for a general audience; and (3) it deserves to transcend the 15 nanoseconds of fame that blog posts typically enjoy.) Please send links you'd like to nominate to *post@annaivey.com*. //

FROM: PRAWFSBLAWG

CONSTITUTIONAL AVOIDANCE IN BABY GIRL

Will Baude[†]

After listening to the oral arguments in Adoptive Couple v. Baby Girl,[1] I expected the final opinion or some separate writings to have a lot of discussion of constitutional law (perhaps through the lens of constitutional avoidance). But I expected it to be about equal protection – I expected hints that members of the Supreme Court thought that modern Indian law was highly troubling as a matter of disparate racial treatment, perhaps with further hints that some members of the Court would reconsider (or at least radically narrow) Morton v. Mancari.[2]

So in fact I was surprised to see absolutely none. Justice Alito says of the dissent, in one sentence, "Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context." Justice Thomas's opinion (more on which in a second) contains only a footnote saying he won't reach the issues. ("I need not address this argument because I am satisfied that Congress lacks authority to regulate the child custody proceedings in this case.") Based on where things seemed headed at argument, supporters of modern Indian law ought to regard this case as dodging a bullet.

(For that reason I wholly disagree with Eric Posner's assessment[3]

[†] Assistant Professor of Law (as of 1/1/14), University of Chicago Law School. Original at prawfsblawg.blogs.com/prawfsblawg/2013/06/constitutional-avoidance-in-baby-girl.html (June 29, 2013; vis. Aug. 30, 2013).

[1] www.scotusblog.com/case-files/cases/adoptive-couple-v-baby-girl/.

[2] supreme.justia.com/cases/federal/us/417/535/case.html.

[3] www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme

that "the majority has laid the groundwork for a future equal protection challenge to Indian classifications and fortified its position that the equal protection clause bans racial preferences like affirmative action." Maybe they will do so in a future case, but they haven't done so here, and if they do it, it will be in an opinion joined by Justice Scalia and not one joined by Justice Breyer. Given Breyer's concurrence, why would he join an opinion that lays the "groundwork" that Posner suggests?)

That said, Justice Thomas's concurring opinion is astounding. It's a surprising, radical rethinking of federal enumerated power over Indians, making the (expected) point that Thomas's narrow view of the interstate commerce clause implies a narrow view of the Indian commerce clause. Basically, it's an inversion of the argument that Akhil Amar has made that early perspectives on the Indian commerce clause should demonstrate a broad view of the interstate clause. But more than that, it also has an interesting and narrow reading of "Indian tribes," ultimately concluding that "the ratifiers almost certainly understood the Clause to confer a relatively modest power on Congress – namely, the power to regulate trade with Indian tribes living beyond state borders."

For all of these conclusions, Thomas relies extremely heavily on Robert Natelson's Original Understanding of the Indian Commerce Clause,[4] (and a little on Sai Prakash) although I can't tell for sure if Thomas's conclusions perfectly match theirs. But Jacob Levy argues[5] that Thomas has the original intent entirely backwards:

> Thomas is right that the Indian Commerce Clause should not be read in the Lone Wolf/ Kagama way to grant plenary power over all Indian affairs. But he's so utterly wrong about the jurisdiction to which the clause applies that the conclusion ends up backward: he would grant plenary power *to the states*, and declare the clause a dead letter now that there is no part of Indian Country that lies outside state boundaries. There is

_court_2013/baby_veronica_indian_adoption_and_the_supreme_court_justice_alito_s_ruling.html?utm_source=tw&utm_medium=sm&utm_campaign=button_toolbar.

[4] papers.ssrn.com/sol3/papers.cfm?abstract_id=1092628.

[5] jacobtlevy.blogspot.com/2013/06/quick-reaction-adoptive-couple-vs-baby.html.

> simply no evidence that the Founders envisioned the extinction of Indian Commerce Clause jurisdiction and a complete transfer of power to the states.

I am not sure where I stand on all of this. Levy's paper on Madison's drafting[6] of the Indian Commerce Clause (and the material it contains) is enough to convince me that Thomas is going a little too fast here, and that the extreme version of the argument he seems to be sketching may be wrong as an originalist matter. But I'm not yet sure exactly *where* Thomas or Natelson go wrong, if they do. Thomas is plainly right to reject federal "plenary power" over Indians. But are things like the end of the treaty era,[7] or the Indian Citizenship Act[8] relevant to federal power? There I am less sure.

Maybe it is time to rethink the federal Indian power. Or at least to figure out where it comes from and what it is. //

[6] www.academia.edu/422868/Indians_in_Madisons_Constitutional_Order.
[7] en.wikipedia.org/wiki/Indian_Appropriations_Act#1871_Act.
[8] en.wikipedia.org/wiki/Indian_Citizenship_Act_of_1924.

FROM: IDIBON

JUSTICE KENNEDY'S FAVORITE PHRASES

Tyler Schnoebelen[†]

In the chambers of the United States Supreme Court, nine men and women are deciding what's going to happen with same-sex marriage in America. Will a widow get back taxes from her wife's estate? Will same-sex marriage be reinstated in California? Or if they rule more broadly, will same-sex marriage be made legal across all 50 states, not just 12?

The decisions are likely come down to one single person: Supreme Court Justice Anthony Kennedy. Expert court-watchers agree that it's clear how the other eight justices will vote (four inclined to support same-sex marriage, four disinclined).

If we could predict the outcome of court cases, we would have retired to our own islands long ago. But what we *can* do, is look at the communications of Kennedy in this court case, and see if his patterns of communication significantly differ from how he has communicated in past court proceedings.

First let's look at some of the phrases that Justice Kennedy uses a lot more than all the other justices (relative to how much he's speaking overall). Again, this is relative to all the justices but I'll put in notes for how Scalia and Ginsburg use the phrase for comparison. In the infographic, the way you get "expected" values is to take the total number of times anyone on the Court says a word/phrase and then multiply it by how much a particular justice is speaking overall. If there were 100 uses of "foo" across all the justices and Justice X

[†] Co-founder and Senior Data Scientist, Idibon; twitter.com/TSchnoebelen. Original at idibon.com/justice-kennedy-speaking-patterns/ (June 12, 2013; vis. Aug. 30, 2013).

spoke 10% of all the words, we'd expect them to have 10 "foo"s. We want to pay attention to when observed/expected ratios are particularly high or low: those are phrases worth further inquiry.

Kennedy also seems to like *in this case, I take it*, *can you tell, you want us*, *let me ask*, *and so forth*, and *I'm not sure* relative to all the other justices. Compared to all the other justices, he seems to avoid *I don't, you don't, don't know,* and *you're saying*.

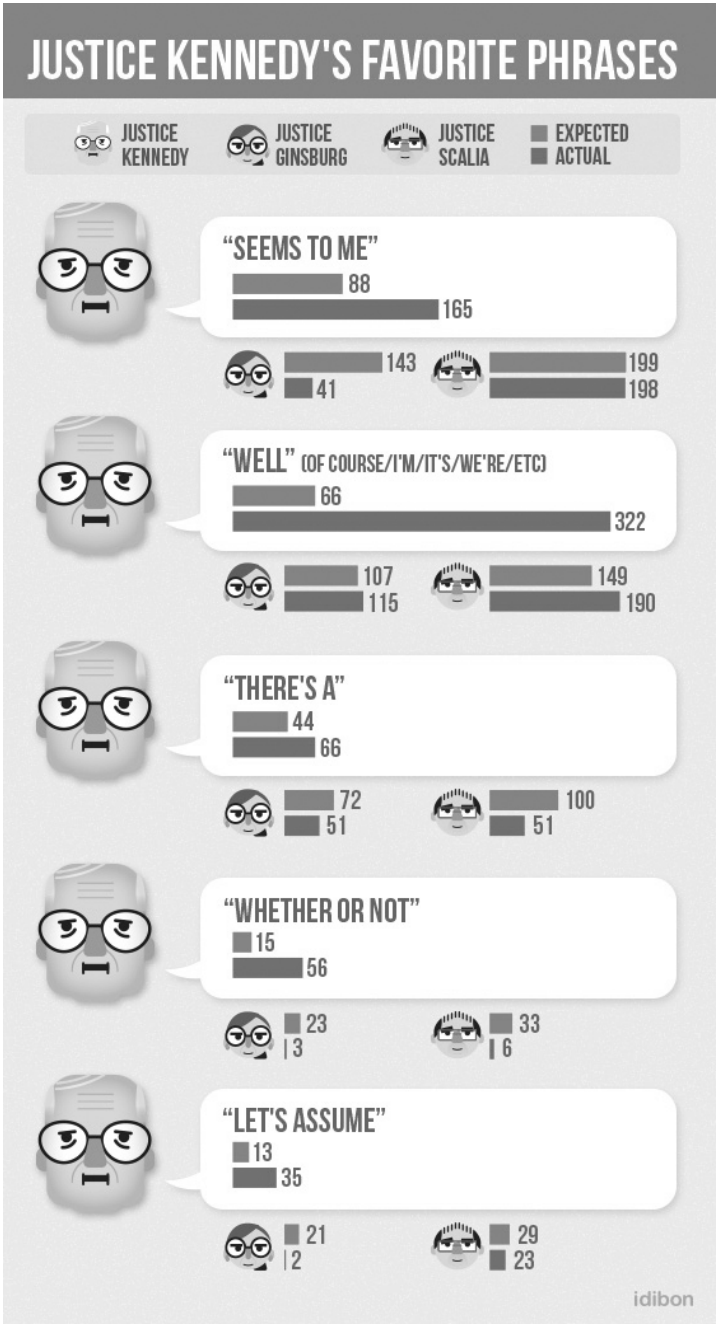
Most of these top phrases are the kinds of things you might be inclined to toss away if you were trying to do "topic detection". But in opinion detection and sentiment analysis, they are much more likely to carry an important signal. Take *well. Well* is one of the most frequent "discourse markers" to pop up in English speech. Certainly it pops up a lot in Kennedy's speech. What's it doing?

Well often indicates a topic change but it can also mark an elaboration or explanation – in that way it's kind of like a *be that as it may* or *that said*. *Well* can mark a kind of insufficiency in what's been said/what's about to be said. It can serve as a pause filler (like *um* or *uh*). It often marks the introduction of reported speech. My own favorite (though wordy) definition is from Andreas Jucker (1993):

> [*Well* is] a signpost that directs the addressees to renegotiate the relevant background assumptions, either because a new set of assumptions becomes relevant or because some of the manifest assumptions are mistaken.

And if we look at how Kennedy is using *well* in the same-sex marriage cases, that seems about right (note that these cases were not included in the data in the chart above). I should probably give you the preceding context since they are so clearly responsive to what's come before. But in the interest of space, I'm just going to give the utterances:

- *Well, that – that assumes the premise. We didn't – the House didn't know it was unconstitutional. I mean –*
- *Well, why not? They're concerned about the argument and you say that the House of Representatives standing alone can come into the court. Why can't the Senate standing alone come into court and intervene on the other side?*


JUSTICE KENNEDY'S FAVORITE PHRASES
JUSTICE KENNEDY
JUSTICE GINSBURG
JUSTICE SCALIA
EXPECTED
ACTUAL
"SEEMS TO ME"
88
165
143
41
199
198
"WELL" (OF COURSE/I'M/IT'S/WE'RE/ETC)
66
322
107
115
149
190
"THERE'S A"
44
66
72
51
100
51
"WHETHER OR NOT"
15
56
23
3
33
6
"LET'S ASSUME"
13
35
21
2
29
23
idibon

- *Well, it applies to over what, 1,100 Federal laws, I think we're are saying.* {This is a lengthy comment/question by Kennedy that is worth reading – he's grappling with the fact that marriage is clearly a power for the states but the Federal government has all sorts of stuff going on in the citizen's lives regarding marriage.}
- *Well, but it's not really uniformity because it regulates only one aspect of marriage. It doesn't regulate all of marriage.*
- *Well, then are – are you conceding the point that there is no harm or denigration to traditional opposite-sex marriage couples. So you're conceding that.*
- *Well, but, then it – then it seems to me that you should have to address Justice Kagan's question.*
- *Well, the Chief – the Chief Justice and Justice Kagan have given a proper hypothetical to test your theory.* {This quote also goes on as Kennedy lays out test again to think through the issue of "standing" – that is, who has the right to bring a case forward.}

This does seem to signal Kennedy challenging what's been said and it matches Jucker's definition reasonably well.

But of course, we're most curious about how Kennedy speaks in the oral arguments based on how he's ultimately going to vote. When Kennedy is going to end up voting with Ginsburg and against Scalia, he tends to use the phrasing *whether or not* (he uses this phrase over 8 times more often than we'd expect when he's going to vote with Ginsburg). He also tends to use the words *can*, *can't*, *or*, *your*, *I'm*, *is that*, and *argument* when he's ultimately going to end up voting with Ginsburg.

By contrast, when Kennedy is going to vote with Scalia and against Ginsburg, he tends to use *there is*, *that's*, *same*, and *government*. He also uses a lot more of the past tense when voting with Scalia (particularly *has*). Kennedy also uses a lot of *this* when he's going to vote with Scalia against Ginsburg – in particular *this case*. (For more about how interesting demonstratives are, see the overview/links in this post.[1])

[1] corplinguistics.wordpress.com/2011/11/17/who-is-the-sarah-palin-of-the-canterbury-tales/.

But notice that these signals are rather weak. That's because across 192 cases that came before the Court before the same-sex marriage cases, Kennedy, Scalia, and Ginsburg voted together in 108 of them (Kennedy voted with Scalia and against Ginsburg in 43, and with Ginsburg against Scalia in 28. And with neither one of them in 13).

So how is Kennedy going to vote? Well . . .

APPENDIX: OTHER TEXT ANALYSES

Here's a collection of links with legal scholars, journalists and others interpreting Kennedy:

- Erwin Chemerinsky: ABAJournal[2] and SCOTUSblog[3]
- Dana Milbank: Washington Post[4]
- Sahil Kapur: Talking Points Memo here[5] and here[6]
- Nina Totenberg: NPR here[7] and here[8]
- Dylan Scott: Governing[9]
- John Bursch: SCOTUSblog here[10] and here[11]
- Lyle Denniston: SCOTUSblog here[12] and here[13]
- Ilya Somin: The Volokh Conspiracy[14]

---

[2] www.abajournal.com/news/article/chemerinsky_another_look_at_same-sex_marriage_cases/.

[3] www.scotusblog.com/2013/03/commentary-what-might-happen/.

[4] www.washingtonpost.com/opinions/the-swing-vote-is-in-so-stop-kissing-up/2013/03/27/87b0803c-9726-11e2-b68f-dc5c4b47e519_story.html.

[5] tpmdc.talkingpointsmemo.com/2013/04/john-roberts-anthony-kennedy-doma-trap.php.

[6] tpmdc.talkingpointsmemo.com/2013/03/anthony-kennedy-gay-marriage-middle-path.php.

[7] www.npr.org/2013/03/30/175765569/gay-marriage-recap-will-justices-rule-on-constitutionality.

[8] www.npr.org/2013/03/27/175476904/justices-cast-doubt-on-federal-defense-of-marriage-act.

[9] www.governing.com/blogs/fedwatch/gov-the-most-important-moment-in-the-supreme-courts-doma-hearing.html.

[10] www.scotusblog.com/2013/03/more-tea-leaves-why-domas-demise-will-support-prop-8-surprise/.

[11] www.scotusblog.com/2013/03/reading-tea-leaves-why-the-court-will-uphold-proposition-8/.

[12] www.scotusblog.com/2013/03/argument-recap-doma-is-in-trouble/.

[13] www.scotusblog.com/2013/03/argument-recap-on-marriage-kennedy-in-control/.

[14] www.volokh.com/2013/03/26/justice-kennedy-on-proposition-8-and-sex-discrimination/.

- Amy Howe: SCOTUSblog[15]
- Marty Lederman: SCOTUSblog[16]
- Adam Liptak: NYTimes[17]
- Jeffrey Rosen: The New Republic[18]
- Peter Dreier: Huffington Post[19]

Notice that one of the things a few of the people comment on is "tone of voice" – Nina Totenberg mentions Kennedy sounding "ticked off". That's a reminder that using transcripts alone wipes out a lot of powerful phonetic cues. //

[15] www.scotusblog.com/2013/03/what-will-the-court-do-with-proposition-8-todays-oral-argument-in-plain-english/.

[16] www.scotusblog.com/2013/03/revisiting-the-courts-several-options-in-the-california-marriage-case/.

[17] www.nytimes.com/2013/03/30/us/supreme-courts-glimpse-at-thinking-on-same-sex-marriage.html?pagewanted=all&_r=0.

[18] www.newrepublic.com/article/112800/supreme-court-doma-case-federalism-comes-back-haunt-conservatives#.

[19] www.huffingtonpost.com/peter-dreier/supreme-court-states-rights_b_3027484.html?utm_hp_ref=politics.

FROM: BRIAN LEITER'S LAW SCHOOL REPORTS

THE ECONOMIC VALUE OF A LAW DEGREE

CORRECTING MISCONCEPTIONS

Michael Simkovic[†]

TOPICS:

- Ability sorting and selection
- Occupation and the versatile law degree
- Long term versus short term
- The broader labor market
- Present value and opportunity costs
- Acknowledgements

ABILITY SORTING AND SELECTION

In *The Economic Value of a Law Degree*,[1] Frank McIntyre and I estimate the increase in annual and lifetime earnings that is attributable to a law degree. To do so, we compare those with law degrees to similar individuals with less education.

Because those who matriculate at law schools may be different from the average bachelor's degree holder, we compare law degree holders to a group of *similar* bachelor's degree holders.

There is a misperception – apparently started by Brian Tamanaha (here[2] and here[3]) and repeated by others[4] – that we simply compare

---

[†] Associate Professor, Seton Hall University School of Law. Original at leiterlawschool.typepad.com/leiter/2013/08/the-economic-value-of-a-law-degree-correcting-misconceptions.html (Aug. 1, 2013; vis. Aug. 30, 2013).

[1] papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

law degree holders to all bachelor's degree holders, or that we compare the 25th percentile of law degree holders to the 25th percentile of all bachelor's degree holders. *This is not true*.

At a high level, what we essentially did was to create two subgroups of bachelor's degree holders – all bachelor's degree holders, and a subset of bachelor's degree holders who look like the law degree holders with respect to many observable characteristics that predict earnings – demographics, academic achievement, parental socio-economic status, measures of motivation and values. It is this second group of bachelor's degree holders that we compare to the law degree holders.

To check for ability sorting and selection, we use statistical techniques including:

- Ordinary Least Squares (OLS) regression (at the mean)
- Quantile Regression at the:
  - 25th percentile
  - 50th percentile
  - 75th percentile
- Propensity score matching (for our lifetime earnings premium estimates)
- Heckman Selection (in an appendix)

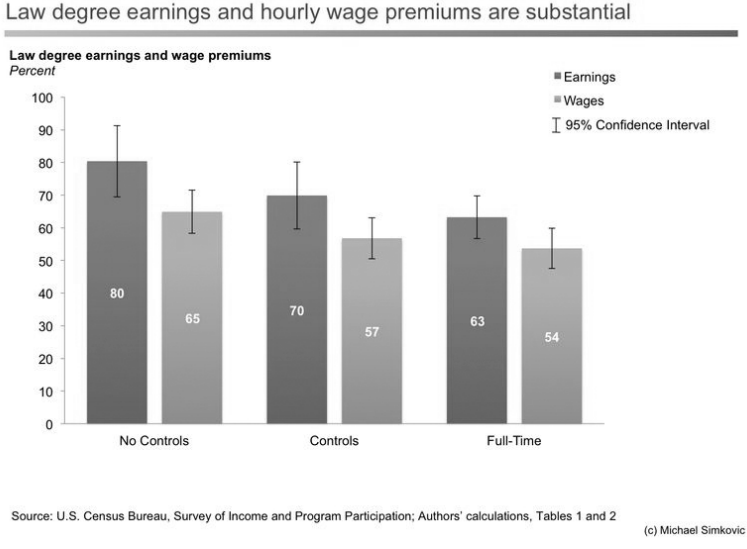
The observable characteristics (pretreatment covariates) that we focus on as controls in the Survey of Income and Program Participation include:

- Race
- Age
- Gender
- Number of years of high school coursework in
  - Math
  - Science
  - Foreign Language
  - English

[2] leiterlawschool.typepad.com/files/balkinization_-how-_the-million-dollar-law-degree_-study-systematically-overstates-value_-three-choices-that-improperly-skewed-the-results-4.pdf.
[3] leiterlawschool.typepad.com/files/balkinization_-leiters-contradictory-conclusion.pdf.
[4] leiterlawschool.typepad.com/leiter/2013/07/repetitive-and-avoidable-mistakes.html.

- Type of High School
  - Private vs. Public
  - College preparatory classes in high school
- College major (divided into five categories based on the International Standard Classification of Education)

These controls bring down our earnings premium estimates by around 10 percent at the mean and around 8 percent at the 25th percentile.



In other words, the data and statistical techniques that we use suggest that the kinds of people who go to law school would probably earn about 10 percent more than the average bachelor's degree holder even if they hadn't gone to law school. But the law school earnings premium is much greater than that, and the earnings premiums we report are *after* controls for ability sorting.

We do an additional check for ability sorting using another data set called the National Education Longitudinal Study (NELS). NELS follows a cohort from 8th grade through their late 20s, and includes additional pretreatment control variables that are not available in SIPP.

Controls that are available in NELS include:

- college quality
- demographics
- standardized test scores
- college GPA and major
- motivation and interest in careers
- subjective expectations about future income
- Parent SES

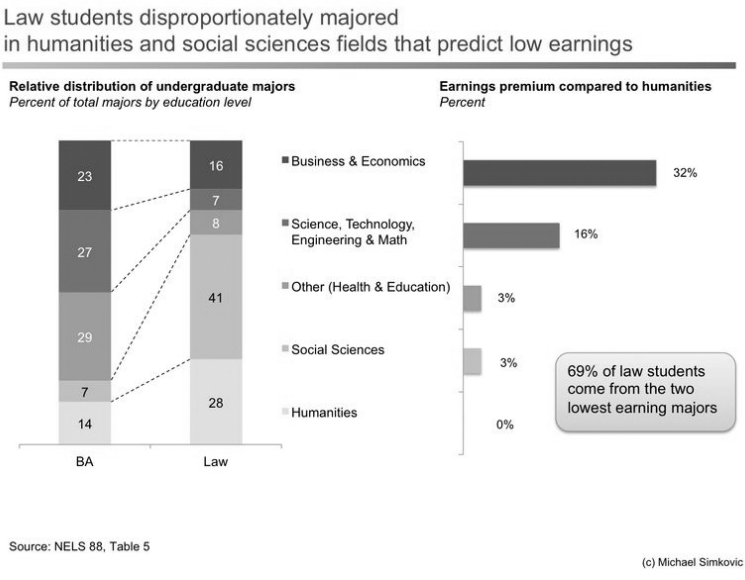
The results of the analysis using NELS are very similar to the results of the analysis in SIPP. The bachelor's degree holders who go on to law school would probably earn about 10 percent more than the average bachelor's degree holder, even if they had not gone to law school.

Because this level of ability sorting was already taken into account in our SIPP analysis, we do not believe that any further adjustment to our SIPP results would be justified based on the analysis in NELS. Because different measures of ability that predict earnings are often correlated with each other, adding more and more control variables that measure essentially the same thing often won't substantially change the estimate of the earnings premium.

Thus we found very little to suggest that law graduates' above average undergraduate academic performance translates into higher earnings other than what we had already accounted for. This may be surprising to people for two reasons. First, law degree holder undergraduate academic performance is better but not fantastically better than the typical BA. Second, that above average performance does not actually translate into much of a boost to earnings. It turns out higher undergraduate grades, for example, do not show a strong correlation with later earnings. We find that this is especially true, by the way, in the majors preferred by law students in the humanities and social sciences.

Eric Rasmusen[5] has an interesting blog post qualitatively describing the "typical" law student.

[5] taxprof.typepad.com/taxprof_blog/2013/07/rasmusen.html.



There are several other issues related to selection on unobservables and offsetting biases that are worth mentioning.

Annual vs. Lifetime and regression to the median:

Annual earnings tend to be much more varied than longer-term lifetime earnings. For one example, job losses or transitions can cause a sharp drop in one year, but tend to be resolved by the next year. People going through such temporary rough spots show up low in the earnings distribution. So the 25th percentile of one year earnings is much lower than the 25th percentile over average lifetime earnings.

Reporting Bias:

When reporting earnings, people tend to not report periods of unemployment and such. The SIPP returns to interview people every four months, so this is not as much of a problem as it could be, but it means that low income people tend to over-report their income relative to those higher up. This typically will bias down estimates of how much more one group earns than another.

Specific Ability:

People tend to pick the career they will succeed at. Thus those who are bad at some jobs but good at jobs available to law degree holders will gravitate towards law. But, in fact, had they not gone in to law they might end up doing very badly. This has several effects – it means that we will tend to underestimate the value of law school to those who choose law because that is their particular advantage but at the same time we may be overestimating it for those who are not choosing law. It is hard to know for sure if this is a large effect or not. It is very difficult to nail down statistically.

