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The Journal of Legal Metrics

The Journal of Attenuated Subtleties

and

Almanac Excerpts

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The Journal of Law

The Journal of Law

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Almanac Excerpts
Ross E. Davies & Cattleya M. Concepcion

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> 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).
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> Andrew Weber, *Tops in THOMAS*, 2 J.L.: Periodical Laboratory of Leg. Scholarship (1 J. Legal Metrics) 53 (2012).
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> Elise Hofer, *The Case for Judicial Review of Direct Democracy*, 4 J.L.: Periodical Laboratory of Leg. Scholarship (1 New Voices) 49 (2014).
>
> Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 4 J.L.: Periodical Laboratory of Leg. Scholarship (1 J. In-Chambers Prac.) 19 (2016).
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This year's *Almanac Excerpts* features the entire
"Ethereal Version" of the 2019 *Green Bag Almanac & Reader*!

Contents

OPENING REMARKS

EXTREME ALMANACS AND TRANSIENT JUSTICES

Ross E. Davies[†]

This installement of "Opening Remarks" is another exercise in converting one of our "Single Sheet Classic" maps into a short article, with some additions, subtractions, and other adjustments to fit this medium. (We've done it twice before.[1])

We have here two pages of Edward Waite's *The Washington Directory, and Congressional, and Executive Register, for 1850*, thanks to Cattleya Concepcion and the Georgetown University Law Library. And we have a map that accompanied Waite's *Washington Directory*, thanks to the Library of Congress. When studied with *The Perpetual Almanack; Or, Gentleman Soldier's Prayer Book*[2] (also reproduced here), they prompt a couple of questions.

First question: what counts as an almanac? Almanacs are to the literary world what dogs are to the animal world: their diversity — of size, shape, function, personality, and so on — is extraordinary. Consider, for example, the old almanacs reprinted in the 2019 *Green Bag Almanac & Reader*. They are drawn from an exceedingly narrow slice of the almanac spectrum, and yet even they vary wildly. Or, to narrow the field even more severely, consider two almanacs, both one-pagers printed within a few years of each other in the first half of the ninetheenth century, and both reproduced here.

Turn this page and you will find, on the left, the one-page almanac from Waite's *Washington Directory* and, on the right, the *Perpetual Almanack*.

[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] *See Evarts Act Day: The Birth of the U.S. Circuit Courts of Appeals*, 6 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 251 (2016); *Supreme Court Practice 1900: A Study of Turn-of-the-Century Appellate Procedure*, 7 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (2 J. IN-CHAMBERS PRAC.) 33 (2017).

[2] Originally published in the 1830s, perhaps 1837 or 1838.

SYNOPTICAL ALMANAC.

1850.	Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.
January	..	..	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	31		
February	..	..	..	..	..	1	2
	3	4	5	6	7	8	9
	10	11	12	13	14	15	16
	17	18	19	20	21	22	23
	24	25	26	27	28		
March	..	..	..	..	..	1	2
	3	4	5	6	7	8	9
	10	11	12	13	14	15	16
	17	18	19	20	21	22	23
	24	25	26	27	28	29	30
	31						
April	..	1	2	3	4	5	6
	7	8	9	10	11	12	13
	14	15	16	17	18	19	20
	21	22	23	24	25	26	27
	28	29	30				
May	..	..	..	1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	
June	..	..	..	..	..	..	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30						

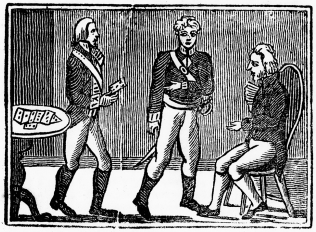
1850.	Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.
July	..	1	2	3	4	5	6
	7	8	9	10	11	12	13
	14	15	16	17	18	19	20
	21	22	23	24	25	26	27
	28	29	30	31			
August	..	..	..	..	..	1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31
September	1	2	3	4	5	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26	27	28
	29	30					
October	..	..	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	31		
November	..	..	..	..	..	1	2
	3	4	5	6	7	8	9
	10	11	12	13	14	15	16
	17	18	19	20	21	22	23
	24	25	26	27	28	29	30
December	1	2	3	4	5	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26	27	28
	29	30	31				

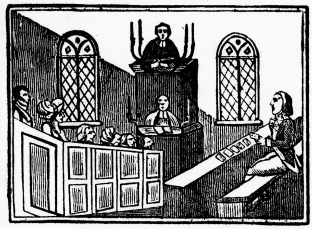
THE

Perpetual Almanack;

Or, Gentleman Soldier's Prayer Book:

Showing how one RICHARD MIDDLETON was taken before the Mayor of the City he was in, for using Cards in Church during Divine Service: being a droll, merry, and humurous Account of an odd affair that happened to a Private Soldier, in the 60th Regiment of Foot.





THE serjeant commanded his party to the church, and when the parson had ended his prayer, he took his text; and all of them that had a Bible, pulled it out to find the text, but this soldier had neither Bible, Almanack, nor Common Prayer Book, but he put his hand in his pocket and pulled out a pack of Cards, and spread them before him as he sat, and while the parson was preaching he first kept looking at one card and then at another. The Serjeant of the company saw him, and said, Richard, put up your cards; for this is no place for them—Never mind that, said the soldier, for you have no buisness with me here.

When the parson had ended his sermon, and all was over, the soldiers repaired to the church-yard and the commanding officer gave the word of command to fall in, which they did. The serjeant of the city came and took the man prisener.—Man, you are my prisoner, Said he. Sir, said the soldier, what have I done that I am your prisoner?—You have play'd a game of cards in the church. No, said the soldier, I have not play'd a game, for I only look'd at a pack. No matter for that, you are my prisener. Where must we go; said the soldier. You must go before the mayor, said the serjeant.