The 25th Percentile:

When we look at the 25th percentile earnings lawyer we use quantile regression to make these ability adjustments to the data before comparing them to the 25th percentile earnings BA, thus we're correcting for ability as much as possible. Though not reported in the paper we find the ability gap (that we adjust for in our lifetime value estimates) between BA and law grads is about eight percentage points at the 25th percentile. This is completely in line with what we found at the mean both in the SIPP and in our more refined estimates from the NELS survey. It is possible that the gap is larger (or smaller) at the bottom than our data show, so that would be a great place for future research, but we think this is the best currently available estimate, especially given issues (1) and (2) biasing the premium down.

OCCUPATION AND THE VERSATILE LAW DEGREE

A very large fraction of law degree holders do not end up practicing law. For some, this is a disappointment and for others it is a preferred outcome. We include all these people in our estimates of the value of a law degree. That is because the question we are interested in answering is the value of the law degree, not the earnings of the subset of individuals who practice law. Controlling for occupation would have been methodologically improper because occupation is an outcome variable, not a pretreatment covariate.

As MIT labor economist Joshua Angrist and LSE labor economist Jörn-Steffen Pischke explain in *Mostly Harmless Econometrics*:[6]

> *Some variables are bad controls and should not be included in a regression model* even when their inclusion might be expected to change the short regression coefficients. Bad controls are variables that are themselves outcome variables . . . That is, bad controls might just as well be dependent variables too. The essence of the bad control problem is a version of selection bias . . .
>
> To illustrate, *suppose we are interested in the effects of a college degree on earnings and that people can work in one of two occupations, white collar and blue collar*. A college degree clearly opens the door to higher-paying white collar jobs. *Should occupation therefore be seen as an omitted variable in a regression of wages on schooling?* After all, occupation is highly correlated with both education and pay. Perhaps it's best to look at the effect of college on wages for those within an occupation, say white collar only.
>
> The problem with this argument is that *once we acknowledge the fact that college affects occupation, comparisons of wages by college degree status within an occupation are no longer apples-to-apples*, even if college degree completion is randomly assigned . . . [because of selection bias].
>
> *We would do better to control only for variables that are not themselves caused by education.*

In a recent article,[7] David Neumark and co-authors also include a helpful explanation of the problems with controlling for occupation and "underemployment",[8] or relying on BLS occupational earnings projections[9] when trying to measure education earnings premiums:

> *For nearly every occupational grouping, wage returns are higher for more highly-educated workers even if the BLS says such high levels of education are not necessary*. For example . . . for management occupations, the estimated coefficients for Master's, professional,

[6] www.amazon.com/Mostly-Harmless-Econometrics-Empiricists-Companion/dp/0691120358/ref=sr_1_1?s=books&ie=UTF8&qid=1375308260&sr=1-1.
[7] www.socsci.uci.edu/~dneumark/Neumark%20skill%20shortages.pdf.
[8] centerforcollegeaffordability.org/uploads/Underemployed%20Report%202.pdf.
[9] digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1586&context=wujlp.

> and doctoral degrees are all above the estimated coefficient for a Bachelor's degree, which is the BLS required level. . . .
>
> If the BLS numbers are correct, we might expect to see higher unemployment and greater underemployment of more highly-educated workers in the United States. As noted earlier, we do not find evidence of this kind of underemployment based on earnings data. Similarly, labor force participation rates are higher and unemployment rates are lower for more highly educated workers.

Even economists at the BLS[10] emphasize that educational earnings premiums, and not BLS employment projections, are the key measure of the value of education:

> The general problem with addressing the question whether the U.S. labor market will have a shortage of workers in specific occupations over the next 10 years is the difficulty of projecting, for each detailed occupation, the dynamic labor market responses to shortage conditions. . . .
>
> Since the late 1970s, average premiums paid by the labor markets to those with higher levels of education have increased.
>
> It is the growing distance, on average, between those with more education, compared with those with less, that speaks to a general preference on the part of employers to hire those with skills associated with higher levels of education.

LONG TERM VERSUS SHORT TERM

We value a law degree based on the present value of a lifetime of increased earnings. The valuation literature is unambiguous about the correct time period to value the cash flows generated by an asset: the entire life of the asset. The delay and higher risks of cash flows in the distant future are already taken into account through the application of a discount rate and the present value formula.

Our approach, using the typical span of a working life and discounting back to present value, is the correct one for the majority of

[10] www.bls.gov/opub/mlr/2004/02/art1full.pdf.

potential law students who obtain their degrees relatively early, in their 20s or 30s. A much shorter time period would only be appropriate for individuals who complete their law degrees later in life, closer to retirement, or who anticipated working only a few years during their lifetimes.

In a recent post post,[11] Brian Tamanaha suggests that the difference between his approach and ours is that he focused on the short-term value of a law degree while we focused on the long-term value of a law degree.

Michael Froomkin[12] wonders if law degree holders will experience a cash crunch early in their careers when their incomes are lower and debt levels are higher.

It is unlikely that a debt financed law degree would create a cash crunch. Young bachelor's degree holders also have lower incomes early in their careers. The earnings premium associated with the law degree will typically exceed required debt service payments on law school debt, particularly in light of the availability of extended repayment, deferment, forbearance, and income based repayment plans. Graduate degrees can readily be financed entirely with federal student loans.

The costs of delayed repayment (i.e., higher interest) are already taken into account in our present value calculation, because we discount back at the weighted average interest rate on law school debt. We're pretty conservative in this respect: we ignore the (likely) possibility that students will prepay their highest interest rate debts first. Indeed, *After the JD II*[13] found evidence of rapid pre-payment of law school debt.

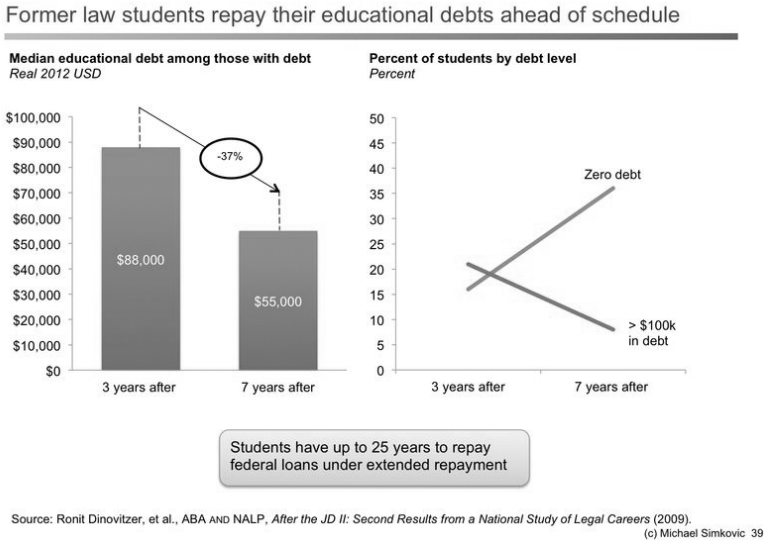
Our results suggest that most young law degree holders most of the time likely have more positive cash flow – even after debt service payments – than they would likely have had with only a bachelor's degree.

---

[11] leiterlawschool.typepad.com/files/balkinization_-sort-term-versus-long-term-perspective.pdf.

[12] www.discourse.net/2013/07/you-can-drown-in-a-river-that-is-an-average-of-six-inches-deep-part-1/.

[13] www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.

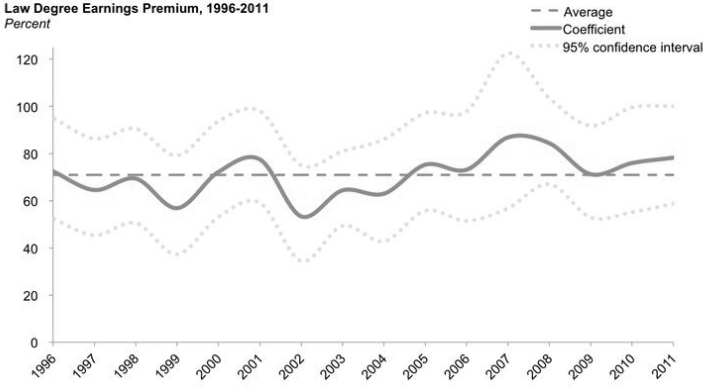


Because the economic value of a given level of education can generally be maximized by completing that level of education early – and thereby maximizing the number of years of subsequent work with the benefit of higher wages from the education earnings premium – delaying graduate school to try to time the market is a high-cost strategy. And timing the market three or four years in advance is difficult.

We recommend long-term historical data on lifetime earnings premiums as a guide rather than short-term fluctuations in starting salaries. Indeed, starting salaries tell us very little – earnings premiums are what matters, and there is no evidence that premiums have compressed, even for the young.

In a supplemental exploratory analysis using ACS data, we find some evidence that post 2008 cohorts of individuals who are probably young law degree holders (professional degree holders excluding those in medical practice) continue to have the same earnings advantage over bachelor's as they had prior to 2008.

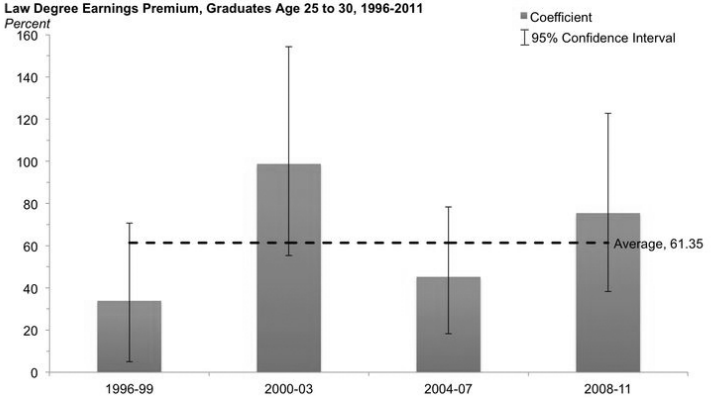
Law degree earnings premium is stable over the long term, with short term cyclical fluctuations



Source: U.S. Census Bureau, Survey of Income and Program Participation; Authors' calculations
Note: Solid line is the coefficient. Dotted lines represent 95 percent confidence interval. Horizontal dashed line represents multi-year average with each year weighted equally

(c) Michael Simkovic 26

Recent premiums for young law graduates are within historical norms



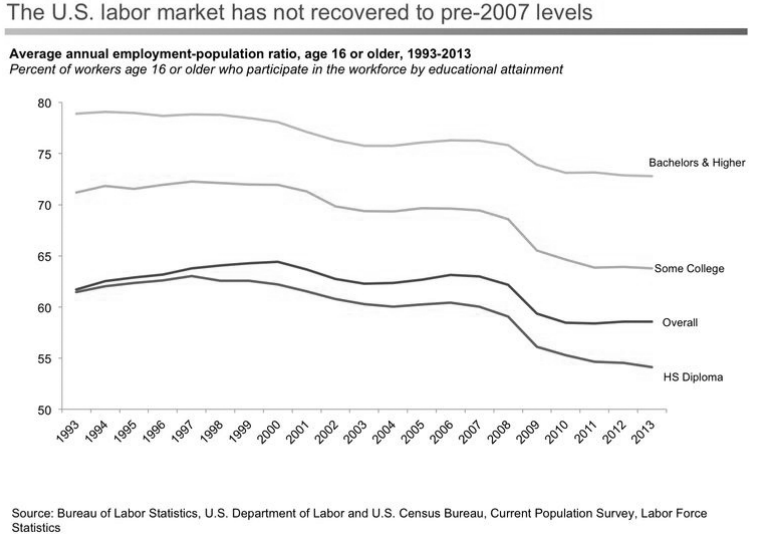
Source: U.S. Census Bureau, Survey of Income and Program Participation; Authors' calculations
Note: Vertical lines represent the 95 percent confidence interval; horizontal line represents the multi-year average, with each four-year interval assigned equal weight.

(c) Michael Simkovic 27

Ben Barros[14] has done some interesting work comparing outcomes 9 months after graduation to subsequent outcomes for recent graduates of Widener Law School.

THE BROADER LABOR MARKET

Tamanaha argues that law continues to be depressed while the rest of the labor market has recovered.[15] The data does not support this view. As can be seen from the chart below, the broader employment population ratio remains below 2007 levels across levels of education, and the more educated continue to be more likely to work than those with less education.



[14] www.thefacultylounge.org/2013/04/reconsidering-the-conventional-wisdom-on-the-legal-job-market-part-i.html.

[15] leiterlawschool.typepad.com/files/balkinization_-sort-term-versus-long-term-perspective-1.pdf.

PRESENT VALUE AND OPPORTUNITY COSTS

Many of our critics have made mistakes relating to net present value, opportunity costs, and direct costs of a law degree. Some general guidelines are provided below.

1. Everything has to be discounted back to the start of law school
2. Costs can't be something that is already taken into account through opportunity cost of lower in school earnings
3. Costs have to be something that the law student would only incur for law school and not matched by any other comparable expense if the student were a working BA; the cost has to be something that is a necessary expense to attend law school
4. The cost can't provide consumption benefits that justify the greater expense
5. The cost has to be what the student actually spends, and not hypothetically what a student might have spent if the student had paid full price

For example, since living expenses would be paid out of higher earnings if law students were working, we have already taken cost of living into account.

Since many students receive scholarships and grants, full-sticker tuition should not be used as a base-case.

Our estimates of in-school earnings are based on data from the SIPP and other Census Bureau Surveys. As we note in footnote 101:[16]

> Footnote 101: We assume that law students earn $5,000 in their first year, $7,000 in their second year and $12,000 in their third year with part time and summer work, for a total of $24,000 during law school. SIPP data suggests typical three-year in-school earnings between $21,800 (median) and $48,000 (mean) for fulltime graduate and professional school

[16] papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

> students. Census data suggests substantial work hours among fulltime graduate and professional students See Jessica Davis, U.S. CENSUS BUREAU, SCHOOL ENROLLMENT AND WORK STATUS: 2011 (Oct. 2012)."

THANKS AND GOODBYE

It's been a fun couple of weeks. We'd like to thank Brian Leiter, Brian Tamanaha, and others for the wonderful opportunity they've given us to explain our research to a wider audience. And I'd like to thank Frank McIntyre for his contributions to this post and previous posts. This will hopefully be our last post about The Economic Value of a Law Degree,[17] at least for a little while. //

[17] papers.ssrn.com/sol3/papers.cfm?abstract_id=2250585.

FROM: BALKINIZATION

LEGAL SCHOLARSHIP (1)

IN THE LAW REVIEWS

Mark Tushnet[†]

On the plane today I read a terrific article, Brannon Denning and Michael Kent, Anti-Evasion Doctrines in Constitutional Law, 2012 Utah Law Review 1773.[1] (And you should read it too.) Without (I hope) casting aspersions on the Utah Law Review, whose editors had the discernment to see the article's quality, I was struck by its "under"placement relative to its quality. Professor Denning tells me that they did a general submission, and Utah was the only offer they received. What might account for this?

First, as to the article itself: It really is very good. Though it's about the structure of constitutional doctrine, it might have been (mis)read as "merely" about doctrine. And it makes an important contribution to the literature on decision rules and operative rules in constitutional law, but it might have been (mis)read as derivative rather than original. Further, it doesn't present itself in a self-consciously "fancy" way, although it's quite sophisticated. And, finally, as to the article, I suspect it would have gotten more attention if the authors had said, "Hey, you know, there's an anti-evasion doctrine in tax law, and we're going to show you that there are similar doctrines in constitutional law." That would have made it cross doctrinal borders in a way that articles editors might like.

But, frankly, the article's so good that all those things are pretty minor. My view is that the reason for its placement is that the au-

---

[†] William Nelson Cromwell Professor of Law, Harvard Law School. Original at balkin.blogspot.com/2013/08/legal-scholarship-1-in-law-reviews.html (Aug. 6, 2013; vis. Aug. 30, 2013).

[1] epubs.utah.edu/index.php/ulr/article/view/950/712.

thors teach at Cumberland Law School and John Marshall (Atlanta) – lower tier schools in (of all places) the South. My guess is that the intake articles editors at top N law reviews looked at the authors' affiliations and read the submission with a prejudiced mind: "If this were any good, the authors would be teaching at higher ranked schools." (I know that some reviews do blind evaluations, but I have a strong sense that most top N reviews don't – and doing a blind review at the first, intake stage is exceptionally difficult for overworked law review editors with little professional support staff.)

The other thing to note is that the star footnote might not signal the article's quality. (In roughly descending order of "heavy-hitter"-ness, from the point of view of articles editors [note that I'm trying to make a judgment about their judgment, not offering one of my own], the acknowledgements go to Eugene Volokh, John Harrison, and either Dan Coenen or Michael Greve.) So, I suppose the advice to scholars writing from second- and third-tier law schools is: Flood the heavy hitters with drafts, on the Nigerian scam e-mail theory that there's some chance that you'll get something back, and then you can put the heavy hitter's name[s] – plural if you're lucky – in the star footnote. (And, if you follow this advice, you'll probably want to push your submission to law reviews back one cycle – you shouldn't send something really incomplete out for comments – if you can.)

(Several disclosures: (1) I don't do many over-the-transom submissions these days, but, as I've blogged about before, my last two were "unsuccessful" – one to the point where I didn't publish the article at all. (2) Two of my own articles that I think are among my best were published in lower ranked law reviews. I won't name the reviews here, though. (3) I read Denning and Kent's article because Denning, who I know, has me on his reprint list – and, though I'm a bit nervous about this disclosure, I read every reprint anyone sends me. They took the effort, and I feel I ought to do something in response, so I read the articles, though I rarely write the authors about the articles. (4) I think I'm not going to make the fourth disclosure.) //

Almanac Excerpts

The Green Bag's

2013
ALMANAC

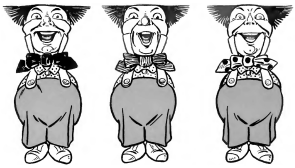
of useful & entertaining tidbits for lawyers for the year to come

&

READER

of exemplary legal writing from the year just passed
(see honorees on back cover)

• SPECIAL LATE-FILED EDITION •



featuring our perennially popular

ANNUAL REVIEWS

The Year in Language & Writing • by Bryan A. Garner

A Term in the Life of the Supreme Court • by Tony Mauro

A Year of Lowering the Bar • by Kevin Underhill

The Year in Law • by Gregory F. Jacob & Rakesh Kilaru

Selected original works from the latest edition of the *Green Bag Almanac of Useful and Entertaining Tidbits for Lawyers and Reader of Exemplary Legal Writing from the Year Just Passed*

Almanac Excerpts

Selected original works from the latest edition of the
Green Bag Almanac of Useful and Entertaining Tidbits for Lawyers and Reader of Exemplary Legal Writing from the Year Just Passed

Editor's note: Unbracketed page number references in the text of the articles published here are to pages in the original printed edition of the *Almanac*.

ISSN 2157-9067 (print) and 2157-9075 (online).

PREFACE 2013

THE CAPACITY TO BE TAXED IS THE CAPACITY TO SELF-DESTRUCT

[parallel citation: 2013 Green Bag Alm. 1]

This is the eighth *Green Bag Almanac & Reader*. For a reminder of the reasons why the world needs our almanac and our reader, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org). This year is a special one, though, for reasons given after our customary salute to our diligent board and before our customary confessions of editorial error.

OUR DILIGENT BOARD

Our selection process for "Exemplary Legal Writing of 2012" was, like past years', not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

> (a) organize a moderately vigilant watch for good legal writing, conducted by people (our Board of Advisers) who would know it when they saw it and bring it to our attention;
>
> (b) coordinate the winnowing of advisers' favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our "Recommended Reading" list);
>
> (c) ballot our advisers to identify the cream of that already creamy crop; and then
>
> (d) present the results to you in a useful and entertaining format – this book.

The nitty-gritty of our process for selecting exemplars is a simple but burdensome series of exercises:

Step 1: Our advisers read legal writing as they always have, keeping an eye out for short works and excerpts of longer works that belong in a collection of good legal writing. When they find worthy morsels, they send them to the *Green Bag*. "Good legal writing" is read broadly for our purposes. "Good" means whatever the advisers and the volume editor think it does. As one experienced scholar and public servant on our board put it, "there is good writing in the sense of what is being said and also in the sense of how it is being said." Our advisers are looking for works that have something of each. "Legal" means anything written about law – opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. "Writing" means ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organizes the advisers' favorites into categories, and then sends a complete set to every adviser. Advisers' names are not attached to the works they nominate. In other words, everything is anonymized. Advisers vote without knowing who nominated a piece. Similarly, their rankings are secret. No one but the volume editor ever sees individual advisers' rankings or knows who voted in which categories. And the editor destroys all individualized records once the *Almanac* is in print.

Advisers are free to vote in as many categories – or as few – as they desire. That is, although there may be scores of nominated works in total, they are free to select the types of writing they want to evaluate. Almost all – but invariably not all – advisers vote in each category.

Step 3: The volume editor tallies the rankings and compiles the "Reader" portion of the *Almanac* based on the results, reserving, as editors tend to do, the right to add, subtract, and reorganize within reason. Nominated works not published in the book are listed in the "Recommended Reading" section.

Step 4: The advisers and the editor start all over again for next year's edition – a process that has been underway since last Halloween (recall that our annual cycle for selection of exemplary legal writing begins and ends on October 31), with dozens of nominees already in the queue for the 2014 *Almanac*.

Despite the substantial work involved in this project, most of our advisers seem to enjoy participating. Those who don't seem to view it as some sort of professional duty. Either way, we're glad to have them. But these are people with day jobs, other commitments, and sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has done some advising, however, and it doesn't seem right to burden people with a slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate, at least this time around. So the list of board members in this *Almanac* is different from last year's and will, we expect, be different again next year and thereafter. The fact that people move on and off the list does not necessarily indicate anything about their ongoing commitment to the *Almanac*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

TAX TROUBLE

There are two big problems with this *Almanac*. First, it is late – printed in September 2013, not in the winter of 2012-13, as it should have been. Second, it is relatively plain and boring – it lacks both the elaborate design and the voluminously numerous entertaining tidbits featured in previous *Almanacs*. (The exemplary legal writing is still excellent, of course, as are the annual reviews on pages [323-397] below.) Both problems are our own fault, because we screwed up the Green Bag, Inc.'s taxes.[1]

Permit me to explain.

The Green Bag, Inc. – publisher not only of this *Almanac* but also of the *Green Bag* (a useful and entertaining law journal), the *Journal of Law* (a periodical laboratory of legal scholarship), *In-Chambers Opinions by the Justices of the Supreme Court* (a case reporter), and several other worthy publications, as well as producer of such works of scholarly artistry as the *Supreme Court Sluggers* trading cards, Learned Hand's *Songs of His Youth*, and a series of bobbleheads of Supreme Court Justices – was a not-for-profit corporation blessed by the IRS

[1] And "we" means mostly me, as head of this little enterprise.

with limited tax-exempt status under section 501(c)(3) of the federal internal revenue code. We received our 501(c)(3) determination in 1998, shortly after the company was formed.

But in August 2010 we lost it. Like many not-for-profits, large and small, the Green Bag, Inc. had been stupidly failing to engage in the fairly simple process of filing the required tax forms. As a result, when the IRS launched its automatic revocation system in 2010,[2] we were one of the roughly 275,000 not-for-profits whose tax exemptions were revoked.[3] Although our revocation occurred in August, we did not learn about it until shortly after the IRS published the information online in June 2011.[4]

Once we realized what we had not done, we went to work to put our house in order and regain our tax-exempt status. We were confident that we would keep the Green Bag afloat, one way or another, but we had no idea what our fate before the IRS would be. The IRS was, after all, administering a large and (maybe more significantly) new program with new rules of uncertain meaning.[5] And then there was the general terror that haunts any tiny entity that finds itself in the grasp of an unpredictable giant.

Faced with an uncertain future (and driven by what may yet turn out to be an excess of caution), we pulled in our horns. We were worried in particular about how much our foolishness might cost us – in taxes and penalties, and in fees paid for professional help. So, we carried on with projects already in the works, but we put new ones – the *Complementary Reporter*, the *National Gazette of the United*

---

[2] *IRS Identifies Organizations that Have Lost Tax-Exempt Status; Announces Special Steps to Help Revoked Organizations*, IR-2011-63, June 8, 2011 (updated June 9, 2011), www.irs.gov/uac/IRS-Identifies-Organizations-that-Have-Lost-Tax-Exempt-Status%3B-Announces-Special-Steps-to-Help-Revoked-Organizations; Pension Protection Act of 2006, P.L. 109-280, 120 Stat. 1090, 26 U.S.C. § 6033.

[3] Paul Caron, *IRS Strips Tax-Exempt Status From 275,000 Nonprofits*, TAXPROFBLOG, June 9, 2011, taxprof.typepad.com/taxprof_blog/2011/06/irs-strips-.html (vis. Sept. 14, 2013); Stephanie Strom, *I.R.S. Ends Exemptions For 275,000 Nonprofits*, N.Y. TIMES, June 8, 2011.

[4] *Exempt Organizations Select Check*, apps.irs.gov/app/eos/pub78Search.do?searchChoice=revoked&dispatchMethod=selectSearch (vis. Sept. 14, 2013) ("Green Bag"), www.available at.org.

[5] *See, e.g.*, *Application for Reinstatement and Retroactive Reinstatement for Reasonable Cause Under Internal Revenue Code § 6033(j)*, INTERNAL REVENUE BULLETIN 2011-25, NOTICE 2011-44 (June 20, 2011), www.irs.gov/irb/2011-25_IRB/ar10.html.

States, the *Bush v. Gore* commemorative chadglobe, the *Great Moments in the Law* parade float, the William Howard Taft weather balloon, the quarterly version of the *Journal of Law*, and others – on hold.

Our thinking was, and remains, that as soon as we are out of the tax woods we can get back to investing all of our time and resources in improved and new law-related products.

But getting out of the woods takes time. It took us a while to assemble the necessary information and file the correct paperwork with the IRS. It took the IRS a longer while to make a decision about our case – understandably, given that many other formerly tax-exempt organizations must have been seeking the same treatment we were asking for, and at the same time. By the spring of 2013, though, we had mostly good news: the IRS determined that we were once again tax-exempt under section 501(c)(3),[6] but that we had been non-exempt from August 2010 to May 2012 and therefore had to pay regular corporate taxes for that period. We filed the required returns for 2010, 2011, and 2012, which showed that we owed taxes for 2010 and 2011 and were due a refund for 2012. Some sort of mysterious snafu slowed delivery of the Personal Identification Number (PIN) we needed to pay our taxes via the IRS's electronic funds transfer system. By the end of July 2013, though, we had the PIN and could finally pay our taxes and put the whole mess behind us.

While this prolonged process was proceeding, we were wringing our hands over the *Almanac*, mostly because it is by far our biggest single annual expense.[7] For the 2012 edition we were committed to a fairly elaborate book with a Rex Stout/Nero Wolfe theme. It came out as planned and on schedule in early 2012. For the 2013 edition we had not made any commitments to content providers or production suppliers. We had, however, been working on it for a couple of years. It was to be a 1,000-page volume featuring the longest flipbook ever published. The artwork was ready, as were many of the useful and entertaining tidbits (most of which are creat-

[6] Thank goodness and the IRS!

[7] The 2009 *Almanac* was an exception, because that year we commissioned an expensive custom sound chip for the Justice David Souter bobblehead.

ed in-house for every *Almanac*). But spending a boatload of money printing and distributing such a volume when the costs of our tax transgressions were still unknown seemed too risky. With a back-up package on the shelf and ready to go if necessary (prepared and socked away back when the *Almanac* series began in 2006), we postponed the decision. The hope was for some good news from the IRS in early 2013 that would free us to bestow on our readers the blockbuster flipbook rather than the relatively low-key (and cheap) 400-page Land of Oz scrapbook you are holding now.

Having made an ill-defined commitment to delay for our beloved flipbook project, we waited, and waited. Just another week or two, just another week or two, and so on. And we were still waiting when we paid our taxes in July 2013. By then we were receiving an increasing number of friendly inquiries about the 2013 *Almanac* (as well as a few peremptory "claims" for a book that we only share as a gift). In retrospect, we should not have stepped onto the Slippery Slope of Hope.

Which brings us to the one moment in this entire process when things moved downright fast. Armed with our IRS PIN, on July 29 we authorized the IRS to electronically transfer funds to itself from the Green Bag's bank account to pay the taxes we owed for 2010 and 2011. (See page[s 315-316] below.) The very next day, July 30, the IRS did just that. (See page [316] below.)

At that point, it seemed worthwhile to wait just a few more days for official confirmation that we had met our tax obligations for 2010 through 2012 and were in fact out of the woods – free to safely pour our resources into the super-flipbook *Almanac*. And so we waited, again.

Finally, in early September, I signed for two certified mail envelopes from the IRS. Inside, alas, were not the good tidings we were expecting. Instead, they were notices that the IRS intends to seize the Green Bag's assets and apply them to the taxes we owe for 2010 and 2011. (See pages [317] and [318] below.) But didn't we pay those taxes back in July? Somewhere along the way there must have been some sort of mistake – maybe by us, maybe by the IRS, maybe by both. Given some more time, surely we will work it out.

That is where we stand now.

Having finally lost all hope that we will find our way out of the woods in time to publish our flipbook *Almanac* in 2013, we offer this year's Oz-themed *Almanac* instead. It is not an eyesore, and the exemplars and reviews are just as good as they would have been had they appeared in the company of hundreds of flippable pictures instead of a few Munchkins. And it will have to suffice.

We are optimistic that this whole tax business will turn out okay – that in the end we will have lost some money, some time, and some dignity, but not our beloved and (we would like to think) worthwhile enterprise. Someday we may even publish that flipbook. We are optimistic in large part because of our experience during this process with the people who work at the IRS. The system in which they work is terrifying, at least for puny outsiders like the Green Bag. The IRS has the idiot strength characteristic of giant bureaucracies – simultaneously ponderous and sudden. But the individual human beings with whom we have dealt have been patient, knowledgeable, helpful, and fair. In other words, fine public servants.

• • • •

This long and ongoing course of events has been mostly frightening and exhausting, but it has also had its entertaining aspects. Consider the following:

1. The Green Bag, Inc. does not have much for the IRS to seize. There is a little bit of money in our bank account and we have a few bobbleheads, mostly Harry Blackmuns, Clarence Thomases, and Ruth Bader Ginsburgs. That's about it. Can you picture a pair of dark-suited, grim-faced, well-armed Treasury agents taking a troop of miniature Supreme Court Justices into custody?

2. For the past several years, the Green Bag has been publishing short articles in which I needle law reviews about their failures to comply with government filing regulations – postal regulations, not tax regulations, but the analogy is pretty darn close.[8] During the

[8] *See, e.g.*, *The Increasingly Lengthy Long Run of the Law Reviews: Law Review Business 2012 – Circulation and Production*, 3 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (2 J. LEGAL METRICS) 245 (2013); *Law Review Circulation 2011: More Change, More Same*, 2 J.L.:

long hours spent on remedial tax compliance over the past couple of years, I have often felt like a gander stewing in goose sauce while being hoist by its own petard.[9] The feeling may have been good for my soul, but it most certainly has not been good for my mood.

3. The material for an Oz-themed *Almanac* has been sitting in a file at Green Bag World Headquarters for almost ten years, just in case of an editorial emergency. All we had to do was add a few recent judicial references to Oz and its denizens, and then move the 2012 exemplary legal writing and our annual reviews out of the flipbook and into the Oz book. If we had known in advance the circumstances in which that emergency file would come in handy we could not have selected a theme more ironically appropriate than the Land of Oz. Indeed, it is not difficult to imagine an IRS-themed spoof of *The Wizard of Oz*. Dorothy could navigate a disorienting and sometimes frightening foreign land (the internal revenue code and associated regulations), making helpful friends (straw-stuffed accountants, tin bureaucrats, cowardly lawyers) along the way, and (after performing a series of difficult tasks) eventually coming face-to-face with the real Commissioner of Oz (who turns out to be a kindly old soul who is trying to make the best of a an enormous and sometimes unmanageable burden of responsibility). The story would end on a cheerful note, when Dorothy learns that to achieve her fondest wish all she must do is complete and file a simple form. She does so, is transported to safety, and joyfully and tearfully shouts: "There's no place like the status quo ante!" That is the Green Bag's fondest wish for 2013, or, if that cannot be arranged, for 2014.

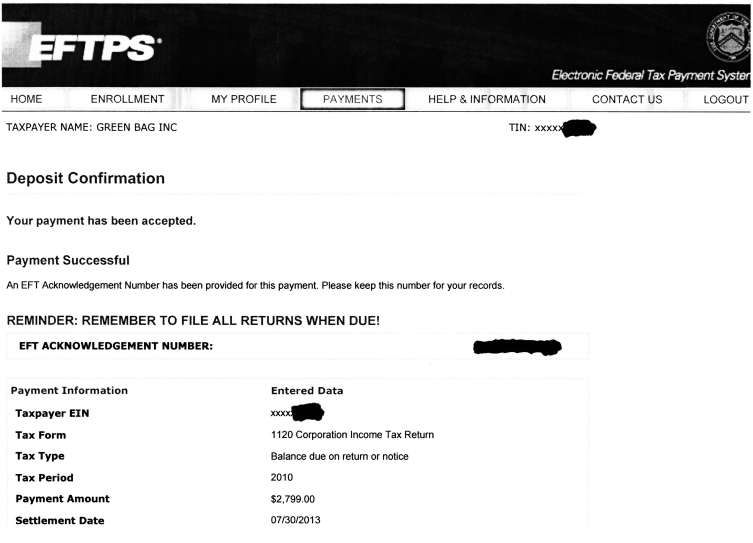
• • • •

PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 179 (2012); *The Dipping Point: Law Review Circulation 2010*, *in* 2011 GREEN BAG ALM. 547; *Law Review Circulation 2009: The Combover*, *in* 2010 GREEN BAG ALM. 419; *Law Review Circulation*, *in* 2009 GREEN BAG ALMANAC 164.

[9] *See, e.g.*, *Kaufmann v. Prudential Insurance Co.*, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009) ("Assuming, without deciding, that sauce for the goose is sauce for the gander . . . ."); *Spradlin v. Pikeville Energy Group, LLC*, 2012 WL 6706188, at *1 (E.D. Ky. Dec. 26, 2012) ("When an engineer was hoist by his own petard during a siege, it was the result of poor timing."). It is a rather messy mixed metaphor, if you think it all the way through.

A final note about the Land of Oz: There are really two of them. One is free and open to the public: L. Frank Baum's *The Wonderful Wizard of Oz* (1900), the novel in which Oz first appeared.[10] The other is privately held, heavily fortified, and fiercely defended,[11] but accessible for a price: MGM's *The Wizard of Oz* (1939), the first Oz film.[12]

The Oz material in this book is a scattering of tidbits from both Ozes, many of them mixed and morphed by judges. And the discerning reader will see that the use of those bits is legally, morally, ethically, spiritually, physically, positively, absolutely, undeniably, and reliably fair. Indeed, we must aver that we've thoroughly examined this *Almanac*, and our use of those bits is not only merely fair, it's really most sincerely fair.[13]



EFTPS

Electronic Federal Tax Payment Syster

HOME | ENROLLMENT | MY PROFILE | PAYMENTS | HELP & INFORMATION | CONTACT US | LOGOUT

TAXPAYER NAME: GREEN BAG INC TIN: xxxx[redacted]

Deposit Confirmation

Your payment has been accepted.

Payment Successful

An EFT Acknowledgement Number has been provided for this payment. Please keep this number for your records.

REMINDER: REMEMBER TO FILE ALL RETURNS WHEN DUE!

EFT ACKNOWLEDGEMENT NUMBER: [redacted]

Payment Information	Entered Data
Taxpayer EIN	xxxx[redacted]
Tax Form	1120 Corporation Income Tax Return
Tax Type	Balance due on return or notice
Tax Period	2010
Payment Amount	$2,799.00
Settlement Date	07/30/2013

[10] You can read it here: archive.org/stream/wonderfulwizardo00baumiala#page/n0/mode/2up.

[11] *See, e.g.*, *Warner Bros. Entertainment v. X One X Productions*, 644 F.3d 584 (8th Cir. 2011); Brooks Barnes, *We Aren't in the Old Kansas, Toto*, N.Y. TIMES, Feb. 28, 2013.

[12] You can buy it on iTunes.

[13] *Cf. The Wizard of Oz* at approx. 25:50-26:38 (Metro-Goldwyn-Mayer 1939); *see also* Noel Langley, Florence Ryerson & Edgar Allan Woolf, *The Wizard of Oz* (1939) (screenplay).

EFTPS

Electronic Federal Tax Payment Syster

HOME | ENROLLMENT | MY PROFILE | PAYMENTS | HELP & INFORMATION | CONTACT US | LOGOUT

TAXPAYER NAME: GREEN BAG INC TIN: xxxxx[redacted]

Deposit Confirmation

Your payment has been accepted.

Payment Successful

An EFT Acknowledgement Number has been provided for this payment. Please keep this number for your records.

REMINDER: REMEMBER TO FILE ALL RETURNS WHEN DUE!

EFT ACKNOWLEDGEMENT NUMBER: [redacted]

Payment Information	Entered Data
Taxpayer EIN	xxxx[redacted]
Tax Form	1120 Corporation Income Tax Return
Tax Type	Balance due on return or notice
Tax Period	2011
Payment Amount	$571.00
Settlement Date	07/30/2013

Citibank CBO Services 904
P.O. Box 769018
San Antonio, Texas 78245

0-0/R1/20F008

003
CITIBANK, N. A.
Account [redacted]
Statement Period
Jul 1 - Jul 31, 2013
Relationship Manager
Citibusiness Service Center
(877) 528-0990
Page 1 of 2

THE GREEN BAG, INC [redacted]

CitiBusiness® ACCOUNT AS OF JULY 31, 2013

Relationship Summary:

Checking	[redacted]
Savings	-----
Checking Plus	-----

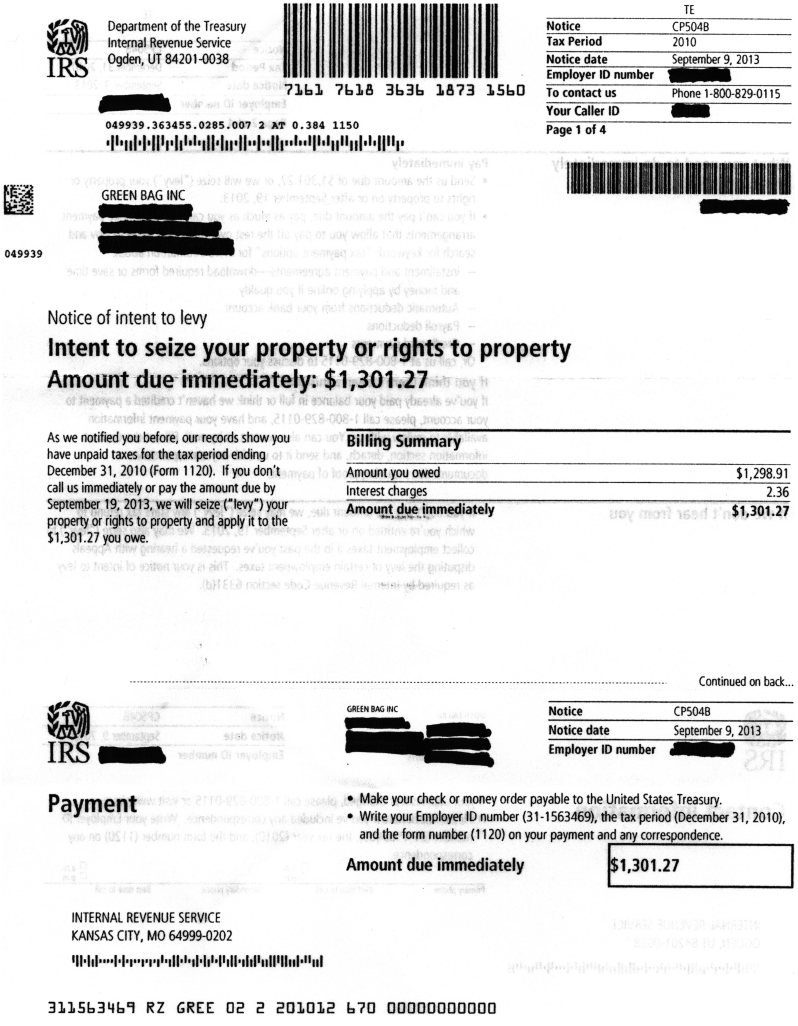
THE GREEN BAG, INC

Account [redacted] Page 2 of 2
Statement Period: Jul 1 - Jul 31, 2013

0-0/R1/20F008

CHECKING ACTIVITY (continued)

Date	Description	Debits	Credits	Balance
07/09	[redacted]			
07/09				
07/09				
07/15				
07/16				
07/17				
07/18				
07/23				
07/30				
07/30	ACH DEBIT IRS USATAXPYMT 270361144514082 Jul 30	571.00		
07/30	ACH DEBIT IRS USATAXPYMT 270361132241377 Jul 30	2,799.00		
07/31	[redacted]			
	Total Debits/Credits			



Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0038

7161 7618 3636 1873 1560

[redacted]

049939.363455.0285.007 2 AT 0.384 1150

	TE
Notice	CP504B
Tax Period	2010
Notice date	September 9, 2013
Employer ID number	[redacted]
To contact us	Phone 1-800-829-0115
Your Caller ID	[redacted]
Page 1 of 4	

[redacted]

GREEN BAG INC
[redacted]

049939

Notice of intent to levy

Intent to seize your property or rights to property

Amount due immediately: $1,301.27

As we notified you before, our records show you have unpaid taxes for the tax period ending December 31, 2010 (Form 1120). If you don't call us immediately or pay the amount due by September 19, 2013, we will seize ("levy") your property or rights to property and apply it to the $1,301.27 you owe.

Billing Summary

Amount you owed	$1,298.91
Interest charges	2.36
Amount due immediately	**$1,301.27**

Continued on back...

IRS [redacted]

GREEN BAG INC
[redacted]

Notice	CP504B
Notice date	September 9, 2013
Employer ID number	[redacted]

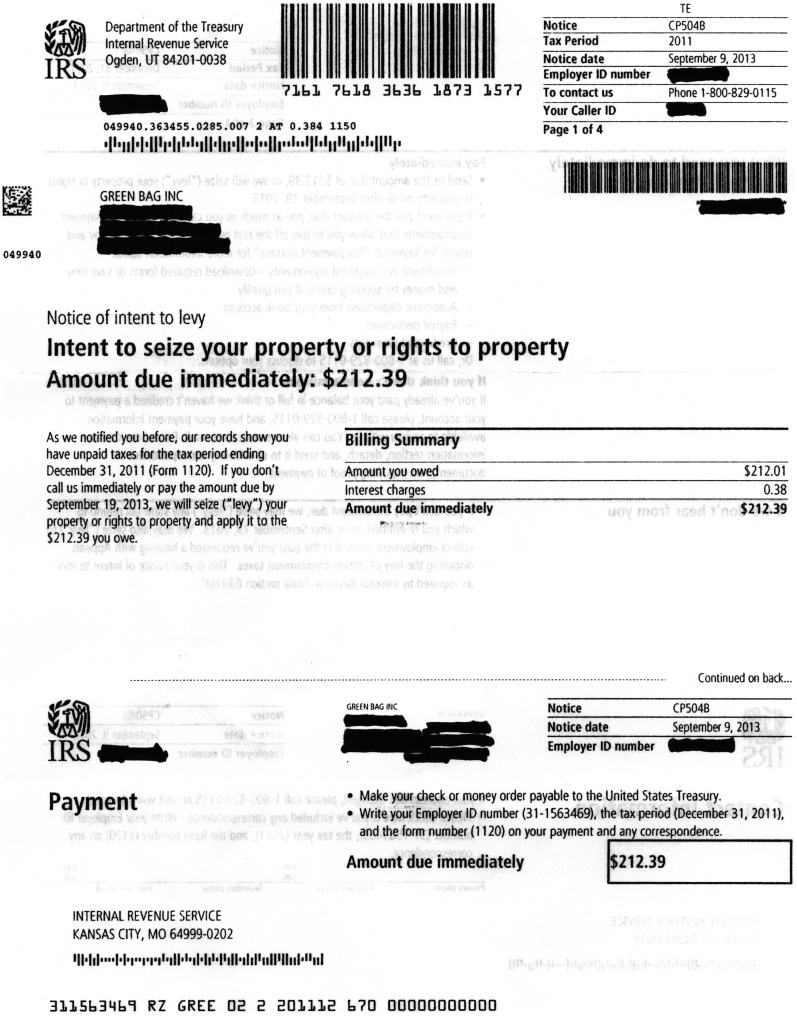
Payment

- Make your check or money order payable to the United States Treasury.
- Write your Employer ID number (31-1563469), the tax period (December 31, 2010), and the form number (1120) on your payment and any correspondence.

Amount due immediately **$1,301.27**

INTERNAL REVENUE SERVICE
KANSAS CITY, MO 64999-0202

311563469 RZ GREE 02 2 201012 670 00000000000



Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0038

7161 7618 3636 1873 1577

[redacted]

049940.363455.0285.007 2 AT 0.384 1150

TE

Notice	CP504B
Tax Period	2011
Notice date	September 9, 2013
Employer ID number	[redacted]
To contact us	Phone 1-800-829-0115
Your Caller ID	[redacted]
Page 1 of 4	

[redacted]

GREEN BAG INC
[redacted]

049940

Notice of intent to levy

Intent to seize your property or rights to property

Amount due immediately: $212.39

As we notified you before, our records show you have unpaid taxes for the tax period ending December 31, 2011 (Form 1120). If you don't call us immediately or pay the amount due by September 19, 2013, we will seize ("levy") your property or rights to property and apply it to the $212.39 you owe.

Billing Summary

Amount you owed	$212.01
Interest charges	0.38
Amount due immediately	**$212.39**

Continued on back...

IRS [redacted]

GREEN BAG INC
[redacted]

Notice	CP504B
Notice date	September 9, 2013
Employer ID number	[redacted]

Payment

- Make your check or money order payable to the United States Treasury.
- Write your Employer ID number (31-1563469), the tax period (December 31, 2011), and the form number (1120) on your payment and any correspondence.

Amount due immediately **$212.39**

INTERNAL REVENUE SERVICE
KANSAS CITY, MO 64999-0202

31156346 9 RZ GREE 02 2 201112 670 00000000000

EXPERTISE ONLINE

Having endured several years of complaints about the unavailability of our fine front matter in a standard law journal format, we have come up with a solution. Starting this year, our annual reviews by Bryan Garner, Greg Jacob and Rakesh Kilaru, Tony Mauro, and Kevin Underhill, as well as prefaces like this one, will be published in the *Journal of Law*[14] as well as the *Almanac*.

OTHER FINE WRITING

The *Green Bag* is not the only institution that salutes good legal writing. Here are a few of the others, and some honors they bestowed in 2012:

Scribes: The American Society of Legal Writers

Book Awards:

Gold: Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press 2010)

Silver: Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (NYU Press 2011)

Bronze: Ronald K.L. Collins and Sam Chaltain, *We Must Not Be Afraid To Be Free: Stories of Free Expression in America* (Oxford University Press 2011)

Law Review Award (best student-written article): Michael Vincent, *Computer-Managed Perpetual Trusts*, 51 Jurimetrics J. 399 (2011)

The Burton Awards for Legal Achievement

Dozens of awards are listed on the Burton Awards website, at www.burtonawards.com/2012event.html

University of Alabama School of Law and the ABA Journal

Harper Lee Prize for Legal Fiction: Michael Connelly, *The Fifth Witness* (Grand Central Publishing 2011)

---

[14] *See* www.journaloflaw.us.

HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. (And we are sure readers will find mistakes even in this relatively slim 2013 edition.) Here are the errors we are sure we made in the 2012 *Almanac*:

Page x: There should be quotation marks after "pernickety" at the bottom of the page.

Pages 323, 325, and 327: "Their Famous Successors" in the running head should be "Legg, Culp, and the Evil Judge."

Page 232: Carol Novak, a charter member of The Wolfe Pack,[15] defended an innocent fictional man:

> Just finished the one about lawyers in the corpus. [Emily Billey, *The Identity of Guilt*] The gist of the section is that the perps who get lawyers don't have the lawyers' names specified, usually, and the innocent parties who hire lawyers, usually have the lawyers' names specified. The chart depicting this phenomenon lists Boyden McNair (*The Red Box*) as a perp. I am almost certain he is a victim and his only misdeed is that he "lost" his daughter to the multi-victim murderess, Calida Frost. I have not had time to look this up, it's from memory, but I'm really sure it's correct.

Ira Brad Matetsky, co-editor of the 2012 *Almanac* and Werowance of The Wolfe Pack, "fear[s] that Carol is correct."

• • • •

The food sections of the 2012 *Almanac* were written by our resident culinary expert, Leiv Blad. His *Condiments* essay (pages 435-37) drew comments – not really corrections – from Daniel Polsby of the George Mason University School of Law:

> I have not tried this and doubt anyone else will (indeed, I have my doubts that Stout ever did), but by inspection: if you treat dough in the way described it is going to be gluti-

[15] *See* www.nerowolfe.org.

> nous, which will bake up tough – not necessarily a bad thing – but virtue in biscuits is normally thought to consist in flakiness. Pinching shortening through the flour is meant to produce this characteristic. Half an hour of mallet-pounding would probably destroy it. . . .
>
> Another thought, which Leiv can confirm: if you make mayonnaise using the Stout recipe (which I have, and other recipes besides, many times) there is a perfectly good reason why it would never occur to you (or Stout) to use it as a sandwich spread. Mayonnaise made that way (the correct way!) much more closely resembles Hollandaise sauce than it does the stuff that comes from a jar, which I like perfectly well by the way. It would never occur to anybody to put home-made mayonnaise on a sandwich – whether or not you put in the sour cream, which strikes me as gilding a lily.

Polsby also had this to say about "Nero Wolfe's Beaten Biscuits" (page 504) from Rex Stout's *"Too Many Cooks" Recipe Box*:

> One more thing – check up on me: I would bet serious money that Marshall du Plessis's chef knew perfectly well what would happen when he put egg yolks and oil together and that it was not a happy accident. If you don't believe it, set all the ingredients in the correct proportions out on a counter and ask someone who has never done it before to make mayonnaise out of it, and see what happens. I bet the chef had done it twenty times before Minorca, but considered it déclassé. Oil – a staple of rustic tastes and kitchens – wouldn't be the first choice of a high-class pro; one may be very sure that that's what that guy was.

IN OTHER BUSINESS

Our goals remain the same: to present a fine, even inspiring, year's worth of exemplary legal writing, – and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2012 exemplars in this volume are wide-ranging in subject, form, and style. This year there is not much potpourri; we hope (despite recent experience) that next year will be better. With any luck we'll deliver some reading pleasure, a

few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

• • • •

Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. The *Green Bag* also thanks our Board of Advisers for nominating and selecting the works recognized here; the George Mason University School of Law and its Law & Economics Center for their continuing generous support of the Green Bag; Ira Brad Matetsky of Ganfer & Shore for his attention to detail; former librarian Paul Haas; and former Green Bag Fellow Cattleya Concepcion.

Ross E. Davies
September 14, 2013

P.S. As we go to press we have more good news. In a letter dated September 19 the IRS says, "We are pleased to inform you that your request to remove the penalty(s) has been granted. However, this action has been taken based solely on the fact that this was the first time you were required to file a return. This type of penalty removal is a one-time consideration. The IRS will base decisions on removing any future penalty(s) on any information you provide that meets reasonable cause criteria." As best we can tell, this means that the notice on page [317] above is for a first-time penalty in the past that has now been removed, but the notice on page [318] above is for a second-time penalty in the future that has not (yet) been removed and therefore seizure is still in the offing. But we could be wrong. As you read this, we are probably either assembling reasonable cause information (and a couple of amended returns) or, having submitted them, are waiting for word from the IRS. And hoping.

THE YEAR 2012 IN LANGUAGE & WRITING

[parallel citation: 2013 Green Bag Alm. 19]

Bryan A. Garner[†]

JANUARY

The *Los Angeles Times* reported on local poet and journalist John Tottenham's crusade against the pandemic overuse and abuse of the word *awesome*. The British expat has launched what he calls the Campaign to Stamp Out Awesome, complete with stickers, t-shirts, and a manifesto, all available at the campaign's headquarters, the Echo Park bookstore where Tottenham works. Once he's laid *awesome* to rest, the linguistic crusader plans to spread his "quiet revolution" to other fronts. Next on the kibosh list will be "It's all good," he says. • The *Daily Telegraph* (U.K.) reported that recently published Disney editions of classic children's stories, including ones by British writers such as A.A. Milne and Lewis Carroll, were marred by grammatical errors (Eeyore says his tail "swishes real good") and tainted by Americanisms (the BrE *skipping rope* has become the AmE *jump rope*). The Bath publisher of *The Magical Story* apologized for any errors but said the word choice reflected the need to "sell our books around the world and not just in the UK." No word yet on whether its books are selling real good. • According to the *New York Times*, Arizona state law requires politicians at all levels to speak, read, and write English. Yet it doesn't specify just how well.

[†] Bryan A. Garner is the author of more than 20 books on writing, English usage, and advocacy, including *Garner's Dictionary of Legal Usage* (Oxford, 3d ed. 2011) and *Garner's Modern American Usage* (Oxford, 3d ed. 2009). He is the editor in chief of *Black's Law Dictionary* and the author of the chapter on grammar and usage in *The Chicago Manual of Style* (Chicago, 16th ed. 2010). He is coauthor with Justice Antonin Scalia of *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) and *Making Your Case: The Art of Persuading Judges* (Thomson/West, 2008). As president of LawProse, Inc., he has taught seminars on legal writing and advocacy for more than 135,000 lawyers, judges, and law students over the last two decades.

Alejandrina Cabrera, a candidate for city office whose English skills were challenged, asked the Yuma County Superior Court to decide the matter. William G. Eggington, a professor of English and linguistics at Brigham Young University, testified that Ms. Cabrera's "basic survival-level" English skills were not adequate to participate in a city's business. The trial and appellate courts agreed. • When ConEd utility workers repaired the street in front of a school in July 2010, they marked the crossing zone on the pavement: "SHCOOL X-NG." The mistake went unnoticed until the *New York Post* reported the spelling error 18 months later. A day after being informed, ConEd ground off the permanent tape and transposed the *C* and *H*. • A typo nearly cost a Florida man his home. The *Tampa Tribune* reported that the homeowner mistakenly punched "0" instead of "8" on his telephone keypad while making his mortgage payment, resulting in an underpayment of 80¢. Bank of America began foreclosure proceedings but later agreed to overlook the error. • The *Charlotte Observer* (N.C.) reported – rather, intended to report – that pro basketball player Baron Davis had a herniated disk. An editor tried to correct an initial misspelling, *disc*, but introduced a new typo instead, turning *disc* into *dick*. Davis laughed off the report, tweeting that his penis was not "herinated."

FEBRUARY

"Proper Spelling? It's Tyme to Let Luce!" wrote Anne Trubek in the magazine *Wired*. She asserted that spellcheckers and autocorrect should not be used because they "reinforce a traditional spelling standard." That standard, she says, was fine for ensuring clarity in the print era. "But with new technologies, the way that we write and read (and search and data-mine) is changing, and so must spelling. . . . Standardized spelling enables readers to understand writing, to aid communication and ensure clarity. Period. There is no additional reason, other than snobbery, for spelling rules." • In *Science*, linguist Michael Cysouw (Ludwig-Maximiliens Universität) disputed Quentin Atkinson's theory that all languages could be traced to southwestern Africa. Atkinson had found that the highest levels of phoneme diversity occurred in languages spoken in south-

western Africa, and theorized that as humans migrated, both genetic and linguistic diversity decreased. Cysouw responded that when other aspects of language are examined using Atkinson's method, it "places the site of origin of language in eastern Africa or the Caucasus, or somewhere else entirely." • The Associated Press reported that the French government has banned the word *mademoiselle* from all its official documents, so that women won't be forced to reveal their marital status. In French, the title for a married woman is *madame*, and for an unmarried woman *mademoiselle*. There is not yet any French counterpart to the very American "Ms." • The *Akron Beacon Journal* reported that Mrs. Lisa O'Rourke's son almost lost his chance to start classes on time at the University of Cincinnati because of a missing apostrophe. When the O'Rourke family moved back to the U.S. with their Irish-born sons, the local Social Security Office registered Mrs. O'Rourke and her older son with the apostrophe, but Mr. O'Rourke and their younger son without it. The omitted apostrophe created confusion at the university registrar's office, which at first insisted that the younger O'Rourke didn't exist. • According to the *New York Times*, linguists and researchers are beginning to look to teenage girls for emerging trends in language and speech. Instead of seeing girls' mercurial slang and unorthodox speech patterns as signs of immaturity or ignorance, as they have traditionally done, some linguists now believe that such manipulations of language serve an important social function, amounting to social-bonding argot for the sweet-16 set. So they argue that, contrary to popular belief, most speakers who use trendy truncations, alterations, and embellishments do so in much more sophisticated ways than it might appear to "grown-ups." Obvi. Perf.

MARCH

Fifty years in the making, the *Dictionary of American Regional English* completed its first edition with the publication of Volume V, covering Sl-Z, the *New York Times* reported. The end came 12 years after the death of the project's founder, Frederic G. Cassidy, described in Jennifer Schuessler's report as "an exuberant Jamaican-born linguist given to signing off conversations with 'On to Z!'" Of

DARE's 60,000 or so entries, many reflect the country's rural and agricultural past. But many newer entries suggest that despite the homogenizing forces of urbanization, mass media, and the Internet, regional English is alive and evolving. One example: *slug*. Around Washington, D.C., *slug* denotes a commuter lined up near a high-occupancy-vehicle lane to carpool with a stranger. *DARE*'s final word: *zydeco*. • Six-year-old Lori Anne Madison of Prince George County, Virginia, became the youngest contestant ever to qualify for the Scripps National Spelling Bee. The precocious girl became a minor media sensation, charming national audiences with her outsized personality. In May she would hold her own at the National Bee for two rounds, correctly spelling *dirigible* before tripping up on *ingluvies* (an organ found in birds) in the third round. But she wasn't Prince George County's only claim to spelling fame this year. The local high school issued nearly 8,000 misspelled diplomas to its graduating class – perhaps demonstrating why Lori Anne is home-schooled. Her favorite word? *Sprachgefühl* (= an intuitive sense of what is linguistically appropriate). To Lori Anne it means "love of language." • Scholastic's *Instructor* magazine discussed the benefits of texting as a tool for teaching communications skills. Citing studies concluding that texting helps develop reading and spelling skills because it enhances phonological awareness (specifically, how sounds and letters are put together), *Instructor* suggested lessons using texting, such as having students write a 20-word text to a friend about what they did last night, then rewriting that text for their parents, then for the teacher. The lesson is intended to show how people use different vocabulary, syntax, and even spelling for different audiences. • The *Pittsburgh Post-Gazette* reported on the "QWERTY effect" – named after the top-left row of letters on the traditional keyboard. Researchers at University College, London, published a study in the *Psychonomic Bulletin and Review* concluding that as between words with more "right-hand letters" and those with more "left-hand letters," people tend to favor the former. Researchers attributed the findings to the psychological effect of "fluency" – the idea that people view easy-to-use things more positively than hard-to-use things. And since most people type faster and more comfort-

ably with their right hands, the right-hand-heavy words are more likable. Curiously though, left-handed typists showed the same preference.

APRIL

A Brooklyn resident contested a parking ticket based on the meaning of the preposition *to*. According to the *New York Times*, Mark Vincent parked under a sign that read: "No standing April to October." He decided that *to* meant that parking was prohibited until the month of October began. Because it was October 2, he reasoned that he was within the law. Supported by Oxford and Merriam-Webster dictionaries, he argued that *to* means "up to but not including," while *through* means "to and including." Although he did not win his appeal, the new sign reads: "No standing April 1-Sept. 30." • As reported in the *Washington Post*, the *AP Stylebook* announced by tweet: "We now support the modern usage of *hopefully*: it is hoped, we hope." Before, the *Stylebook*'s only accepted meaning was "in a hopeful manner." According to David Minthorn, the deputy standards editor of the Associated Press, "We batted this around, as we do a lot of things, and it just seemed like a logical thing to change. We're realists over at the AP. You just can't fight it." Stickler-traditionalists decried the decision as hopelessly wrong. • Bad brief-writing contributed to a New York lawyer's two-year license suspension. The Second Circuit's Committee on Admissions and Grievances concluded that the lawyer had submitted briefs of "shockingly poor quality" and cited some particular defects such as incorrect client names, inclusion of irrelevant boilerplate, and reference to evidence that had not been submitted. The Second Circuit was not impressed by his excuse that an unsupervised paralegal had actually made the errors. The lawyer was ordered to attend CLE classes on brief-writing. • The *New Yorker* introduced a new weekly word-purge contest called "Questioningly," asking readers what word they would most like to eliminate from the magazine for the following week. The popular first choice was *moist*, which has more than 3,000 detractors in a Facebook group called "I HATE the word MOIST!" (How dry.) But the ultimate winner was *slacks*, which was said to produce "a creepy-crawly feeling." And what, besides a

week's banishment of the word, is the winner's prize? "A member of the magazine's esteemed copy department will write the word on a piece of paper, crumple it up, and toss it in the garbage." • The *New Yorker* came clean about its continued use (eccentric use, many would say) of what most readers might mistakenly call the umlaut (ü). In fact, copy editor Mary Norris explained, it's a diaeresis (also spelled *dieresis*), always appearing over the second of two vowels and signaling that the latter "forms a second syllable," as in *coöperate* (or, as the rest of us would write, *cooperate*). Norris said that Hobie Weekes, style editor since 1928, promised in 1978 that he would dump the diaeresis soon. But then he died. Norris added: "No one has had the nerve to raise the subject since." • A study published in the journal *Science* shows that baboons can distinguish real English words from nonsensical ones in writing – the same ability human children display when first learning to read. The baboons were shown four-letter sequences and given a treat for choosing the real words. They were able to memorize more than 300 words in this way and to apply the linguistic rules they inferred to new sets of words and nonwords. While these apes can't read Dr. Seuss, they're helping scientists understand how toddlers can. • The *Washington Post* reported that Afghan interpreters working with the U.S. Army speak a slang- and profanity-filled colloquial English picked up from young soldiers. In an effort to produce idiomatic rather than literal translations to facilitate communication, they model their English phrasings on the verbal habits they've gleaned over the past decade of working with native speakers – mostly American soldiers. So they now curse like seasoned pros, peppering their translations with profanity and a grab bag of English colloquialisms. One interpreter, translating for an Afghan commander who was asked where his soldiers were, replied: "Sir, he says they are chillin' like villains."

MAY

Several large newspapers, including the *Denver Post*, *Contra Costa Times*, and the *Salt Lake Tribune* laid off some or all of their copy-editors, and Postmedia Network Canada Corp. announced that it would soon do the same for the *Vancouver Sun* and two Saskatchewan

newspapers, the *Star Phoenix* and the *Leader Post*. Copyediting duties are being spread to "the content-generating level" and typically only one editing pass will be done. Dave Butler, executive editor of the *Contra Costa Times*, said that "a second or third edit on most stories has become a luxury most newspapers can no longer afford." Warning: more and more typos lie ahead. • The assistant dean of public affairs at the University of Texas issued an apology for the typo on the thousands of commencement programs distributed at its Lyndon B. Johnson School of "Pubic" Affairs. New and corrected copies of the program were printed and given to students later. • The *Washington Post* reviewed *The Life of Slang*, written by Julie Coleman, a linguistics professor at the University of Leicester. In a not-so-complimentary evaluation, the article accused Ms. Coleman of attempting "to walk a line between academic and popular readerships, with uneven results." According to Ms. Coleman: "Slang was once considered a sign of poor breeding or poor taste, but now it indicates that the speaker is fun-loving, youthful, and in touch with the latest trends. Although some adults try to discourage teenagers from using slang, plenty of others want to understand and adopt it." Again, obvi. • Oxford University Press announced that it had analyzed 74,000 stories containing 31 million words written by British children and found that American English has become common in their speech. *Fairycakes* have become *cupcakes*, *flashlights* are used instead of *torches*, and *sneakers* are worn instead of *trainers*. Argy bargy! • The *Christian Science Monitor* reported that Democratic senators Charles Schumer and Robert Casey proposed legislation to increase penalties on wealthy people who renounce their U.S. citizenship for tax reasons. The move was in response to Facebook cofounder Eduardo Saverin's decision to give up his citizenship and move to Singapore, saving an estimated $67 million to 100 million in taxes. To stop others from following suit, the pair introduced the "Expatriation Prevention by Abolishing the Tax-Related Incentives for Offshore Tenancy Act" – the Ex-PATRIOT Act. Apparently the senators were engaging in wordplay, riffing on formerly patriotic expatriates. • *Good Morning America* reported on the trial of Senator John Edwards for allegedly violating federal campaign-finance laws.

Much of the defense appeared to focus on the interpretation of the word *the*. The statute forbids receiving illegal campaign contributions "for the purpose of influencing any election for federal office." Edwards argued that *the purpose* meant that illegal influence must be the sole purpose. But the prosecution argued that the phrase should be read more broadly (one purpose perhaps among many). The case ended in a mistrial. • Want an honest answer? You're more likely to get it through a text message than in a face-to-face interview, *Science Daily* reported. A study by the Program in Survey Methodology at the University of Michigan Institute for Social Research found that people are more likely to disclose sensitive information when texting than when speaking. "It seems that texting may reduce some respondents' tendency to shade the truth or to present themselves in the best possible light in an interview," psychologist Michael Schober said. • *Science Daily* also reported that people use words with a positive emotional content more frequently in written communications. Scientists at ETH Zurich theorized that social relations are enhanced by positive words even though the positive words carry less information than negative ones. They also found that when writers do use emotively negative words, they're balanced with positive words that make the overall communication more neutral. • NPR reported that the Sunlight Foundation, an open-government group, analyzed the *Congressional Record* for readability, using the Flesch-Kincaid scale. For 2012, the average score was 10.6, or a 10th-grade level. Speeches by individual members of Congress were also analyzed. Rep. Dan Lungren's grade level was 20, based on his use of long sentences and polysyllabic words. Rep. Rob Woodall registered the second-lowest grade level: 8.01, based on short, pithy words and sentences. "My mother will probably be embarrassed to hear this news," Woodall said, "but I'm glad to know I'm not obfuscating our challenges with words that are too complicated."

JUNE

The U.S. Court of Appeals for the D.C. Circuit sharply admonished both parties in a tort case for "abandon[ing] any attempt to write in plain English" by overusing abbreviations, familiar or

not, and using both little-known and newly created acronyms and initialisms. Citing George Orwell, the Court wrote: "Brief-writing, no less than 'written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble.'" • Managers are fighting an epidemic of grammar gaffes in the workplace, the *Wall Street Journal* reported. Employees are used to informal – even lax – writing in e-mails, texting, and social media, and are unaware that such informality can create bad impressions with clients, ruin marketing materials, and cause communicative misfires. Some bosses and coworkers step in to correct mistakes. Some offices provide business-grammar guides to employees. And almost half of employers are adding language-skills lessons to employee-training programs. • A job candidate's proper grammar continues to be a skill highly valued by prospective employers. The *New York Times* reported that while politicians and economists talk about creating new jobs, business owners and recruiters see thousands of jobs sitting vacant because the candidates lack the necessary social skills. The owner of a sheet-metal-manufacturing business noted: "My operators are in constant contact with our customers, so they need to be able to articulate through e-mail. But you'd be surprised at how many people can't do that. I can't have them e-mailing Boeing or Pfizer if their grammar is terrible." • Is texting displacing face-to-face talking? Not according to experts quoted in the *Huffington Post*. But "more of us are losing our ability to have – or at least are avoiding – the traditional face-to-face conversations that are vital in the workplace and personal relationships." Professor Janet Sternberg of Fordham University said that more students fail to look her in the eye and have trouble with the basics of direct conversation – bad habits that, she said, will not serve them well as they enter a world where many of their elders still expect an in-person conversation, or at the very least a phone call. • The *Daily Mail* (U.K.) reported that the Queen's English Society has succumbed to the Twitter- and text-obsessed generation and has disbanded after none of its 1,000 members volunteered to hold board positions. Since its founding in 1972, the organization has tried to defend the English language against poor grammar, spelling, and punctuation.

Its most notable achievement was shaping the British National Curriculum. Chair Rhea Williams said: "Things change, people change. People care about different things." • The *New York Times* reported that the William and Flora Hewlett Foundation sponsored a competition offering $60,000 for the algorithm that best predicted the scores given by human graders to standardized-test essays. It also sponsored a study of the commercial automated essay-scoring engines currently available and found that their scores were effectively identical to those given by human graders. Using these programs cuts the costs to schools immensely, but computers haven't replaced human readers just yet: studies have also shown that savvy students can fool the machines with well-worded factual nonsense any human would catch.

JULY

The ACLU filed a class-action lawsuit against the state of Michigan and a Detroit-area school district for violating students' "right to learn to read" under an obscure state law. A 1993 statute provides that if a public-school student is not proficient in reading, as determined by tests given in grades 4 and 7, the school must provide "special assistance" to bring the child up to grade level within a year. The suit charged that most of the students in the district are at least three years below level, and that some cannot even spell their own names correctly. • The *Atlantic* printed what "may well go down as the most polite, encouraging and empathetic cease-and-desist letter ever to be sent in the history of lawyers and humanity." It was written by Christy Susman, the lawyer who defends trademarks for the Jack Daniel's distillery, to an author whose book cover somewhat resembled the whiskey's label (including the same "40% Alc. by Vol." notation). She wrote that "because you are a Louisville neighbor and a fan of the brand, we simply request" that the cover be redesigned for the next printing. The blog *Above the Law* commented: "You get more flies with Tennessee whiskey than you do with adversarial attorneys." • Residents of Englewood, New Jersey, were puzzled about how to comply with a two-hour parking sign that read "8 a.m. to 8 a.m." The *Fort Lee Suburbanite* reported

that the city council had examined the sign ordinance – enacted in 1978 – and found the language prescribed "8 a.m. to 8 a.m." "Nobody could figure out why they did that 30-something years ago," the city clerk commented. The council planned to meet again in September to discuss amending the ordinance. • Can your native language change the way you plan for retirement? Yes, says Yale University economist Keith Chen, because different languages distinguish future and present events in differing degrees. In strong future-time-reference (FTR) languages such as English and Spanish, you say "It will rain tomorrow." But in weak-FTR languages like German and Japanese, you say "Tomorrow, it rains." According to Chen's hypothesis as reported in the *News Tribune* in Tacoma, Washington, "weak-FTR speakers see the future as less distant and therefore engage in fewer behaviors with negative future consequences." His study showed that speakers of weak-FTR languages smoked less, saved more for retirement, and were less likely to be obese. • According to the *New York Times*, research results published in *Science* magazine identify present-day Turkey as the home of the Indo-European-language family, which includes English, Russian, and Hindi. The international team led by biologist Quentin Atkinson from the University of Auckland in New Zealand used methods for tracing the evolution of diseases to analyze words from over 100 ancient and modern languages, plus geographical and historical data. The language's roots were traced back more than 8,000 years to Anatolia, contradicting one linguistic theory that has the language originating in Russia. "Archeologists and linguists have had different favorite theories on the language origins," said Michael Dunn, co-author of the study. "But now, new research like ours provides linguistic support for the Anatolian hypothesis." [For a critique of Atkinson's earlier work, see February.]

AUGUST

Reporting on the U.S. presidential race for the *Globe and Mail* (Canada), Courtney Shea remarked that when the Obama campaign team unveiled its new "Forward." poster (yes, with the period), it was like "Christmas came early for grammar geeks." The

Wall Street Journal wrote that there had been a "spirited debate" about the punctuation among staffers. But in the end, Shea wrote, "an unwelcome period hasn't caused this much panic since you wore white shorts to high-school gym class." (*You*? Reverse sexism, methinks.) Almost three months later, it would become a minor "October surprise" when the period was replaced with an exclamation point. • Author James Gleik wrote in the *New York Times* about the perils of autocorrect functions: "People who yesterday unlearned arithmetic will soon forget how to spell. One by one we are outsourcing our mental functions to the global prosthetic brain." A Google spellcheck developer posited: "A dictionary can be more of a liability than you might expect. Dictionaries have a lot of trouble keeping up with the real world, right?" So Google retrieves a significant subset of *all* the words people type – "a constantly evolving list of words and phrases," he says, "the parlance of our times." • The *Daily Telegraph* (U.K.) reported that the University of Wolverhampton, which warns its students to be careful with grammar, posted a sign reading: "Celebrating our graduates success." The sign was replaced after passersby pointed out the missing apostrophe. Chrissie Maher, of the Plain English Campaign, commented: "If they can't get it right then God help the rest of us." • As reported in the *Malone Telegram* (N.Y.), the Native American Studies Program in Syracuse University's College of Arts and Sciences launched a new undergraduate program aimed at students and teachers of Iroquois languages: the Certificate in Iroquois Linguistics for Language Learners. The program's interim director, Philip P. Arnold, says that the need for Iroquois language teachers is critical because elder speakers in Iroquois communities are dying off and younger people are speaking primarily English. Adding to the problem, the Iroquois grammar is a complex one. The three-semester curriculum includes courses in phonetics, phonology, semantics, verb morphology, and syntax. • According to the *Times of India*, the celebrated Indian lexicographer Ganjam Venkatasubbiah turned 100 on August 23. An expert in Kannada, GV (as he is popularly called) has compiled more than 10 dictionaries, including the eight-volume *Kannada-Kannada Bruhat Nighantu*.

SEPTEMBER

The *San Jose Mercury News* reported that a California ballot measure was challenged because it was two words longer than the state law's 75-word maximum. The Santa Clara Valley Water District's board thought it had corrected the problem in a six-minute emergency session by dropping the word *as* in one place and the abbreviation *No.* ("number") in another. But the board failed to post notice of the meeting, so the Silicon Valley Taxpayers Association added that open-meetings grievance to its ballot challenge. If their suit succeeds, it could cost the water district half a billion dollars, the paper reported. • The authors of *Articulate While Black: Barack Obama, Language, and Race in the U.S.* opined in the *New York Times* that the speech characteristics of President Obama and Mitt Romney heavily influenced voters' perceptions of them as "likable" or "relatable." Romney's speech, they said, "is essentially the verbal equivalent of his public persona: flat, one-dimensional, unable to connect." They described Obama as linguistically flexible, noting that his "ability to bring together 'white syntax' with 'black style' played a critical role in establishing his identity as both an American and a Christian." • A lawyer faced with a five-page limit for an amicus brief opposing a proposed antitrust settlement opted to present his argument in the form of a comic strip. According to *ABA Journal.com*, after a traditional table of authorities, the first page of the comic shows the judge ordering a five-page limit, then the lawyer at home, sitting in bed wearing a robe and working on his laptop. When his daughter asks what he's doing, they discuss his argument in four pages of comic-book dialogue. Although the court accepted the brief for filing, it approved the settlement. • The *Dallas Morning News* reported that language researchers at the University of Texas have found that most Texans no longer sound like stereotypical Texans: the twang is fading. Lars Hinrichs, an assistant professor of English and director of the Texas English Project, says that 30 years ago about 80% of Texas residents had clear Texas accents, but now Texans sound more like accent-neutral Midwesterners. The reasons? Immigration, urbanization, and gentrification. But Texans haven't completely abandoned the *y'alls* and drawls – they just use

them at certain times. According to Hinrichs, the trend of adapting language and accents to fit different needs represents the future of Texan talk. • In his *Guardian.co.uk* article "Dictionaries are Not Democratic," Jonathon Green lamented the decision of dictionary-publisher Collins to solicit suggestions from the general public for definitions: "Suggest a word that qualifies for their dictionary and win a prize!" According to Green: "Such shout-outs are the antithesis of traditional lexicography. . . . [T]he dictionary is not designed for second-guessing. If it is not intensively researched, edited, proofed, and rendered as 'true' as possible, why bother to consult it? . . . [I]f reference is to remain useful then it cannot become amateur hour."

OCTOBER

The U.S. Court of Appeals for the 11th Circuit ruled that no authority supports using the First Amendment as a shield against sanctions for insulting a judge. A Florida lawyer wrote a brief that opened by saying, "It is obvious that you have not reviewed the record in this case," and concluded: "It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings." The Court rejected the lawyer's defense that these were "truthful responses to a string of unjustified abuses" and affirmed his 60-day suspension. • The *Daily Telegraph* (U.K.) reported that a survey released by the book-publishing firm Pearson UK found that bedtime stories are dying out as children's attention spans decrease. One in six parents never read to their children. Another two of those six read to their children only once a week. Pearson expressed concern, noting: "Study after study has shown that reading for pleasure is a key indicator of future success for children, but demands on children's attention and the difficulty of inspiring reluctant readers mean many are missing out." • Britishisms are cropping up in the daily speech of Americans, the *New York Times* reported. A journalist dubbed Mitt Romney a *toff*. A science-fiction writer described the latest iPad as a "lovely piece of *kit*." And everywhere, people are heard expressing affirmation with *brilliant*, excusing themselves to use the *loo*, and worrying about getting *sacked* from their jobs. "Is it pompous,"

mused the *Times*, "or just further evidence of the endless evolution of American English?" Oh, posh. • The *New York Times* reported that Hurricane Sandy made an instant celebrity of Mayor Michael Bloomberg's sign-language interpreter, Lydia Callis, who enlightened a lot of people about the grammar and sheer dynamics of sign language. Callis's animated style and whole-body expressions, "gesticulating, bobbing and nodding," as reporter Jeremy W. Peters understated it, made her an overnight social-media sensation. As Callis told one reporter, "When I'm interpreting, you see the tree falling, you see the building, you see the crane moving around." As one Twitter fan said, she "signed with a New York accent." • An article in the *Daily Telegraph* (U.K.) highlighted the negative influence that spellcheckers are having on children. Research has shown that while children ages 7-13 could correctly spell terms like *pterodactyl* and *archaeologist*, they couldn't spell simple and everyday words because of their reliance on spellcheckers. Most problematic are common words with unusual spellings and distinguishing between homophones such as *there* and *their*. • HarperCollins published David Skinner's book *The Story of Ain't: America, Its Language, and the Most Controversial Dictionary Ever Published*. Skinner, editor of *Humanities* magazine for the National Endowment of the Humanities, wrote about the history and controversy surrounding *Webster's Third New International Dictionary*. • The *Atlantic* reported that Staten Island's New Dorp High School, once a notoriously underperforming school, has staged a dramatic turnaround in the last four years – thanks to an almost single-minded focus on teaching writing. The school's Writing Revolution program places strong emphasis in nearly every academic subject on teaching the skills necessary for good analytical writing. After a chemistry lesson, for example, students may be asked to write what they've learned using sentences with subordinate clauses. The results have been extraordinary, and once-failing New Dorp is now hailed as a model of school turnaround. • Jacques Barzun died on October 25 at the age of 104. Best known as a historian, the polymath Barzun completed Wilson Follett's posthumous work *Modern American Usage: A Guide* (1966) and wrote *Simple and Direct: A Rhetoric for Writers* (1975), among dozens of other books.

NOVEMBER

The *Daily Telegraph* (U.K.) reviewed *Trench Talk: Words of the First World War* by the historian Peter Doyle and the etymologist Julian Walker. The authors studied thousands of public and private writings to document how new words and phrases originated and others broadened from earlier, narrow contexts to gain new meanings. Others were imported from French and German. Among the list of everyday terms found to have originated or spread from the conflict are *cushy*, *snapshot*, *wash out*, *conk out*, *blind spot*, *binge drink*, *dud*, and *pushing up daisies*. • Sarah Ogilvie's book *Words of the World: A Global History of the Oxford English Dictionary* set off a firestorm in the world of lexicography. The linguist, lexicographer, and former staff editor for the *Oxford English Dictionary* claimed that the late Robert Burchfield, eminent former *OED* chief editor, "covertly deleted thousands of words because of their foreign origins and bizarrely blamed previous editors." Among the deleted words she listed are *shape* (= a Tibetan councillor), *chancer* (= to tax), *calabazilla* (= a wild Mexican squash), and *wading-place* (= a ford). The *OED* is reportedly reevaluating the expunged words, but the accuracy and fairness of the book's claims are yet to be known. (Burchfield having been my friend and mentor, I doubt Ogilvie.) • Oxford University Press picked its U.S. word of the year: *GIF*, the verb for creating a GIF file of an image or video. According to Katherine Martin, head of the U.S. dictionaries program at OUP, *superstorm*, *pink slime*, and *YOLO* (the acronym for "you only live once") were all contenders, but "GIF transcended any particular event and spoke to an overall trend of how we consume media." As the *Los Angeles Times* pointed out, the "verbing" of the noun *GIF* – an acronym for "graphic interchange format" – follows in the footsteps of other noun-to-verb examples such as *Google* and *Photoshop*. • The *Boston Globe* reported that Oxford University Press also chose its British word of the year: *omnishambles* (= a situation that has been comprehensively mismanaged, characterized by a string of blunders and miscalculations). Oxford lexicographer Susie Dent said the word – coined by writers of the satirical television show *The Thick of It* – was chosen for its popularity as well as its "linguistic productivity." • As report-

ed by the *Christian Science Monitor* (and many other news outlets), a mother named her baby girl "Hashtag" after the Twitter symbol (#) used to mark keywords and trending topics. Although the story went viral within just a few hours after the mother's post on Facebook, it couldn't be confirmed, and skepticism mounted. Of course, the story created a hashtag of its own: #babyhashtag. Maybe when she gets older she will become friends with "Facebook," the baby girl born in Egypt a few months earlier.

DECEMBER

On December 20, the *Guardian* (U.K.) noted the 200th anniversary of *Die Kinder und Hausmärchen* (*Children's and Household Tales*) by the Brothers Grimm. Kate Connolly reported on the kickoff of a yearlong celebration at a meeting that drew participants ranging from lexicographers to psycholanalysts to examine "everything from the book's enduring legacy to the brothers' impact on German grammar and how they shaped the nation's erotic imagination." The Brothers Grimm looked at people's "dark souls," critic Matthias Matussek said. The book was banned from German kindergartens after World War II. • Every day, the *Oxford English Dictionary* e-mails and posts on its blog a selected "word of the day." The words are chosen months in advance and automatically distributed. By unfortunate coincidence, the day after the Sandy Hook massacre of schoolchildren occurred, the *OED*'s "word of the day" was *bloodbath*. The *OED* quickly deleted the blog entry and issued sincere apologies. It added that it is taking steps to review its word selection and scheduling policies. • Doctors from Harvard Medical School reported in the *Archives of Neurology* on a condition called *dystextia* and how it revealed that a woman was experiencing a stroke when she sent a series of texts. Bizarre messages (not attributable to autocorrect errors) may indicate difficulties with language, a possible symptom of neurological dysfunction. One doctor noted that "the growing digital record will likely become an increasingly important means of identifying neurologic disease, particularly in patient populations that rely more heavily on written rather than spoken communication." • The "whole nine yards" may not be nine

and may not be a distance. Or anything else concrete. The *New York Times* reported that researchers found references to the "whole nine yards" in 1956 but also to the "whole six yards" as far back as 1912 in Kentucky. The expression's origins are still unknown, but now many of the folk theories for the nine yards (fabric in a kilt, WWII ammo belts, quantity of beer, etc.) seem less likely to be valid. • The *Washington Post* story "Caps-lock and Load on Twitter" discussed a Twitter grammar bot (an automated software application) called @CapsCop. The account systematically finds tweets posted in all caps and immediately sends a snarky reply such as "Give lowercase a chance" or "On Twitter, no one can hear you scream." In fact, there are many tech-savvy grammarians launching Twitter campaigns like this one. One account finds users who tweet "sneak peak" and sends a correction. Yet another, @YourorYoure, simply replies "Wrong!" when the contraction is misused. • Dmitry Golubovskiy recited the longest word in the world – all 189,819 letters – in a video that lasts over three hours. According to *Geekologie.com*, the name for a giant protein nicknamed Titin begins with "methio" and ends with "leucine." It is not listed in any dictionary (perhaps because its name alone would fill many pages before getting to the definition). Why is the name so long? Because Titin is the largest protein ever discovered, and proteins are named by their component chemicals. • Despite a cult following of enthusiasts, the Russian letter *ë*, pronounced "yo," is fading from use. Russians are increasingly omitting the diacritic, dissolving the distinction between *ë* and *e* (pronounced "ye"). The Russian Language Institute says the dots are optional, necessary only to avoid confusion. But Viktor Chumakov, the man leading the campaign to save *ë*, is convinced that this is part of a CIA plot to weaken Russia. A spokesperson for the CIA formally denied the accusation, however, assuring the *Wall Street Journal* that "the Agency supports the practice of good grammar and pronunciation in any language."

* * *

THE DOZEN BIGGEST LINGUISTIC GAFFES IN 2012 LAW REVIEWS

Bracketed citations are to *Garner's Modern American Usage* (3d ed. 2009) (*GMAU*) and *Garner's Dictionary of Legal Usage* (3d ed. 2011) (*GDLU*).

1. "The attorney must strive to keep the lines of communication between *he* and his client open." Paige Masters, *Caught Between a Rock and a Hard Place*, 37 Okla. City. U. L. Rev. 97, 125 (2012). (Read *him*. If the idea is to be gender-neutral, make it *keep the lines of communication with the client open*. [See *GMAU* at 102, 663-64; *GDLU* at 108-09, 719.])

2. "Many Democrats did not share his [Professor Rostow's] views on the subject of SALT II – a concept that becomes especially obvious during the question and answer session between *he* and then-Sen. Joe Biden." H. John Goodell & Alexander T. Simpson, *From Start to Finish?*, 20 Mich. St. Int'l L. Rev. 441, 445 n.37 (2012). (Read *him*. [See *GMAU* at 102, 663-64; *GDLU* at 108-09, 719.])

3. "He who suffered the loss must be compensated by *she* who inflicted the wrong." Douglas Sanderson, *Redressing the Right Wrong*, 62 U. Toronto L.J. 93, 108 (2012). (Read *her*. [See *GMAU* at 663-64, 860-61; *GDLU* at 719, 944-45.])

4. "Before Houston Law Review was *begat*, the University of Houston was." Craig Joyce, *Driven: The First Decade of Houston Law Review*, 50 Hous. L. Rev. 257, 257 (2012). (A misbegotten past participle. [See *GMAU* at 92-93; *GDLU* at 110.])

5. "Vermont had de jure prohibition since 1852, but it was *honored in the breech*." Paul S. Gillies, *John H. Senter: A Crusty World View*, 38 Vt. B.J. 6, 9 (2012). (A misbegotten "breech birth" – a breach of idiom. [See *GMAU* at 114; *GDLU* at 119.])

6. "At one point, the mid-day liquor break was considered benign, and drinking upon turning eighteen years of age was a '*right* of

passage.'" E. Ericka Kelsaw, *Out of Our Right Minds*, 16 Mich. St. U. J. Med. & L. 167, 195 (2012). (Not right: it should be *rite*. [See *GMAU* at 721.])

7. "While theories exist to ground intellectual property rights – especially copyright – as *just desserts* flowing from one's intellectual labor, as a matter of 'natural rights,' the notion of *just desserts* in general does not dispositively define the fruit that should flow from one's first act of possession." Allen K. Yu, *The En Banc Federal Circuit's Written Description Requirement*, 33 Cardozo L. Rev. 895, 920-21 (2012). (Read *just deserts*. The error appears three times in the same paragraph and again two paragraphs later. The mention of *fruit* in the same sentence as [*] *just desserts* deliciously compounds the error. [See *GMAU* at 492; *GDLU* at 508.])

8. "The defendants were transferred to military jurisdiction and the Circuit Attorney apparently entered a nolle prosequi, dismissing the action. The case then appears in the records of the Provost Marshal, who in October 1864, initiated *court marshal proceedings* against the four suspects." Frank O. Bowman III, *Getting Away with Murder (Most of the Time)*, 77 Mo. L. Rev. 323, 374 (2012). (This is arguably ambiguous. Were the defendants being tried under military jurisdiction in a *court martial* or in a civilian marshal's court? Surely it's *court martial*. [See *GMAU* at 211; *GDLU* at 232.])

9. "In laymen's terms, this means a court would not let a big strong union crush a small weak secondary employer, but *might would* let a big strong union take on a big strong secondary company whose actions affect the primary dispute." Lance Compa & Fred Feinstein, *Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action in the United States: Enforcement by Industrial Action*, 33 Comp. Lab. L. & Pol'y J. 635, 648 (2012). (Laymen's terms indeed! [See *GMAU* at 274-75.])

---

[*] Invariably inferior forms.

10. "Lincoln, Nebraska, has *one of the more unique* chicken ordinances when it comes to limiting the number, in that it not only provides for a maximum number of chickens, but also a minimum." Jaime Bouvier, *Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry*, 42 Envtl. L. Rep. News & Analysis 10888, 10906 (2012). (Read *a unique*, or perhaps *an unusual. Unique* means "one of a kind." [See *GMAU* at 831; *GDLU* at 913-14.])

11. "It would have sent the signal to those African heads of state who began complaining when Mr. al-Bashir was indicted that *no one*, not even national leaders, *are* above the law." Matt Eisenbrandt, *The Prosecution of George W. Bush*, 6 J. Parliamentary & Pol. L. 277, 284 (2012). (Read *no one . . . is*. The *not even* phrase is not part of the subject, so it doesn't control the number of the verb. [See *GMAU* at 571.])

12. "One of the things that *makes* legal scholarship distinctive is that law reviews publish works by students, who almost by definition are not yet experts in the field." Andrew Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. Legal Educ. 259, 260-61 (2012). (Read *make*. This verb is controlled by *things* (the antecedent of the relative pronoun *that*), not *one*. [See *GMAU* at 591-92; *GDLU* at 634.])

* * *

> It is a duty to maintain the continuity of speech that makes the thought of our ancestors easily understood, to conquer Babel every day against the illiterate and the heedless, and to resist the pernicious and lulling dogma that in language – contrary to what obtains in all other human affairs – whatever is is right and doing nothing is for the best.
>
> Wilson Follett,
> *Modern American Usage:*
> *A Guide* 30 (1966)

THE YEAR IN LAW 2011-2012

[parallel citation: 2013 Green Bag Alm. 37]

Gregory F. Jacob & Rakesh Kilaru[†]

A review of some highlights of law in America (with a few overseas detours) during the past twelve months or so.

NOVEMBER 2011

Nov. 4: Former Penn State University assistant football coach Jerry Sandusky is indicted by a grand jury on 40 counts of sex crimes against young boys. As additional victims come forward, 12 new counts will later be added.

Nov. 8: The Supreme Court releases its unanimous opinion in *Greene v. Fisher*, concluding that federal courts cannot grant habeas relief based on changes in federal law that occur "before the defendant's conviction becomes final" but "after the last adjudication of the merits in state court." *Greene* is the first published opinion of October Term 2011.

Nov. 10: The Senate Judiciary Committee votes 10-8 to report to the full Senate legislation repealing the Defense of Marriage Act of 1996.

Nov. 16: Oscar Ramiro Ortega-Hernandez is arrested for firing rifle shots near the White House. Four days after the shots were fired, officials find at least one bullet hole in a White House window.

Nov. 17: In an opinion by Chief Justice Tani Cantil-Sakauye, the California Supreme Court holds that proponents of Proposition 8, California's ban on same-sex marriage, have standing to appeal a federal district court decision striking down the ban. The decision paves the way for the U.S. Court of Appeals for the Ninth Circuit to

---

[†] Greg Jacob is a partner in O'Melveny & Myers LLP and an editor of the *Green Bag*. Rakesh Kilaru is an attorney at O'Melveny & Myers LLP.

decide the merits of the appeal; it had certified the standing question to the state court.

Nov. 18: The Supreme Court appoints H. Bartow Farr III, of Farr and Taranto, and Robert Long, of Covington & Burling, to serve as *amici* in the lawsuits challenging the Affordable Care Act. The Court asks Farr to argue that the individual mandate is severable from the rest of the Act, and asks Long to argue that the lawsuit is barred by the Anti-Injunction Act.

Nov. 21: Responding to a report from the International Atomic Energy Agency that Iran continues to pursue nuclear weapons, and to Iran's alleged plot to assassinate the Saudi ambassador to the United States (see entry for October 17, 2012), President Barack Obama enters an executive order imposing additional sanctions on Iran, targeting Iran's petroleum industry and designating Iran's entire banking sector as supportive of terrorism.

Nov. 23: Judge William Adams, who became notorious after the release of a 2004 video showing him beating his 16-year-old daughter with a belt, is suspended with pay by the Texas Supreme Court.

Nov. 28: On "Cyber Monday," federal authorities seize 150 domain names for websites selling alleged knockoffs of athletic jerseys, handbags, and sports equipment.

Nov. 30: Feld Entertainment, Inc., famous for producing the Ringling Bros. and Barnum & Bailey Circus, agrees to pay $270,000 to the U.S. Department of Agriculture for animal welfare violations. The penalty is the largest in history. • Congress passes the Federal Courts Jurisdiction and Venue Clarification Act of 2011, amending the rules governing the removal of lawsuits from state to federal court to resolve a variety of interpretive splits that had arisen in lower courts.

DECEMBER 2011

Dec. 5: A dozen former National Football League players file a lawsuit against the NFL, claiming that its flawed concussion policies, coupled with leaguewide misuse of the anti-inflammatory drug To-

radol, caused them to suffer long-term brain injuries. The suit comes at a time of increased attention to the connection between concussions and serious conditions like degenerative brain disease, dementia, and depression. • Billionaire hedge fund manager Raj Rajaratnam begins serving his 11-year prison sentence for insider trading.

Dec. 6: The Senate fails to invoke cloture on the nomination of Caitlin Halligan to the D.C. Circuit. Only 54 senators voted to invoke cloture – six short of the necessary 60 – effectively blocking a vote on President Obama's nominee to fill the seat vacated by Chief Justice John G. Roberts, Jr.

Dec. 7: The Supreme Court Historical Society begins selling a cookbook containing recipes by Martin Ginsburg, the late husband of Justice Ruth Bader Ginsburg.

Dec. 8: Rod Blagojevich, the former Governor of Illinois convicted of corruption in public office, is sentenced to 14 years in prison – the second-longest sentence in a Chicago public corruption case. • The Department of Health and Human Services refuses to allow Plan B, a form of emergency contraception, to be sold over the counter to people under the age of 17.

Dec. 15: The U.S. Department of Justice issues a report accusing Maricopa County, Arizona Sheriff Joe Arpaio of creating "a pervasive culture of discriminatory bias against Latinos" reaching "the highest levels of the agency." Arpaio's aggressive immigration enforcement efforts were the topic of "Arpaio's America," a documentary film made by two Stanford Law students. • The Death Penalty Information Center reports that the number of death penalty sentences dropped to the lowest point since the reinstatement of capital punishment in 1976. Only 78 capital sentences were handed down in 2011, compared to 104 in the previous year. • Congress passes the National Defense Authorization Act of 2012, which, among other things, affirms the President's authority under the September 14, 2001 Authorization for Use of Military Force Against Terrorists to indefinitely detain enemy combatants captured during the War on Terror without trial.

Dec. 16: The SEC charges six former executives of Fannie Mae and Freddie Mac with securities fraud, claiming that they knowingly approved misleading statements about their holdings of risky mortgages.

Dec. 17: Congress passes the 2012 Consolidated Appropriations Act, appropriating funds for most federal agencies for fiscal year 2012. The Act continues prohibitions on the use of federal funds to move Guantanamo Bay detainees into the United States, or to transfer such detainees to the control of foreign governments unless certain conditions are met. The Act also reinstates a longstanding ban on federal funding of needle exchange programs, which had been lifted by legislation in 2009.

Dec. 20: The Senate holds its first of 10 pro forma sessions designed to prevent President Obama from making recess appointments (but see entry for January 4, 2012).

Dec. 22: The Ninth Circuit dismisses a lawsuit filed by a number of citizens, including former Presidential candidate Alan Keyes, challenging President Obama's constitutional eligibility to be President of the United States. The court concludes that the plaintiffs lack standing to bring their suit.

Dec. 23: Congress passes the Temporary Payroll Tax Cut Continuation Act of 2011, extending the 2 percent payroll tax cut initially enacted in December 2010. • The Department of Justice releases a September 2011 opinion issued by DOJ's Office of Legal Counsel finding that the Wire Act of 1961 does not apply to non-sports betting, reversing a longstanding DOJ position but conforming to a 2002 opinion of the U.S Court of Appeals for the Fifth Circuit from which DOJ had long dissented. DOJ maintains that its April 2011 prosecutions of several Internet poker sites were separately authorized by the Internet Gambling Ban Act, which provides for federal enforcement of state law gambling bans.

Dec. 31: Chief Justice John Roberts Jr. issues his year-end report on the state of the federal judiciary, which includes a spirited defense of the Justices' handling of their ethical duties. The Chief Jus-

tice adds, "I have complete confidence in the capability of my colleagues to determine when recusal is warranted." The report was widely viewed as a response to the public calls for Justices Clarence Thomas and Elena Kagan to recuse themselves from participation in the cases challenging the Affordable Care Act.

JANUARY 2012

Jan. 4: President Obama appoints Richard Cordray, the former Attorney General of Ohio, as head of the Consumer Financial Protection Bureau, during a pro forma Senate session. He also recess appoints Democrats Richard Griffin and Sharon Block and Republican Terrence Flynn to the NLRB, restoring a working quorum in that body; two of the three NLRB recess appointments had been nominated to the positions on December 15, 2011, just two days before the Senate adjourned for the year. The recess appointments prove to be quite controversial, as Senate Republicans had previously blocked a vote on Cordray's confirmation.

Jan. 8: Rep. Gabrielle Giffords (D-Arizona) returns to Tucson to commemorate the one-year anniversary of her shooting.

Jan. 11: In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court unanimously holds that there is a "ministerial exception" to employment discrimination laws that authorize wrongfully terminated employees to sue their employers for reinstatement and damages. The Court concludes that it would violate the Free Exercise Clause to "requir[e] a church to accept or retain an unwanted minister, or punish[] a church for failing to do so." Every court of appeals had reached the same result before the Court agreed to review the case. The Court also holds that Cheryl Perich – the dismissed employee who filed suit – is a minister covered by the ministerial exception.

Jan. 12: Virginia Seitz, the Assistant Attorney General for the Office of Legal Counsel, releases a memorandum arguing that President Obama had authority to make recess appointments during a pro forma Senate session (see entry for January 4, 2012).

Jan. 13: The Brookings Institution releases a research paper indicating that President Obama made fewer judicial appointments than President George W. Bush by the third year of their respective presidencies.

Jan. 20: The "occupy" movement arrives at the Supreme Court, with demonstrators storming up the Court's steps before eventually being arrested. • In a unanimous *per curiam* opinion, the Supreme Court rejects the electoral maps drawn by a three-judge panel in the Western District of Texas. The three-judge court had drawn the maps after it became clear that the legislatively-drawn maps would not be precleared in time for the election. The Supreme Court held that the three-judge court had not paid enough attention to the legislature's suggestions when drawing its own maps. • The Justice Department and FBI seize the Web site Megaupload and charge seven people connected with it with Internet piracy charges. In response, a hacker collective known as "Anonymous" carries out cyberattacks on the Department of Justice's website.

Jan. 23: Harold Hodge, Jr., a resident of Maryland, sues U.S. Supreme Court Marshal Pamela Talkin, challenging the Court's rules barring protestors from displaying signs on grounds. Hodge was arrested after walking up the Court's steps wearing a sign saying, "The U.S. Gov. Allows People To Illegally Murder And Brutalize African Americans And Hispanic People." • The Supreme Court hands down a 9-0 decision in *United States v. Jones*, which holds that the warrantless installation and use of a GPS device by police to track a suspect's vehicle constitutes a search under the Fourth Amendment. Justice Scalia writes the principal opinion, joined by four other members of the Court, which concludes that the police violated the Fourth Amendment by trespassing on Antoine Jones's property in an effort "to find something or obtain information." Justice Alito pens a separate concurrence, joined by only three Justices, which rejects the trespass rationale and relies on the fact that long-term police monitoring of Jones's vehicle violated his reasonable expectations of privacy. Justice Sotomayor authors a decisive concurrence that agrees with both Justice Scalia's and Justice Alito's approaches.

Jan. 24: President Obama delivers the State of the Union address, spending most of his time on economic issues.

FEBRUARY 2012

Feb. 2: U.S. District Judge James Boasberg denies a motion for a preliminary injunction filed by Occupy D.C. protesters seeking to prevent U.S. Park Police from seizing or destroying tents or other signs of encampment.

Feb. 3: The Administrative Office of the U.S. Courts lifts the freeze on promotions and pay increases for federal court employees, based on a better-than-expected appropriation from Congress. The lifting of the freeze does not apply to judges.

Feb. 6: President Obama issues an executive order sanctioning Iran by, among other things, freezing U.S.-based assets of the Iranian government, the Central Bank of Iran, and other Iranian financial institutions.

Feb. 7: In a 2-1 decision authored by Judge Stephen Reinhardt, the Ninth Circuit overturns California's Proposition 8, a voter referendum that strips same-sex couples of the right to marry. The opinion claims to express no view on whether same-sex marriage is constitutionally required, but instead rules that Proposition 8 violates the 14th Amendment's Equal Protection Clause because it took away benefits (including the official designation of "marriage") that the state had previously extended to same-sex couples. Judge N. Randy Smith dissents.

Feb. 10: By an 11-7 vote, the Senate Judiciary Committee approves a bill calling for television access to Supreme Court proceedings.

Feb. 13: President Obama proposes a budget of $402 million for the Legal Services Corporation, an independent agency providing civil legal aid to indigent people. The proposal represents a 15.5% increase over the previous year's budget, but is less than the Corporation's proposed 35% increase.

Feb. 17: Congress passes the Middle Class Tax Relief and Job Crea-

tion Act of 2012, extending through the end of 2012 both unemployment benefits and the 2% payroll tax cut initially implemented in December 2010.

Feb. 21: Virginia Governor Robert F. McDonnell backs off his unconditional support for a new bill requiring women to have an ultrasound before obtaining an abortion.

Feb. 22: Former University of Virginia lacrosse player George Huguely is convicted of second-degree murder for killing his former girlfriend, Yeardley Love. He receives a 26-year prison sentence.

Feb. 23: The Obama Administration releases a "Consumer Privacy Bill of Rights," designed to give internet users more control over their personal information. The Bill contains seven parts, which address "Individual Control," "Transparency," "Respect for Context," "Security," "Access and Accuracy," "Focused Collection," and "Accountability." • U.S. District Judge Royce Lamberth rules that a Twitter user who threatened Michelle Bachmann must reveal his or her identity to a federal grand jury investigating the threat. • Campaign finance reform groups stage a rally outside the Supreme Court at noon to criticize the Court's controversial decision in *Citizens United v. FEC*, and to urge the Court to grant certiorari in *American Tradition Partnership v. Bullock*, a Montana Supreme Court decision upholding a state law ban on corporate independent expenditures similar to the one struck down in *Citizens United*.

Feb. 29: U.S. District Judge Richard Leon grants summary judgment on First Amendment grounds to tobacco companies suing the FDA over its new regulations requiring new labels on cigarette packages. The labels depict various risks of smoking, and feature pictures of, *e.g.*, a man with a hole in his throat.

MARCH 2012

Mar. 5: The Supreme Court orders reargument in *Kiobel v. Royal Dutch Petroleum*. The case, which was argued on Feb. 28, initially presented the question whether corporations could be sued under the Alien Tort Statute. The Court's reargument order asks the par-

ties to address whether the ATS allows federal courts to hear lawsuits based on extraterritorial violations of international law. • BP and the plaintiffs in the 2010 Deepwater Horizon oil spill case agree to an estimated $7.8 billion dollar settlement. • In a speech at Northwestern University Law School, Attorney General Eric Holder states that "we are a nation at war [with terrorist forces]," and asserts that in this war the President has the authority to target and kill enemy agents, including U.S. citizens, with drone strikes, with no judicial review of the decision to kill.

Mar. 12: Ruling in a lawsuit filed by the League of Women Voters, Dane County Circuit Judge Richard Niess issues a permanent injunction blocking Wisconsin's voter ID law. A temporary injunction had been issued the week before by Judge David Flanagan of the same court in a separate lawsuit filed by the NAACP.

Mar. 15: Henry Schuelke III, a special prosecutor, releases a 525-page report on mismanagement and misconduct in the Justice Department's prosecution of the late Alaska Senator Ted Stevens. The report includes findings that certain prosecutors willfully concealed information from the defense, but does not recommend criminal contempt charges against any of the prosecutors. Brendan Sullivan, a Williams and Connolly partner who was Stevens's lead counsel, calls the "extent of the corruption . . . shocking."

Mar. 17: John Demjanjuk, a retired U.S. autoworker who was convicted of being a Nazi death camp guard, dies at the age of 91. Demjanjuk had maintained his innocence, claiming mistaken identity.

Mar. 20: The Supreme Court issues its unanimous opinion in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, which holds that Section 101 of the Patent Act prohibits patenting the natural relationship between the concentration of a prescription drug in a person's bloodstream and the need to adjust the person's dosage up or down. The decision calls into question the increasingly common practice of patenting medical diagnostic techniques.

Mar. 21: A New York trial judge dismisses a proposed class action against New York Law School. The suit was filed by nine alumni

who claimed that the school had misrepresented its alumni's success in finding legal jobs. • Thomas Haynesworth, a man recently exonerated for a series of rapes in Virginia that he did not commit, testifies in front of the Senate Judiciary Committee in favor of government-funded DNA testing. • In *Missouri v. Frye* and *Lafler v. Cooper*, the Supreme Court holds, by 5-4 margins, that the constitutional right to counsel in criminal trials extends to the plea-bargaining process.

Mar. 22: Following revelations in Peter Schweizer's 2011 book "Throw Them All Out," further publicized by a November 2011 segment on "60 Minutes," that several members of Congress may have used inside information acquired through their official positions to make trades for personal gain (see April 30, 2012 entry), Congress passes the Stop Trading on Congressional Knowledge ("STOCK") Act, which is intended to prohibit members of Congress and high-ranking government officials from trading on non-public information acquired through the performance of official duties (as of the date of this *Almanac*'s publication, it is set to take effect on April 15, 2013).

Mar. 26: Lawyers for erstwhile New York Knicks phenom Jeremy Lin file cease-and-desist letters against California medical marijuana dispensaries selling a "Linsanity" brand of marijuana.

Mar. 27: The Supreme Court hears over 2 hours of argument on the constitutionality of the Affordable Care Act's "individual mandate." The word "broccoli" is mentioned eight times.

Mar. 29: U.S. District Judge Royce Lamberth orders a $44.6 million judgment against the government of Iran for its role in the 1983 bombings at the U.S. Marine barracks in Beirut, Lebanon. Lamberth had previously handled civil claims related to the bombings, notably imposing a $1.2 billion judgment against Iran back in December 2011.

Mar. 30: A U.S. Department of Education administrative judge overturns a $55,000 fine imposed on Virginia Tech for its handling of a 2007 on-campus shooting. The case marked the first-ever appeal of a fine issued by the Department of Education under the Clery Act, which imposes campus security requirements.

APRIL 2012

Apr. 1*: In a 9-0 decision issued just weeks after oral argument, the Supreme Court strikes down the Affordable Care Act, finding that the individual mandate is prohibited by the Constitution's Emoluments Clause.

Apr. 5: Attorney General Eric Holder files a 2.5-page letter with the U.S. Court of Appeals for the Fifth Circuit confirming that courts have the power to review the constitutionality of legislation. The letter was a response to a request from Judge Jerry Smith, who asked the Justice Department to address the President's comment that it would be "unprecedented" for the Supreme Court to strike down the Affordable Care Act.

Apr. 11: The Department of Justice files an antitrust suit against Apple and a number of publishers, arguing that the companies conspired to drive up prices for e-books.

Apr. 12: The Supreme Court's four female Justices sit together in a public program at the Newseum for the first time in history. When asked why it is important for the Court to have more women serving as Justices, Justice O'Connor states, "Maybe you haven't noticed, but I think maybe 51 or 52 percent of the population are females." • A Washington Post-ABC poll indicates that more Americans think the Justices will decide the constitutionality of the Affordable Care Act based on their own political views rather than on a neutral reading of the law.

Apr. 16: William Welch II, the head of the Justice Department's Public Integrity Section during its prosecution of former Alaska Senator Ted Stevens, leaves the Department of Justice.

Apr. 17: Stephanie Thacker, a West Virginia lawyer, is confirmed to serve as the fifteenth Judge on the United States Court of Appeals for the Fourth Circuit, giving the Fourth Circuit a full slate of judges for the first time in over a decade.

Apr. 20: George Zimmerman, the man charged with murder based on the February shooting death of teenager Trayvon Martin, appears in court for a bond hearing. Bond is set at $150,000.

Apr. 24: Latham and Watkins agrees to represent the University of Texas in *Fisher v. University of Texas*, a case challenging the university's use of race in admissions. Latham had previously received accolades for representing the University of Michigan in *Grutter v. Bollinger*, the last collegiate affirmative action case to reach the Supreme Court.

Apr. 25: The Supreme Court hears argument in *United States v. Arizona*, which presents the question whether Arizona's controversial immigration statute is preempted by federal law. The day before argument, Senator Chuck Schumer (D-New York) states that Congress would try to undo Arizona's law if the Court refused to strike it down. • Federal prosecutors file the first set of criminal charges relating to the BP oil spill in the Gulf of Mexico. This set of charges was brought against Kurt Mix, a former BP engineer, for obstruction of justice.

Apr. 26: Judge James Boasberg of the U.S. District Court for the District of Columbia refuses to order the government to publicly disclose any photos or videos of the death and burial of Osama Bin Laden. The non-profit group Judicial Watch had filed a FOIA suit against the U.S. Department of Defense and other agencies, but Boasberg found credible the CIA's claim that releasing photos or videos would harm the nation's security. • Senator Mike Lee (R-Utah) votes against a federal judicial nominee from his own state as part of his plan to vote against all of President Obama's judicial nominees in response to the President's recess appointments to consumer and labor boards in January (see January 4, 2012 entry).

Apr. 30: The Office of Congressional Ethics clears Spencer Bachus, Chairman of the House Financial Services Committee, of allegations that he used his official position to engage in insider trading. Bachus had been the primary object of furor in the congressional insider trading scandal that erupted in November 2011 (see March 22, 2012 entry).

MAY 2012

May 1: Andy Pettite, a pitcher for the New York Yankees, testifies against his former teammate Roger Clemens in Clemens' trial for

perjury and obstruction of justice. Pettite is equivocal on whether Clemens used performance-enhancing drugs.

May 2: To celebrate Law Day, District of Columbia Superior Court Judge Lee Satterfield and District of Columbia Court of Appeals Chief Judge Eric Washington conduct a hour-long "Twitter chat," during which they answer questions on topics ranging from food trucks to cameras in the courts.

May 3: U.S. District Judge John Bates sentences former D.C. Councilmember Harry Thomas, Jr. to 38 months in prison, following Thomas's guilty plea to theft and tax charges. • Representative Darrell Issa (R-California) sends out a 44-page draft of proposed contempt charges against Attorney General Eric Holder in connection with the Department of Justice's failed Fast and Furious gun-trafficking sting. • The Ninth Circuit dismisses Jose Padilla's lawsuit against John Yoo, a lawyer in the Bush administration who wrote the "torture memos."

May 4: Khalid Sheikh Mohammed, the man who claims to have organized the September 11, 2001 attacks, appears at an arraignment in a military courtroom at Guantanamo Bay. The arraignment represents the first step in a process designed to culminate in a military trial.

May 5: The U.S. Court of Appeals for the D.C. Circuit enjoins the NLRB, pending the outcome of an appeal, from enforcing a final rule that would require most U.S. employers, including non-unionized employers, to post notices at all worksites informing workers of their right to unionize. The decision below had upheld the rule but invalidated most of the associated penalties as beyond the NLRB's statutory authority; the U.S. District Court for the District of South Carolina had declared the regulation invalid and issued an injunction against it on April 13, 2012.

May 11: The U.S. Court of Appeals for the D.C. Circuit affirms the dismissal of a Freedom of Information Act lawsuit filed by the Electronic Privacy Information Center (EPIC) seeking the release of documents pertaining to an alleged partnership between Google

Inc. and the National Security Agency. The Court holds that releasing such records might reveal legitimately secret details of protected national security activities.

May 14: The U.S. District Court for the District of Columbia invalidates the NLRB's rule shortening the time between the filing of union-representation petitions and the conduct of elections, holding that the rule was not properly promulgated because only two members of the NLRB – not a quorum – had voted on it.

May 16: President Obama issues an executive order empowering the Treasury Department to freeze the assets of individuals and entities deemed to be contributing to the destabilization of Yemen's ongoing political transition.

May 17: NLRB recess appointee Terence Flynn resigns amidst allegations that he had improperly released confidential details on the status of pending cases to former NLRB member Peter Schaumber.

May 23: Dr. Shakil Afridi, who allegedly helped the United States track down Osama bin Laden through a fake vaccination campaign that was actually used to collect DNA samples, is sentenced to 33 years in prison by Pakistan on charges of treason.

May 28: Collapsing law firm Dewey & LeBoeuf files for bankruptcy, with $315 million in outstanding liabilities. By the first week of May 2012, 200 of Dewey's 300 partners had left the firm.

May 31: After nine days of deliberations, the jury hearing the campaign finance trial against former Democratic Vice Presidential candidate John Edwards, in which he was accused of improperly using campaign money from the 2008 presidential primary to hide his pregnant mistress from public scrutiny, acquitted him of one charge of campaign finance fraud and deadlocked on the other five charges against him, resulting in a mistrial.

JUNE 2012

June 1: Judge Kenneth Lester revokes George Zimmerman's bond on the grounds that he improperly failed to disclose to the court

more than $200,000 he had raised for his defense through the Internet. Zimmerman later successfully posts a $1,000,000 bond.

June 5: Scott Walker, Governor of Wisconsin, survives a recall election, the first Governor in U.S. history ever to do so (there were two previous recall elections targeting sitting governors). He was targeted for recall after pushing changes in public sector union laws through the state legislature in 2011.

June 11: President Obama nominates Sri Srinivasan, the Principal Deputy Solicitor General of the United States, to the U.S. Circuit Court of Appeals for the District of Columbia. If confirmed, Srinivasan would be the first South Asian-American ever to serve as a federal circuit court judge.

June 12: The U.S. Anti-Doping Agency initiates proceedings against Lance Armstrong and five associates, charging that Armstrong engaged in doping violations beginning in August of 1998.

June 15: President Obama announces that, as a matter of executive policy, the government will no longer deport undocumented immigrants who were brought to the United States as children, and will further dispense permits authorizing them to work. The move effectively implements the "DREAM Act," which Congress declined to pass on several occasions over the last decade. On March 28, 2011, the President had told an audience at a Univision Town Hall that "[w]ith respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed . . . . Congress passes the law. The executive branch's job is to enforce and implement those laws." And indeed, the new policy is not issued through an executive order.

June 18: A federal jury clears seven-time Cy Young winner Roger Clemens of all charges of lying to Congress in February 2008 about his use of performance-enhancing drugs. Juror Joyce Robinson-Paul explains to the press after the verdict was announced that "[t]he defense showed that [longtime Clemens trainer Brian] McNamee was a liar and once that was done, nothing that he said could hold up."

June 21: The Supreme Court decides *FCC v. Fox*, the famous "fleeting expletive" case, which addresses the FCC's decisions to fine Fox for expletives uttered by Cher during the 2002 Billboard Music Awards and by Nicole Richie during the 2003 Awards, and ABC for an episode of *NYPD Blue* that featured a brief moment of nudity. In a narrow ruling, the Court concludes that the Commission's policies as of the time of the challenged broadcasts did not give adequate notice to Fox and ABC that a fleeting expletive or brief shot of nudity would be actionably indecent. • The Court also announces its decision in *Knox v. Service Employees Int'l Union, Local 1000*, holding that the First Amendment permits non-union members to be charged for special political assessments by unions only if they affirmatively opt in to the assessments.

June 22: Jerry Sandusky is found guilty of 45 of the 48 charges against him relating to his sexual abuse of young boys – 25 felonies and 20 misdemeanors. Four of the 52 charges had previously been dropped or dismissed (see November 4, 2011 entry).

June 25: In *Miller v. Alabama*, a 5-4 opinion written by Justice Kagan, the Supreme Court holds that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" It is the first Eighth Amendment decision in years that is not authored by Justice Kennedy. • The Court also decides *Arizona v. United States*, ruling that three out of four provisions in Arizona's controversial immigration enforcement bill are preempted because they operate in areas controlled by federal policy and interfere with federal enforcement efforts. As to the remaining provision – which requires police to check the immigration status of persons whom they detain for some other, legitimate reason, and to determine the immigration status of all arrestees prior to their release – the Court concludes that it is too early to make a ruling on preemption. • And the Court summarily reverses the Montana Supreme Court's ruling in *American Tradition Partnership v. Bullock*, which upheld a ban on corporate political expenditures that was all but identical to the one struck down in *Citizens United v. FEC*.

June 27: The State of New Hampshire's legislature overrides the Governor's veto of a voter ID law. The Justice Department later grants that law, which allows voters without photo IDs to swear out affidavits at the polling place affirming their identify, preclearance under Section 5 of the Voting Rights Act.

June 28: The Supreme Court issues its blockbuster ruling in *National Federation of Independent Business v. Sebelius*. In a 5-4 decision authored by the Chief Justice, the Court upholds the "individual mandate" as a valid exercise of Congress's power under the Taxing Clause. Five Justices, however, conclude that the mandate cannot be justified under the Commerce Clause or the Necessary and Proper Clause. The Court also holds that the Affordable Care Act's expansion of the Medicaid program exceeds Congress's powers under the Spending Clause, because it threatens States with the loss of their existing Medicaid funding if they decline to comply with the expansion. The Chief Justice, joined by Justices Breyer and Kagan, concludes that the proper remedy for the Spending Clause violation is to make the expansion optional. Justices Scalia, Kennedy, Thomas, and Alito issue a rare joint dissent, arguing that the mandate cannot be justified under the Taxing Clause, that the Medicaid expansion is unconstitutional, and that the entire Act should be invalidated. Finally, Justice Ginsburg authors a dissent joined in full by Justice Sotomayor and in part by Justices Breyer and Kagan, arguing that the mandate can be justified under the Commerce Clause and the Necessary and Proper Clause, and that the Medicaid expansion complies with the Constitution.

June 29: Peter Madoff, brother of famed Ponzi schemer Bernard Madoff and the former chief compliance officer of his investment company, pleads guilty to aiding his brother in committing fraud. He is later sentenced to ten years in prison. • The House of Representatives votes to find Attorney General Eric Holder in contempt of Congress by a vote of 258-95 after he refuses to turn over a number of congressionally subpoenaed documents related to the Justice Department's infamous Fast and Furious operation (see entry for May 3, 2012). President Obama had invoked executive privilege

with respect to the documents just days earlier. It is the first time that a U.S. Attorney General has been held in contempt of Congress.

JULY 2012

July 1: CBS news reports that "two sources with specific knowledge" of the Supreme Court Justices' deliberations confirmed that Chief Justice Roberts initially was disposed to join an opinion striking down the Affordable Care Act, but later switched his vote after concluding that the individual mandate was properly enacted pursuant to Congress's taxation authority.

July 6: The Justice Department announces that it will not prosecute Attorney General Eric Holder for the contempt of Congress citation entered against him on June 29, 2012.

July 11: Citing encouraging reforms recently implemented by the government of Burma, President Obama issues an executive order easing previously imposed sanctions, permitting the first new United States investment in Burma in 15 years.

July 12: An independent panel commissioned by Penn State University and headed by former FBI director Louis Freeh issues a report finding that top University officials covered up Jerry Sandusky's sexual abuse of young boys to protect the University's football program. • The U.S. Department of Health and Human Services announces that states administering the Temporary Assistance for Needy Families ("TANF") Program, which was instituted to replace welfare in 1996, can apply for waivers of the TANF work requirements. Critics claim that the waiver of the work requirements is expressly prohibited by statute.

July 16: Republican Senators Rob Portman of Ohio and Kelly Ayotte of New Hampshire announce their opposition to the Law of the Sea Convention, preventing the treaty, which had been languishing in the Senate for nearly three decades, from securing the two-thirds Senate majority necessary for ratification. The Senators allege that the treaty would erode U.S. sovereignty.

July 20: President Obama issues an executive order embargoing exports of charcoal from Somalia to the United States – the revenues from which are thought to support the al-Qaeda-affiliated terrorist organization al-Shabaab – and empowering the Treasury Department to freeze the assets of individuals and entities who recruit child soldiers, commit gender-based violence, or otherwise contribute to the destabilization of Somalia.

July 23: The National Collegiate Athletic Association issues sanctions against Penn State University for the involvement of football program officials in covering up Jerry Sandusky's sexual abuse of young boys. The University is fined $60 million, banned from bowl game participation for four years, and stripped of all wins dating back to 1998 – which has the effect of dropping the recently deceased Joe Paterno from first to twelfth (from 409 wins to 298) on the list of "winningest" NCAA football coaches.

July 25: Yale Law School announces that it will begin offering a three-year Ph.D. program in law in the fall of 2013, enrolling five Ph.D. students per year. The program is intended to be different from other law-related Ph.D. programs in that it is designed to cover the entire field of law, not just specific aspects of it.

July 31: Congress passes the Presidential Appointment Efficiency and Streamlining Act of 2011, eliminating the need for the President to secure Senate confirmation of about 170 positions across the federal government.

AUGUST 2012

Aug. 1: Congress passes the Yselta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, removing the requirement that individuals must have at least one-eighth Yselta del Sur Pueblo blood to qualify for tribal membership.

Aug. 4: The Obama presidential campaign sues the State of Ohio, seeking to invalidate a new law that allows members of the military, but not other Ohioans, to vote during the weekend before elections.

Aug. 8: Dean of Saint Louis University Law School Annette E.

Clark resigns, accusing the University administration of improperly diverting to other uses money that should have been provided to the law school. University President Rev. Lawrence Biondi declines to directly address Clark's charges, but states that Clark would have been fired had she not resigned.

Aug. 13: The House Oversight Committee files a civil contempt lawsuit against Attorney General Eric Holder, seeking the release of subpoenaed documents related to the Fast and Furious operation that Holder refused to turn over on grounds of executive privilege (see June 29 and July 6, 2012 entries).

Aug. 16: Judge Lucy Koh of the U.S. District Court for the Northern District of California, presiding over extensive smartphone technology patent litigation in *Apple v. Samsung*, tells lawyers representing Apple after they submit a lengthy witnesses list that "[u]nless you're smoking crack, you know these witnesses are not going to be called." Attorney William Lee of WilmerHale assured Judge Koh: "I am not smoking crack. I promise you this." A week later, the jury returns a $1.049 billion verdict in favor of Apple.

Aug. 20: Judge Sam Sparks of the U.S. District Court for the Western District of Texas dismisses cyclist Lance Armstrong's lawsuit against the U.S. Anti-Doping Agency, requiring Armstrong to arbitrate his complaints. Armstrong announces that he will not arbitrate the doping charges against him because the arbitral process is biased against him, thereby allowing USADA's findings and proposed penalties to go into effect. In October, Armstrong will be stripped of his seven Tour de France titles.

Aug. 29: A Florida appeals court issues a 2-1 ruling removing Judge Kenneth Lester from presiding over the trial of George Zimmerman, ruling that Lester's statement at Zimmerman's bond hearing that he was a "manipulator" of the law (see June 1, 2012 entry) could be viewed as a sign of bias. Judge Debra Nelson is assigned to the case to replace him.

Aug. 30: The National Football League files a motion to dismiss more than 140 concussion-related lawsuits filed against it by former

NFL players (see December 5, 2011 entry) that have been consolidated in the U.S. District Court for the Eastern District of Pennsylvania. The motion alleges that the lawsuits are preempted by the National Labor Relations Act because they require interpretation of the League's collective bargaining agreement. • A three-judge panel of the U.S. District Court for the District of Columbia upholds a March 2012 Justice Department determination refusing to approve Texas's Voter ID law pursuant to Section 5 of the Voting Rights Act, stating that "record evidence demonstrates that [the law] will likely have a retrogressive effect."

SEPTEMBER 2012

Sept. 6: The *New York Times* reports that the softball team of defunct law firm Dewey & Leboeuf – reigning champions of the Lawyers Coed Softball League – continues to play, posting a regular season 10-1 record. Team members chipped in to cover the league's $1600 fee in the spring after the faltering firm declined to pay, and most members continued to play for the team after having found jobs elsewhere.

Sept. 11: Peregrine Financial CEO Russ Wassendorf, also known as the "Midwest Madoff," pleads guilty in federal court in Cedar Rapids, Iowa, to having carried out a $200 million fraud and embezzlement scheme, subjecting him to up to 50 years in prison.

Sept. 13: Congress passes legislation extending for a period of three years the E-Verify Program, which allows (and, through a variety of related laws, sometimes requires) employers to electronically verify the legal status of prospective employees.

Sept. 14: According to a study by PricewaterhouseCoopers, patent infringement levels surged 22% during 2011, reaching their highest levels ever.

Sept. 18: Legal search consultant Major, Lindsey & Africa releases a survey of partners at Am Law 200, NJL 350, and American Lawyer Global 100 firms showing that between 2010 and 2012, the average billing rate of partners rose 5.4% (from $555 per hour to $585 per

hour). In that same span, average equity partner compensation increased 11% (from $811,000 to $896,000 per year), while average nonequity partner compensation stayed flat (at about $335,000).

Sept. 20: The States of Oklahoma, South Carolina, and Michigan join a lawsuit filed in June 2012 in the U.S. District Court for the District of Columbia that challenges the constitutionality of several titles of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as the recess appointment of Richard Cordray (see January 4, 2012 entry).

Sept. 22: Responding to an 82% increase in theft from pharmacies since 2006, Congress passes the SAFE DOSES Act, which, among other things, doubles the penalties for pharmacy thefts. • Congress passes the Continuing Appropriations Resolution, 2013, funding the federal government for six months at an annual level of $1.047 trillion. • Congress passes legislation "confirming" the rights of astronauts from the Mercury, Gemini, and Apollo missions to retain full ownership of space artifacts and mementos they had kept from their missions (excluding moon rocks and other lunar material).

Sept. 25: Citing statistics showing that 20 million men, women, and children worldwide are victims of human trafficking, President Obama issues an executive order requiring all federal contractors to take measures to avoid complicity in trafficking in persons, and barring practices such as charging employees recruitment fees or providing them misleading information about prospective jobs.

Sept. 27: According to the 2012 HBR Consulting Law Department Survey, companies worldwide increased their legal spending by 5% in 2012, returning to 2009 expenditure levels.

Sept. 28: President Obama issues an executive order blocking Chinese company Ralls Corporation from completing a wind-farm project near a naval base in Oregon, citing concerns that the company "might take action that threatens to impair the national security of the United States" and invoking authority under the Defense Production Act of 1950. It is the first commercial transaction blocked by a President on national security grounds in 22 years.

OCTOBER 2012

Oct. 3: Attorneys for presidential candidates Barack Obama and Mitt Romney sign a Memorandum of Understanding on the rules that will govern the upcoming presidential and vice-presidential debates. Among other things, the rules provide that "[t]he candidates may not ask each other direct questions during any of the four debates" and that "[w]here a candidate exceeds the permitted time for comment, the moderator shall interrupt and remind both the candidate and the audience of the expiration of the time limit . . . ."

Oct. 5: The U.S. Court of Appeals for the Sixth Circuit affirms a lower court injunction against Ohio's new law that allows members of the military, but not other Ohioans, to vote on the weekend before election day, stating that Ohio had not articulated a "sufficiently weighty" reason to justify providing the military a special voting schedule. The effect of the ruling is to allow local election boards to determine whether to allow early voting on that weekend, which if allowed must be made equally available to all registered voters.

Oct. 6: Pennsylvania Commonwealth Court Judge Robert Simpson enjoins enforcement of Pennsylvania's newly enacted voter ID law for purposes of the 2012 election. Simpson had initially upheld the law in August 2012, but the Pennsylvania Supreme Court reversed and remanded in September 2012, requiring Simpson to assess whether Pennsylvania residents would have sufficient time to acquire photo IDs before the impending November election. He ultimately determines that they might not.

Oct. 9: Jerry Sandusky is sentenced to 30 to 60 years in prison after being convicted on 45 counts of sexually abusing young boys.

Oct. 10: A three-judge panel of the U.S District Court for the District of Columbia reverses a Justice Department order refusing to pre-clear South Carolina's Voter ID law under Section 5 of the Voting Rights Act. The panel favorably cites a provision in the South Carolina law that allows voters who claim they have a "reasonable impediment" to presenting a photo ID to nonetheless vote after swearing out an affidavit at the polling place confirming their identi-

ty. The Court does not allow the law to be implemented until 2013, however, voicing concerns that it cannot properly be implemented in time for the upcoming November elections.

Oct. 16: The U.S. Court of Appeals for the D.C. Circuit overturns the military commission conviction of alleged Osama bin Laden driver and bodyguard Salim Ahmed Hamdan, finding that "material support of terrorism" was not a recognized war crime prior to the passage of the Military Commissions Act of 2006, and that Hamdan's conviction for conduct occurring on or before 2001 was therefore unconstitutionally ex post facto. At the time of the decision, Hamdan had already fully served his sentence and been released to Yemen. The D.C. Circuit's ruling calls into question several other war on terror military commission convictions and guilty pleas founded on conspiracy charges, because while such charges are expressly permitted by the Military Commissions Act of 2006, some commentators argue that conspiracy was not a war crime recognized under international law prior to 2001.

Oct. 17: Manssor Arbabsiar pleads guilty in federal court in New York City to conspiring to commit murder for hire and an act of international terrorism for his role in attempting to hire a Mexican drug cartel to kill the Saudi ambassador to the United States by bombing The Monocle restaurant in Washington, DC. Arbabsiar was alleged to be acting on behalf of members of the government of Iran. • 21-year-old Bangladeshi national Quazi Mohammad Rezwanul Ahsan Nafis is charged in federal court in New York with attempting to blow up the Federal Reserve Bank of New York with what he believed to be a 1,000 pound bomb in a van that he parked outside the bank. The FBI and New York Police had actually long been on to the plot, and had provided Nafis with a fake detonator and inert explosives.

Oct. 23: Accepting the position of the U.S. Department of Justice, the U.S. Court of Appeals for the D.C. Circuit rules that former President of Colombia Alvaro Uribe Velez is immune from being compelled to provide testimony in a civil lawsuit against Alabama-based coal company Drummond Co. The lawsuit alleges that

Drummond conspired with the terrorist organization the United Self-Defense Forces of Colombia to advance its business interests, and plaintiffs sought Uribe's testimony on the supposition that he had ties to the terrorist organization as well. The Court held that the factual record concerning former President Uribe's activities was insufficiently developed to raise questions whether the immunity traditionally accorded to former heads of state for official acts while in office can ever be pierced.

Oct. 25: Former Goldman Sachs director Rajat Gupta is sentenced to two years in prison and fined $5 million for providing inside trading information about Goldman's financial prospects to a hedge fund in the midst of the 2008 financial crisis. Since late 2009, the United States Attorney's Office for the Southern District of New York has charged 72 individuals with insider trading and secured 69 guilty pleas or convictions.

Oct. 28: East Coast residents from Maryland to Connecticut are placed under emergency orders from state and local governments to evacuate from coastal areas in the face of "Frankenstorm" Hurricane Sandy's impending landfall. The storm ultimately killed at least 125 individuals and caused an estimated $50 billion in property damage.

NOVEMBER 2012

Nov. 1: The Tennessee Supreme Court affirms a lower court ruling allowing Memphis voters to use photo IDs issued by public libraries as proof of identity under the State's newly enacted voter ID law.

Nov. 3: New Jersey Governor Chris Christie announces that New Jersey residents affected by Hurricane Sandy will be allowed to vote by e-mail or by facsimile.

Nov. 5: The American Lawyer's annual technology survey reveals that as law firms increasingly embrace consumer-friendly technology, despite ongoing concerns about associated security risks, 90% of firms expect to see a decrease in Blackberry use and an increase in the use of Apple- and Android-based smartphones. Only 7% of firms signaled an intention to update their operating systems to the newly released Microsoft Windows 8 in the next twelve months.

Nov. 6: President Obama is re-elected President of the United States, winning 50.7% of the popular vote and 332 electoral votes. • Democrats gain two seats in the U.S. Senate and eight seats in the U.S. House, which remain under Democratic and Republican control respectively. • Republicans gain one net gubernatorial seat, with 29 total governors. • The States of Maine, Maryland, and Washington pass popular ballot measures approving same-sex marriage. • The States of Colorado and Washington pass popular ballot referendums legalizing marijuana outright, while Oregon rejects such a measure. Massachusetts approves medical use of marijuana, while Arkansas rejects it. • The State of Massachusetts rejects a ballot measure that would have legalized doctor-assisted suicide. • The States of Maryland and Rhode Island pass ballot measures approving expanded casino gambling, while Oregon rejects a similar measure. • The State of California rejects a ballot referendum that would have ended use of the death penalty in the state. • The State of Oregon approves a ballot measure that corrects grammar and spelling in the State Constitution. A no vote was described on the ballot as a vote in favor of retaining the misspellings – which 28% of Oregonians apparently liked. • In a plebiscite, 54% of Puerto Ricans reject their continuing status as an unincorporated U.S. territory, and 61% vote in favor of statehood. Three days later, Governor-elect Alejandro Padilla writes a letter to President Obama claiming that a majority of voters actually rejected statehood for Puerto Rico because one third of voters left the statehood portion of the referendum blank, reducing the portion of voters favoring statehood to 43% of the total. • Los Angeles voters approve Measure B, which requires that condoms be used in all local pornographic productions. The industry responds by promising to challenge the law in court as a First Amendment violation, and by threatening to do future filming elsewhere.

Nov. 9: The Supreme Court grants certiorari in *Shelby County v. Holder*, directing the parties to address "[w]hether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and

Article IV of the United States Constitution." • The Court also agrees to review *Maryland v. King*, which asks whether "the Fourth Amendment allow[s] the States to collect and analyze DNA from people arrested and charged with serious crimes."

* Just in case you couldn't tell – the entry for April 1, 2012 is an April Fool's joke. See entry for June 28, 2012.

* * *

A Term in the Life of the Supreme Court

[parallel citation: 2013 Green Bag Alm. 59]

Tony Mauro[†]

A summary of developments involving the U.S. Supreme Court from November 10, 2011 to November 7, 2012 that are unlikely to be memorialized in the United States Reports.

2011

Dec. 7: In an unusual last-minute sequence of events, Justice Stephen Breyer's wife Joanna sold stock so that her husband could participate in arguments in the patent case *Mayo Collaborative Services v. Prometheus Laboratories*. The night before the arguments the lawyer for Prometheus filed a letter with the Court reporting, belatedly, that Prometheus had been bought in July by a subsidiary of Nestle SA. The change in ownership, the letter said, "could be of interest to the Court, as individual justices assess whether to consider recusing themselves." Breyer's latest financial disclosure form revealed that he owned between $15,001 and $50,000 in Nestle stock, so the new information would have triggered an automatic recusal by Breyer if the stock had not been sold. It was also notable that the Court's public information office disclosed the sale, a break from the Court's usual practice of not explaining recusal decisions.

Dec. 12: The Court's orders list and several opinions were inadvertently posted on the Court's web site at 9:30 a.m., a half-hour before they were announced from the bench. Bloggers spotted the early release and began reporting on it. At 9:45, the list and opinions were taken down from the site until 10. Court spokeswoman

---

[†] Tony Mauro is Supreme Court correspondent for *The National Law Journal*, *Supreme Court Insider*, the *Blog of Legal Times*, and law.com.

Kathy Arberg said the premature posting was the result of a "technical malfunction." Interestingly, the Court announced on September 24, 2012 that it would begin releasing the orders list routinely at 9:30 a.m., to give lawyers, the media, and the public the opportunity to see the list before the Court's argument sessions begin at 10.

Dec. 31: Chief Justice John Roberts Jr. defended the ethical conduct of his Supreme Court colleagues in his annual year-end report on the state of the judiciary. Robert said he had "complete confidence in the capability of my colleagues to determine when recusal is warranted." Though he said he was not addressing specific situations, his unusual defense of the Court was clearly triggered by partisan calls that Justices Clarence Thomas and Elena Kagan recuse themselves from deliberating in the cases challenging the Affordable Care Act. Liberal groups said Thomas's wife Virginia was an avowed and public opponent of the law in her role as a conservative activist. Conservatives said Kagan should step aside, asserting she was involved in defending the law in her former role as Solicitor General. Roberts said that under the Constitution, the Judicial Conference and its committees "have no mandate" to set ethics rules for the high court, though Justices consult the Conference's code of conduct and other sources for guidance in their recusal decisions.

2012

Jan. 10: During oral arguments in *FCC v. Fox Television Stations*, former Solicitor General Seth Waxman made an unexpected reference to the bare buttocks and breasts on display in the Court chamber among the marble friezes that line the walls above the Justices. At issue was the government's rules against broadcast indecency, which were challenged by television networks. Waxman, a partner at Wilmer Cutler Pickering Hale & Dorr who was representing ABC, noted that the FCC had earlier received complaints about the opening ceremonies for the Olympics, which Waxman said, "included a statue very much like some of the statues that are here in this courtroom, that had bare breasts and buttocks." As he spoke, Waxman pointed to the friezes, which display sculpted images of

historical and allegorical legal figures. Several Justices followed his lead to look toward the ceiling. "Right over here, Justice Scalia," Waxman said helpfully. "There's a bare buttock there, and there's a bare buttock here. And there may be more that I hadn't seen. But frankly I had never focused on it before." A surprised Scalia said, "Me neither."

Jan. 17: Justice Samuel Alito Jr. issued a statement mourning the closing of his favorite pizza or "tomato pie" restaurant in his hometown of Trenton, N.J. The restaurant was De Lorenzo's Tomato Pies, where he went for pizza with his family as a child. "We always called it tomato pie when I was young, so that's what it is for me," Alito said in a statement. Established in 1947, De Lorenzo's was often called the state's best pizzeria and survived, even as the surrounding Chambersburg neighborhood – once a thriving Italian-American enclave – declined. But finally on January 15, it closed for good. "The closing of De Lorenzo's on Hudson Street marks the end of an era. I have many fond memories of going there when I was growing up in Trenton. Fortunately, the tradition that Chick [De Lorenzo] passed on to Gary and Eileen [Amico, Chick's son-in-law and daughter] is maintained intact by their son Sam at his beautiful new restaurant in Hamilton."

Mar. 27: Defending the Affordable Care Act in oral arguments before the Supreme Court, the soft-spoken Solicitor General Donald Verrilli Jr. spoke haltingly, provoking criticism of his performance in what may have been the most important argument of his career. CNN's Jeffrey Toobin immediately pronounced it a "train wreck" for the Obama administration in the case of *National Federation of Independent Business v. Sebelius.* Verrilli did not comment afterward, but told friends that he had a frog in his throat that was only exacerbated when a sip of water went down the wrong way. Audio of the argument was soon used in a political commercial to make the point that even the administration could not defend the law. Verrilli had the last laugh, however, when the law was ultimately upheld in late June as an exercise of the taxing power of Congress – a point Verrilli had stressed during the argument.

Apr. 11: All four women who have served on the Court joined for a discussion at the Newseum in Washington, D.C. The event, sponsored by the Supreme Court Historical Society, honored retired Justice Sandra Day O'Connor on the 30th anniversary of her first term on the Court. "This is fabulous to have all these women on the Court!" O'Connor exclaimed. All four lamented the polarization of the Senate confirmation process since 1981, when O'Connor was approved, 99-0. O'Connor, who retired in 2006, amiably chided the current Justices for not working as hard as she did, when the Court was deciding twice as many cases as it does now. At 82, O'Connor is still physically active. The aerobics class she started after joining in 1981 still meets at the Court. "I went this morning at 8 a.m.," she told the audience.

April 16: The papers of the late Justice Byron White were opened to the public for the first time at the Library of Congress. White, who died April 15, 2002, dictated that his papers be made public 10 years after his death. During his lifetime, White and his clerks shredded many of his Court papers, but the trove still contained numerous nuggets of interest. Among them was a May 1986 memorandum from then-Chief Justice Warren Burger urging White to include stronger anti-gay language in the landmark decision in *Bowers v. Hardwick* – a request White rejected. White wrote the majority opinion in *Bowers*, upholding Georgia's anti-sodomy law and setting back the gay rights movement until 2003 when a new majority overturned *Bowers*. "In my view, we need something more in relation to the values of our society and their historical background," Burger told White while drafts in the case were circulating among the Justices.

Apr. 24: Patricia Millett, head of the Supreme Court practice at Akin Gump Strauss Hauer & Feld, argued her 31st case before the Court – more than any other woman in history. She has traded the distinction back and forth with Lisa Blatt of Arnold & Porter, who made 30 arguments. The case was *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*. Millett said she is looking forward to the day when "there will be hordes of women rolling past us" up the path toward setting new argument records.

May 9: Immigration law groups petitioned the Court to correct a statement made in the 2009 decision in *Nken v. Holder*. The effort shed light on the rare practice of amending an already-issued opinion. The Court in *Nken* held that aliens may seek a stay of deportation pending judicial review of the government's removal order. A Freedom of Information Act lawsuit brought in New York by immigration advocacy groups uncovered documents showing that the Solicitor General's brief in the case misstated government policy on helping previously removed aliens to return to the United States when they prevail in court – a misstatement that the Court cited and relied on in its decision. The American Immigration Lawyers Association and other groups wrote the Court asserting that the flawed part of the *Nken* decision has been relied on by lower courts, to the detriment of aliens seeking stays of removal. As of press time, no change had been made.

May 29: President Barack Obama awarded Medals of Freedom to retired Justice John Paul Stevens and 13 others at a White House ceremony. In giving the award to Stevens, Obama recalled Stevens's style of questioning during oral argument. Stevens would politely ask the lawyer if he could interrupt, said Obama, and then would ask a penetrating question that would force the advocate to "stop dancing around" and focus on the core issues of the case. Obama praised Stevens for decisions protecting individual rights, and for favoring pragmatic rather than ideological solutions to the cases before him. Stevens, 92, served on the high court from 1975 to 2010.

July 1: Jan Crawford of CBS News, citing unnamed sources "with specific knowledge of the deliberations," reported that Chief Justice Roberts initially voted with the Court's four conservative Justices to strike down the "individual mandate" provision of the Affordable Care Act, but later changed his position to uphold the mandate under the taxing power of Congress. She also reported that conservatives were furious about Roberts's switch. The leaks, which came just days after the Court handed down the decision in *National Federation of Independent Business v. Sebelius*, were extraordinary but not unprecedented at an institution that prizes confidentiality and secre-

cy in its deliberations. Through the summer, Justices discounted the notion of serious rifts on the Court.

July 18: As part of a publicity tour promoting the book he co-authored with legal writing guru Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, Justice Scalia appeared on CNN in an interview with Piers Morgan. Scalia flatly denied a feud with Roberts. "No, I haven't had a falling out with Justice Roberts," he said. "Nothing like that." The interviewer also asked Scalia to name his favorite Italian pasta dish. Scalia's said it was pasta con sarde, a grim pastiche of sardines and fennel fronds.

July: After a history-making year at the nation's highest court, last term's Supreme Court law clerks were offered jaw-dropping hiring bonuses of $280,000 or more by law firms specializing in high court advocacy. With associate salaries at $150,000 or more at many large firms, that amounted to a first-year investment approaching $500,000 per law clerk, not counting other bonuses or benefits. Put another way, former clerks were earning more than twice the salaries of the Justices they had worked for, even though ex-clerks are ethically barred from doing Supreme Court work for two years. One firm, Jones Day, hired five clerks from the 2011-2012 term.

Aug.-Sept.: Scalia and Richard Posner, a judge on the U.S. Court of Appeals for the 7th Circuit, engaged in a running feud after Posner authored a critical review of Scalia's book in *The New Republic*. Among other things, Posner accused Scalia of resorting to legislative history in spite of Scalia's avowed abhorrence of doing so. "To say that I use legislative history **. . .** is simply, to put it bluntly, a lie," Scalia retorted during a Thomson Reuters interview on September 17. "And you can get away with it in *The New Republic* I suppose, but **. . .** not to a legal audience."

Sept. 7: In a speech at the University of Michigan Law School, Justice Kagan signaled that she is having second thoughts about the desirability of allowing broadcast access to Supreme Court proceedings. During her confirmation hearings in 2010, Kagan was an enthusiastic supporter of cameras in the court. But now, she said, "I

have a few worries, including that people might play to the camera. Sometimes you see that when you watch Congressional hearings."

Sept. 28: Just in time for the beginning of the Court's new term, workers placed a fabric screen called a "scrim" in front of the scaffolding that surrounds the Court's front façade as part of its marble-repair project. Imprinted on the fabric was a full-sized photo of the pre-scaffolding façade, so that the passing public saw a representation of the same majestic marble and bronze front that has symbolized the high court since it opened in 1935. Why was a scrim showing an image of the Court used to conceal the scaffolding when no scrim at all, or a plain white scrim would also have worked? A Court spokeswoman explained, "The scrim allows the building's iconic façade to remain visible to tourists and visitors during cleaning and restoration work."

Sept. 30: Six Justices, an unusually high number, attended the annual Red Mass at the Cathedral of St. Matthew the Apostle in Washington, D.C. The Roman Catholic mass is timed for the day before the first Monday in October and is intended to bless the labors of judges, lawyers and other government officials. Four of the six Catholics on the court – Chief Justice Roberts and Justices Scalia, Anthony Kennedy and Thomas – attended, as did two Jewish Justices – Breyer and Kagan. It was Kagan's first Red Mass since joining the Court in 2010.

Nov. 6: R. Ted Cruz, former law clerk to Chief Justice William Rehnquist, was elected to the U.S. Senate from Texas, making him the third former clerk to join that legislative body. The others, Mike Lee of Utah and Richard Blumenthal of Connecticut, were elected in 2010. Former Thomas clerk Wendy Long was defeated in her Senate race in New York against Kirsten Gillibrand.

* * *

A YEAR OF LOWERING THE BAR 2011-2012

[parallel citation: 2013 Green Bag Alm. 65]

Kevin Underhill[†]

OCTOBER 2011

Oct. 31: Sources report that a Michigan woman has sued the makers of the film "Drive," complaining that it doesn't show enough driving. The film is a thriller about a getaway driver, but he doesn't drive the whole time. The plaintiff claims she was misled by the film's name and trailer into thinking that "Drive" would be more like the "Fast and the Furious" films she likes, in which people drive a lot.

NOVEMBER 2011

Nov. 2: A criminal defendant pokes his appointed defense lawyer in the neck with a pencil, which is news primarily because this is the third lawyer he has poked in this way. He succeeded in getting a mistrial after the first two pokings, but this time the judge allows the lawyer to withdraw and requires the defendant to represent himself. The judge instructs jurors to disregard the poking, the lawyer's sudden absence, and the fact that the defendant is now strapped to a chair.

Nov. 4: Actor/comedian Babatunde Omidina, popular in Nigeria under the name "Baba Suwe," is finally released after Nigerian authorities admit they have no evidence he is smuggling drugs. Authorities suspected Omidina of swallowing heroin packages, but are forced to let him go after three weeks because "25 closely moni-

---

[†] Kevin Underhill is a partner with Shook, Hardy and Bacon LLP. His legal-humor blog *Lowering the Bar*, from which this is adapted, has been selected as one of the ABA Journal's "Blawg 100" for three years in a row, and his writing has also appeared at *Forbes.com* and in the *Green Bag*, among other places. The blog can be found at www.loweringthebar.net.

tored bowel movements" have "produced nothing suspicious." Omidina's fame in Nigeria led to extensive reporting of each bowel movement, spawning headlines such as "Baba Suwe Excretes Again" and "Baba Suwe Yet to Pooh Suspected Drug."

Nov. 7: Sources report that the Spanish government has fined the makers of "Larry Crowne" 25,000 euros because a poster for the film shows Julia Roberts and Tom Hanks riding a scooter without helmets. This is said to violate a Spanish law against publicity that "may incite excessive speed, reckless driving, [or] situations of danger." The fine comes four months after Spain celebrated the "Running of the Bulls," still helmet-free after more than 400 years.

Nov. 10: The Illinois legislature overwhelmingly approves a bill amending state hunting laws to allow citizens to take home "roadkill," as long as they have a permit for the beast in question. The governor had vetoed the bill, citing safety concerns, but the legislature votes to override.

Nov. 15: The *Morning Call* reports on the following exchange in a Pennsylvania criminal case: Defendant (representing himself): "How did the robber sound?" Witness: "He sounded like you."

Nov. 23: The *New York Times* reports that a controversial free-trade bill in South Korea has passed, despite one legislator's use of tear gas in an attempt to disrupt the vote. "The legislators were passing a bill which will make ordinary people shed bitter tears," he later explained, "so I detonated tear gas so that they too shed tears, even if theirs were fake tears." A 2008 dispute over similar legislation involved fire extinguishers, sledgehammers, and an electric saw.

Nov. 26: A German newspaper reports that someone has sued the Pope for violating seatbelt laws, violations the plaintiff's lawyer says are clearly established by YouTube videos that show the pontiff standing up in the Popemobile. The lawyer hastens to clarify that the suit is meant to increase public awareness of the seatbelt law and is not actually "an attack on the Church."

Nov. 28: The Illinois Supreme Court affirms the suspension of an attorney who told job applicants he wanted to hire a woman for du-

ties including general secretarial work, some paralegal work, and sex. One applicant reported the attorney to the disciplinary commission after being told the interview process would test her abilities in all three areas.

Nov. 30: U.S. Rep. Louise Slaughter says that after languishing for years, her proposed legislation to ban insider trading by members of Congress has suddenly become quite popular. On November 12, the bill had just nine co-sponsors; a week later, there were 171. (Coincidentally, the insider-trading issue was featured on the November 13 episode of *60 Minutes*.) "I've never seen such an explosion of interest," Slaughter says. The bill later passes.

DECEMBER 2011

Dec. 3: The *Greenville Daily News* reports on a new technology being deployed in Michigan Homeland Security Region 6, comprising 13 western counties. The technology: 13 snow-cone machines. Asked whether the $900 machines are an appropriate use of homeland-security funds, one official says yes because, among other things, the machines could be useful "at the scene of a large fire."

Dec. 8: A woman sues the state of Louisiana for violating her right to have an assistance animal. One report summarizes the complaint as alleging that "[t]he plaintiff's four service monkeys were taken from her as she attempted to change their diapers and feed them on Bourbon Street." She had dressed the monkeys up like pirates (apart from the diapers) and taught them to beg from tourists.

Dec. 15: Congress passes the 2011 National Defense Authorization Act, which authorizes the military to detain U.S. citizens arrested in the U.S. "without trial until the end of the hostilities authorized by the Authorization for Use of Military Force." The AUMF, passed on September 14, 2001, has no expiration date.

Dec. 16: Another member of the Sandusky defense team suggests an adult might shower with young people simply because the latter may lack basic hygiene skills. "Teaching a person to shower at the age of 12 or 14 sounds strange to some people," the attorney states,

"but people who work with troubled youth will tell you there are a lot of juvenile delinquents . . . who have to be taught basic life skills like how to put soap on their body."

Dec. 21: The *New York Times* and two reporters sue the Department of Justice to force it to produce its "legal analysis justifying the use of targeted lethal force, especially as it applies to American citizens." DOJ won't confirm that a written analysis exists but says that if it does, it's classified.

JANUARY 2012

Jan. 3, 2012: The *Wall Street Journal* publishes excerpts from a deposition of Scott Rothstein, the Florida lawyer who pleaded guilty to running a massive Ponzi scheme. In the deposition, Rothstein claims that many of his law partners smoked marijuana in the office, a practice to which he objected. "Q: That was one crime you wouldn't tolerate? A: No, no, it's not that . . . . I don't know why, specifically, it bothered me . . . [P]robably because they were actually dealing the pot out of the office while I was in the middle of running a several-hundred-million-dollar Ponzi scheme."

Jan. 5: *Rolling Stone* reports that an Indiana state senator has introduced legislation that would impose fines on anyone who chose to sing the national anthem at a public school-sponsored event but did not meet approved "standards and guidelines" when doing so. Schools would be required to record every such performance and keep the recordings for at least two years, presumably to aid in prosecution.

Jan. 5: Responding to reports of excessive drinking and drug use in a local park, police in Madison, Wisconsin, arrest "a subject they had previous dealings with, identified as Beezow Doo-Doo Zoppitybop-Bop-Bop." Zoppitybop-Bop-Bop had been arrested the previous April on weapons charges, although he was not going by that name at the time.

Jan. 12: Not to be outdone, police in California arrest a suspect identified as Peace Baba Aquarius.

Jan. 17: The D.C. Circuit affirms the dismissal of Lee Paige's law-

suit against his former employer, the Drug Enforcement Administration. Paige sued in 2006 claiming someone at the DEA leaked a video that caused him public embarrassment. The video, taken while Paige was teaching a gun-safety class, showed him accidentally shooting himself in the foot just after uttering the words, "I am the only person in this room professional enough to handle a gun."

Jan. 18: Oklahoma state senator Ralph Shortey introduces a bill that would make it illegal to make or sell any "product intended for human consumption which contains aborted human fetuses," though he admittedly has no evidence that anyone anywhere in the world is making or selling such products. The bill, aimed at limiting stem-cell research, is later quietly tabled.

Jan. 23: A West Virginia lawsuit alleges that the plaintiff was injured when he fell off a deck attached to the back of a fraternity house. Plaintiff claims he fell after being startled by a bottle rocket that exploded prematurely while the defendant was attempting to launch it out of his anus. "[Defendant] owed plaintiff . . . a duty of care not to drink under age or to fire bottle rockets out of his anus," the complaint alleges, saying he breached both duties. Plaintiff also contends that "the activity of underaged drinking and firing bottle rockets out of one's own anus constitutes an 'ultra-hazardous activity' which exposes [the defendant and the fraternity] to strict liability."

Jan. 24: A Florida man calls 911 to report an apparent home invasion after hearing gunfire and shouts of "trash the place" coming from his living room. He says he is hiding behind his bed in the next room with a revolver. Deputies find the "gunfight" still in progress, but resolve the situation easily by turning off the television. The man apologizes for the false alarm, saying he had been watching a documentary and forgot to turn the TV off before going to sleep.

Jan. 24: A penguin defecates on the floor of the Kentucky Senate.

Jan. 26: The following exchange takes place in a deposition in California: "Q: At what age did you enter the United States? A: When I was 16 years old. Q: And how did you enter the United States? A: Running."

Jan. 30: A 34-year-old man is arrested in Minnesota for driving while intoxicated after witnesses report seeing him "struggling to maneuver" a Zamboni machine across the ice in a local hockey arena.

FEBRUARY 2012

Feb. 2: Police in Butte, Montana, arrest a man who has just led them on a dangerous high-speed chase reaching speeds in excess of 100 miles per hour. He had not been drinking, there was no warrant for his arrest, and police found no drugs or other contraband in his vehicle. "I just always wanted to do that," he explains.

Feb. 3: Supreme Court Justice Sonia Sotomayor appears on *Sesame Street*. She resolves a dispute between Goldilocks and Baby Bear by ruling that while the former was negligent in sitting on and breaking the latter's chair, Bear has a duty to mitigate damages. She orders Goldilocks to produce glue with which the damaged chair can be repaired.

Feb. 7: "[O]ne of the central recurring assertions in Washington's pleadings is that his genitals are shrinking and prison officials are responsible for this process. Indeed, Washington's prior complaints have, *inter alia*, requested that we reverse the process and restore him to his former stature, something that is plainly beyond the power of any court to achieve." *Washington v. Grace* (M.D. Pa. Feb. 7, 2012) (explaining one reason the court was refusing leave to amend).

Feb. 10: Princess Samantha Kennedy (it's unclear whether "Princess" is a name or title) sues Paramount Pictures for allegedly basing the movie *Titanic* on her life. Although the movie premiered in 1997, Kennedy claims her lawsuit is timely because she "[has] not been in a movie theatre since 1995 and only recently discovered the infringement." She demands that all existing copies of the movie be destroyed and that she be awarded all $1.8 billion the movie has made to date.

Feb. 17: A 28-year-old Georgia man calls 911 to report that he is invisible.

Feb. 24: Apparently to show his opposition to a bill creating a "government continuity" task force to prepare for a possible collapse of organized government in America, Wyoming Rep. Kermit Brown inserts an amendment directing the task force to also explore the "conditions under which the state of Wyoming should implement a draft, raise a standing army, marine corps, navy and air force and acquire strike aircraft and an aircraft carrier." The bill does not pass.

MARCH 2012

Mar. 5: *The Guardian* reports that a former soccer player has sued the Baptist Church for allegedly ruining his career. Arquimedes Nganga reportedly argues that he could have played for Manchester United had the Baptists not convinced him in the 1990s to do missionary work instead.

Mar. 5: The Attorney General of the United States takes the position that at least under certain circumstances, the government can drop a bomb on a U.S. citizen without getting a warrant or charging that person with a crime.

Mar. 8: Police in Broward County, Florida, arrest a 21-year-old man for stealing a judge's nameplate from the door of his courtroom. The suspect was located after he posed for a picture with the nameplate and then posted the picture on Facebook. According to the sheriff, because of prior convictions the nameplate theft qualified as a felony; it was also a parole violation.

Mar. 14: The *Boulder Daily Camera* reports that a 19-year-old man has been cited for mistreating an animal after a passerby saw his cat tethered to a rock in a local park. Police say the man explains he had been trying to go for a jog around the lake but "the animal was either unwilling or unable to keep up." The cat was uninjured, although the passerby reported it was being harassed by birds.

Mar. 20: A South Carolina man allegedly attacks two people with a hammer after an argument about whether Loretta Lynn or Reba McEntire "really started country music." (He is in the right, except for the hammer.)

Mar. 27: The *ABA Journal* reports that a New York attorney has been suspended for nine months for allegedly groping a client in his law office. The hearing panel cites as an "aggravating factor" the fact that the attorney was a member of the state bar's Character and Fitness Committee at the time.

APRIL 2012

Apr. 2: The U.S. Supreme Court holds 5-4 to uphold a jail policy subjecting all detainees to strip searches even if being held for minor offenses. Concurring, Justice Alito does allow that "if an alternative procedure is feasible," then strip-searching everybody might not be reasonable.

Apr. 6: Police in Galveston, Texas, ask for the public's help in identifying a suspect who was filmed by a security camera in the vicinity of a burglary. They say they have tentatively identified the suspect as a particular 16-year-old who is "known for his 'swag,' or signature dance move," a move that the person in the video allegedly also performs.

Apr. 13: Visiting the St. Louis Zoo while on the campaign trail, Newt Gingrich is bitten by a penguin.

Apr. 22: Andrew Basiago and Alfred Webre, both attorneys, present a seminar in Vancouver entitled "An Introduction to Time Travel with an Emphasis on Teleportation." Basiago claims to be "one of America's early time-space explorers." Webre does not claim to have traveled in time but says he wrote a book that the Pentagon sent back to 1971.

Apr. 27: A reporter tweets the following: "Police scanner crackling with news of a security breach at Newark involving an unscreened baby." Apparently, a mother handed a baby through a metal detector to its father in such a way that the baby was not independently screened. When TSA employees realized they had an unscreened-baby situation, they shut down the terminal for over an hour to re-screen all passengers. The alleged baby was never found.

MAY 2012

May 1: Noting that it is illegal to place any structure in a navigable stream without approval from the Wisconsin Department of Natural Resources, an official for that agency asks whoever put a sculpture of the Loch Ness Monster in the Chippewa River to please remove it as soon as possible.

May 9: A man is arrested in Detroit after trying to pawn a counterfeiting machine at the pawn shop featured in the reality show "Hardcore Pawn." The man actually signed a waiver agreeing to be on the show, apparently not realizing either the risks of being filmed breaking the law or the problems with saying you need to pawn a counterfeiting machine because you are short on cash.

May 14: The *Washington Post* reports that an 89-year-old man in a wheelchair was subjected to a pat-down at New York's LaGuardia Airport, which unfortunately is news at this point only because the man was former Secretary of State Henry Kissinger. Kissinger was forced to stand and to endure a full pat-down, despite the fact that he has not been associated with any bombings since the 1970s.

May 15: According to the Seattle Police Department, they were called to a local dog park about 2 a.m. by witnesses who claimed that two people had been trying to hit each other with "pooper scoopers" for the preceding half-hour.

May 17: Arizona Secretary of State Ken Bennett says in an interview that he has asked officials in Hawaii to provide verification that Barack Obama was born there and so is a "natural born citizen," something that a number of people dispute. Bennett complains that the officials have insisted that before they provide the information, Bennett needs to prove to their satisfaction who *he* is.

May 23: Manhattan Supreme Court Justice Ellen Coin dismisses a case brought by an attorney against his Wall Street health club demanding over $100,000 for the club's decision to stop serving free breakfast. The attorney had complained in an angry email that "there has been no yogurt for two (2) weeks and now no cereal . . . .

WHAT THE F--- IS GOING ON?" The judge does not issue a written opinion but orders the plaintiff to pay $440 in legal fees.

May 29: The *New York Times* reports that the Obama administration has embraced "a disputed method for counting civilian casualties" inflicted by drone strikes that "in effect counts all military-age males in a strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent." This counting method, the *Times* suggests, "may partly explain the official claims of extraordinarily low collateral deaths."

JUNE 2012

June 4: When the bank she is in is robbed, a Houston woman flees and takes shelter in a nearby car. Noticing the keys are in the car's ignition, she drives away in it. When she eventually stops to call police, they first arrest her for stealing the car, but then release her when it turns out she has stolen the robbers' getaway car, forcing them to flee on foot.

June 11: In a column about Watergate, former White House Counsel and co-conspirator John Dean mentions that he recently visited the scene of the (original) crime for the first time, while waiting to speak at a symposium. Specifically, he entered a stairwell through the same door the burglars used, having apparently forgotten they were caught because a guard noticed they had put tape over the door latch to prevent it locking behind them. Obviously aware of the irony, Dean says he was relieved that he was eventually able to find an unlocked door and did not have to call for help.

June 12: Newt Gingrich, speaking two months almost to the day after he was bitten by a penguin at the St. Louis zoo, complains that elections are "rigged, frankly, in favor of the wealthy," a conclusion he has evidently reached during his primary campaign against Mitt Romney. According to CNN, Gingrich had to scrape by in 2011 on just $2.4 million.

June 18: In a letter responding to a question by two U.S. senators, the Inspector General of the U.S. intelligence community reports

that according to the National Security Agency, it is unable to estimate the number of people inside the United States that have had their communications collected or reviewed under the FISA Amendments Act. The NSA says it is concerned that an effort to determine the number would "violate the privacy of [the] U.S. persons" on whom it has been spying.

June 20: U.S. District Judge Steven Merryday denies a lawyer's request to suspend a scheduled murder trial so the lawyer can compete in an Ernest Hemingway look-alike contest in Key West. "Between a murder-for-hire trial and an annual look-alike contest," the judge writes, "surely Hemingway [himself] would choose the trial."

June 25: Louisiana State Rep. Valarie Hodges says she is rethinking her vote in favor of a bill authorizing the use of public funds to support religious schools, having wrongly assumed that "religious" meant only "Christian." Hodges supports funding for "teaching the fundamentals of America's Founding Fathers' religion, which is Christianity," she says, not quite accurately, but has apparently just learned that other religions exist.

June 27: The Seventh Circuit rules in *United States v. Burge* that a prior conviction for llama abandonment does not count as a "criminal history point" for sentencing purposes. The defendant was sentenced to ten years in prison on other charges, after a sentence enhancement that included a point for the "llama incident." The court rules that the llama incident should have been considered "similar to" fish-and-game violations, which don't generate criminal history points, because the llama simply escaped from its pen and was not mistreated.

June 28: The U.S. Supreme Court upholds most provisions of the health-care legislation that was championed by President Obama. The majority holds that Congress can't require people to buy health insurance, but can tax them if they don't buy it.

JULY 2012

July 3: Sources in Germany report that the University of Applied Sciences for Economics and Management in Essen has sued one of its students for graduating too quickly. The university argues that by

graduating in only three semesters instead of the usual 11, the student has deprived it of the full amount of tuition payments.

July 11: A woman sues Justin Bieber for allegedly damaging her ears during a concert to which she had taken her daughter. Plaintiff claims that during a part of the show in which Bieber is suspended above the crowd in a heart-shaped metal gondola, Bieber "ENTICED THE CROWD INTO A FRENZY OF SCREAMS . . . WHEREAS [*sic*] I WAS STRUCK WITH A SOUND BLAST. THE GONDOLA THAT JUSTIN BIEBER WAS SUSPENDED IN ACTED AS A SOUND CONDUCTOR CREATING A SOUND BLAST THAT PERMANENTLY DAMAGED BOTH OF MY EARS." Plaintiff, who demands over $9,000,000, appears to blame Bieber for the enticement rather than contending the gondola was defective.

July 18: After a half-day trial in Portland, a jury acquits John Brennan of indecent exposure. Brennan had stripped naked at an airport checkpoint after getting fed up with TSA screening procedures, saying "I guess I have to show you that I don't have anything [explosive]." He successfully argues at trial that his public nudity was "intended as a symbolic or communicative act" and is therefore protected free speech under Oregon law.

July 23: A driver in Marin County, California, is arrested for trying to run down a pedestrian. The driver reportedly admits to police that this was no accident; according to a police sergeant, "He didn't like the plaid jacket the man was wearing."

July 27: *The Guardian* reports that in an effort to prevent "ambush marketing," a practice in which advertisers seek to take advantage of the publicity surrounding certain events without paying to sponsor them, the Olympic torch has been shadowed by lawyers during its journey across the UK. According to a member of the International Olympic Committee, two lawyers have been "running all the way" with the torch "to make sure that there is no brand ambush or infringement."

July 28: In other Olympic news, police arrest a man watching a cycling race based on concerns "about his demeanour and why he

had not been seen to be visibly enjoying the event." He is released two hours later, with apologies, after convincing them that he was not smiling only because he has Parkinson's Disease and cannot move his facial muscles.

July 29: Police in Fairbanks, Alaska, charge a man with "driving under the influence" after he is found floating through town on the Chena River while heavily intoxicated. The state DUI statute does criminalize "operating a watercraft" while under the influence, but also says that term means "to navigate a vessel" on state waters. Whether "navigating" includes drunken floating remains to be seen.

AUGUST 2012

Aug. 7: California's State Bar Court agrees that an attorney should be disbarred for, among other things, continuing to hold himself out as an attorney while his license was suspended. The attorney continued to use letterhead saying "Attorney at Law" and to use the title "Esquire" after his name. The court finds "unconvincing" his argument that the latter term has many meanings other than "attorney," including that of "property owner" and "subscriber to the magazine *Esquire*."

Aug. 10: Violent J and Shaggy 2 Dope, the musical duo known as the Insane Clown Posse, announce they have retained counsel to pursue legal action against the FBI for labeling ICP fans (also known as "Juggalos") as members of a "loosely organized hybrid gang." The report in question defines a "hybrid gang" as a group with "multiple affiliations, ethnicities, [a] migratory nature and nebulous structure" and a membership that is "transient and continuously evolving," a definition that could also apply to the cast of *Saturday Night Live*. ICP's legal counsel releases a statement "seeking individual Juggalos whose rights have been violated as a result of the mistaken belief that they are a 'gang member.'"

Aug. 13: Writer and law professor Jay Wexler announces that, based on his ongoing analysis of U.S. Supreme Court oral-argument transcripts, Justice Antonin Scalia was the funniest justice in 2011.

The court reporter entered "[laughter]" in the transcript 83 times following comments by Scalia, who was well ahead of Justice Stephen Breyer (56 "laughters") and Chief Justice John Roberts (30). As expected, the justice who generated the fewest laughs during argument (zero) was Justice Thomas, who has not asked a question at oral argument since February of 2006.

Aug. 17: Kentucky state Rep. Ben Waide criticizes national education standards for including material that does not "stand up to scientific scrutiny," which would be fine except that the material he's talking about is the theory of evolution. "[E]ssentially," he says, "the theory of evolution is not science – Darwin made it up." Which he did, in a way, after a mere three decades of research. Another state lawmaker agrees, saying they "don't want what is a theory to be taught as a fact in such a way it may damage students' ability to do critical thinking."

Aug. 24: Citing a policy that forbids "any instrument . . . that looks like a weapon" in school, officials in Grand Island, Nebraska, ask a three-year-old deaf student named "Hunter" to sign his name differently. In the form of sign language he uses, the name "Hunter" apparently resembles a gun. The school district later says it was asking only that Hunter use American Sign Language rather than a technique called Signing Exact English, but the boy's parents maintain the weapons policy was cited.

Aug. 28: A Wisconsin woman is fined $300 for skipping out on jury duty after she left the country during deliberations in a felony criminal case. According to the defense attorney, the woman called the court's clerk from the airport to say she was leaving on a planned trip to Cancún, but that "it was OK because she'd done her three days and left her vote with the foreman." The rule in Wisconsin is actually two days or, if chosen for a jury, the duration of trial (including deliberations).

Aug. 29: In *Selch v. Columbia Management*, the Illinois Court of Appeal holds that the defendant was within its rights to terminate the plaintiff "for cause" after he "mooned" the company's senior officers.

As a result, and because the termination came just a few months before the plaintiff's rights in a profit-sharing plan had vested, the mooning cost him approximately two million dollars.

SEPTEMBER 2012

Sept. 6: From the California Court of Appeal's decision in *People v. Jones*: "We strongly discourage anyone from choosing crime as a career. Nevertheless, as with any pursuit in life, one should be prepared. For instance, if you are planning to carjack someone, you should make sure you can drive a stick shift."

Sept. 7: The *Des Moines Register* reports that, citing new regulations that forbid banks from employing anyone who has ever been convicted of a crime involving dishonesty, Wells Fargo Home Mortgage has fired an employee who was convicted of putting a fake dime in a washing machine in 1963. Although minor offenses were once overlooked, regulations were tightened in 2011 in response to the banking-fraud scandal, which in this case has resulted in the firing of a 68-year-old customer-service representative.

Sept. 13: Concurring in *Holsey v. Warden*, Judge J.L. Edmondson of the Eleventh Circuit says he has refused to join the majority's opinion only because, at 104 pages, it is just too long. "I stress that [my refusal is] not because the opinion says something that I am sure is wrong or I am sure is even likely wrong," he writes. "[But] no one wishes to join in an opinion that they do not understand fully" or that is so long that errors may be "lurking somewhere in the text."

Sept. 20: The publishers of *Annals of Improbable Research* award the 2012 Ig Nobel Prize for Literature to the government's General Accountability Office, based on a report entitled "Actions Needed to Evaluate the Impact of Efforts to Estimate Costs of Reports and Studies." The report detailed the GAO's evaluation of a Pentagon effort to estimate how much it spends creating required reports. The GAO concluded further study was necessary. As the judges note, this means that GAO issued "a report about reports about reports" that recommended preparing another report.

Sept. 20: Samuel Mullet and a number of his followers are convicted under federal hate-crime statutes, based on charges that they assaulted other members of their Ohio Amish community and forcibly cut off their beards. Other Amish describe the Mullet group as a "cult" seeking to compel other Amish to act more conservatively, which led prosecutors to argue a religious motive that justified hate-crime charges. Earlier in the case, prosecutors had argued the attacks involved "interstate commerce" because the scissors used by the Mullet gang were made in New York.

Sept. 24: A federal judge rules that Florida does not have jurisdiction to hear a declaratory judgment action against Justin Bieber filed by the makers of "Joustin' Beaver," an iPhone app that claims to be a parody of celebrity success. In the game, the player controls a beaver floating down the river on a log who must knock paparazzi off other logs with a lance. The declaratory judgment action was filed in response to a cease-and-desist letter from Bieber's lawyers.

OCTOBER 2012

Oct. 5: The *Austin American-Statesman* reports that the state of Texas has settled a case brought by four voters who had been informed they were "potentially deceased" and so would not be allowed to vote in the upcoming election unless they proved they were alive. The state says it was trying to clear the rolls of dead but still-registered voters; under the settlement, the state will only declare people potentially dead if there is a "strong match" between their information and federal death records.

Oct. 12: The former captain of the cruise ship *Costa Concordia* files an appeal of his employer's decision to terminate him. The captain is a former captain largely because his ship hit a rock off the coast of Italy and capsized, killing dozens of people; not only was he not the last one off the ship, he was discovered in a lifeboat and refused repeated orders to go back on board. (Later he said he was only in the lifeboat because he had "tripped.")

Oct. 17: U.S. District Judge David Carter dismisses a case filed by

Orly Taitz (the best-known member of the "birther" community) challenging President Obama's claim to be a "natural born citizen." Taitz, who has removed her own case to federal court after a state court ruled against her, fails to convince the court that it has jurisdiction over the President and 28 other defendants, including, for some reason, the Postmaster General. Like other birthers, Taitz sues frequently but has yet to prevail; one tally says that, counting all court rulings, the birthers' record is approximately 0-258.

Oct. 23: An Italian court convicts six seismologists of manslaughter, claiming they misrepresented the risk of a major quake in the town of L'Aquila, which was hit by a deadly quake a few days after the seismologists gave a public statement trying to reassure citizens. Several thousand scientists have signed a letter to the Italian authorities making the point that it is impossible to predict earthquakes with any degree of accuracy, but to no avail.

Oct. 24: New York's highest court rules 4-3 that lap-dance revenues are not "dramatic or musical arts performances" and are therefore taxable. The dissenters argue that the law says "choreographic performances" are entitled to the exemption at issue.

Oct. 30: Judge Elia Cornejo Lopez is removed from presiding over cases against a particular defendant after the defendant's attorney argues, in part, that Lopez "directed" him to buy Girl Scout Cookies from her daughter's troop. The judge denied ever asking the attorney to buy anything; the attorney declined to comment, saying he was "upset that media has focused . . . on the cookies."

* * *