So he took him before the mayor; and when they came to the mayor's house, he was at dinner. When he had dined, he came to them, and said—Well serjeant, what do you want with me; I have brought a soldier before your honour for playing at cards in the church. What! that soldier? Yes. Well soldier, what have you to say for yourself? Much, sir, I hope. Well and good, but if you have not, you shall be punished the worst that ever man was. Sir, said the soldier, I have been five weeks upon the march, and have but little to subsist on, and am without either Bible, Almanack, or Common Prayer Book, or any thing but a pack of cards. I hope to satisfy your honour of the purity of my intention.

Then the soldier pulled out of his pocket the pack of cards, which he spread before the mayor, and then began with the ace.

When I see the ace, said he, it puts me in mind, that there is one God only; when I see the deuce, it puts me in mind of the Father and the Son; when I see the trey, it puts me in mind of the Father, Son, and Holy Ghost; when I see the four, it puts me in mind of the four Evangelists that preached the gospel, viz, Mathew, Mark, Luke, and John; when I see the five, it puts me in mind of the five wise virgins that trimmed their lamps; there were ten, but five were foolish, who where shut out; when I see the six, it puts me in mind that in six days the Lord made Heaven and Earth; when I see the seven, it puts me in mind that the seventh day God rested from all the works which he had created and made, wherefore the Lord blessed the seventh day and hallowed it; when I see the eight, it puts me in mind of the eight rightous persons that were saved when God drowned the world, viz.---Noah, his wife, three sons, and their wives; when I see the nine, it puts me in mind of nine lepers that were cleansed by our Saviour; there were ten, but nine never returned God thanks: when I see the ten, it puts me in mind of the ten commandments that God gave Moses on Mount Sinai, on the two tables of stone.

He took the knave and laid it aside.

When I see the queen, it puts me in mind of the queen of Sheba, who came from the furthermost parts of the world to hear the wisdom of King Solomon, and who was as wise a woman as he was a man; for she brought fifty boys and fifty girls, all clothed in boys apparel, to show before King Solomon, for him to tell which were boys and which were girls; but he could not until he called for water for them to wash themselves; the girls washed up to their elbows and the boys only up to their wrist, so King Solomon told by that. And also of Queen Victoria, to pray for her. And when I see the King, it puts me in mind of the great King of Heaven and Earth, which is God Almighty.

Well, said the mayor you have given a very good description of all the cards, except one, which is lacking. Which is that? said the soldier. The knave, said the mayor. Oh, I can give your honour a good description of that, if your honour won't be angry. No, I will not, says the mayor, if you will not term me the knave.

Well, said the soldier, the greatest that I know of is the sarjeant of the city that brought me here. I don't know, said the mayor, that he is the greatest knave, but I am sure he is the greatest fool.

I shall now show your honour how I use the cards as an Almanack. You certainly are a clever fellow, said the mayor, but I think you'll have a hard matter to make that appear.

When I count how many spots there are in a pack of cards, I find there are three hundred and sixty-five, there are so many days in the year.

Stop, said the mayor, that's a mistake. I grant it, said the soldier, but as I have never yet seen an almanack that was thoroughly correct in all points, it would have been impossible for me to imitate an almanack exactly without a mistake. Your observations are very correct, said the mayor; go on. When I count how many cards there are in a pack, I find there are fifty-two; there are so many weeks in the year; when I count how many tricks there are in a pack, I find there are thirteen; there are somany months in a year. You see, sir, that this Pack of cards is a Bible, Almanack, Common Prayer Book, and Pack of Cards to me.

Then the mayor called for a loaf of bread, a piece of cheese, and a pot of good beer, and gave to the soldier a piece of money, bidding him to go about his business, saying, he was the cleverest man he had ever seen.

Catnach, Printer, 2, & 3, Monmouth-Court, 7 Dials.

The almanac from Waite's *Washington Directory* (page 2 above) is about as dry and plain as an almanac can be. Yes, this "Synoptical Almanac" is a synopsis (per the *Oxford English Dictionary*, a "general view of some subject") of an almanac (an "annual table, or . . . book of tables, containing a calendar of months and days").[3] But if it were any more general or less tabular it could not be called an almanac. (Note its one appealing feature: it can be re-used this year!)

Now shift your gaze to the *Perpetual Almanack* (page 3 above). It is about as juicy and frilly as an almanac can be. Yes, it calls itself an "*Almanack*," and yes, it does contain a "table" (if you look closely at the left side of the left illustration at the top of the *Perpetual Almanack*, you should be able to spot a table). And yes, it does purport to track the days of the year (with a deck of playing cards). But if that table and those days are enough to make an almanac, then any document furnished with any kind of table and any clump of days — including any *Green Bag Almanac & Reader* consisting (as all do) of a few pages of tabulated dates and hundreds of pages of other stuff — qualifies.

• • •

Second question: where do Supreme Court Justices work? To oversimplify a bit, in the late eighteenth and early nineteenth centuries, riding circuit to sit on the lower federal courts in their home jurisdictions was a full-time job for the Justices, while sitting together in Washington, DC was part-time. By the end of the nineteenth century, travel for work on circuit was nearly nil, while the work in Washington had become full-time. The Justices serving in 1850 were in transition — part of the last generation for whom Washington was a place to visit, rather than the place to live. And so, when they came to work in the Capital city they rented rooms. Their temporary lodgings in Washington were widely publicized, including in Waite's *Washington Directory*, because litigants needed to know where to find them. In those days, even when the Justices were in Washington, much of their work was still individual — connected to their circuit jurisdictional duties.[4]

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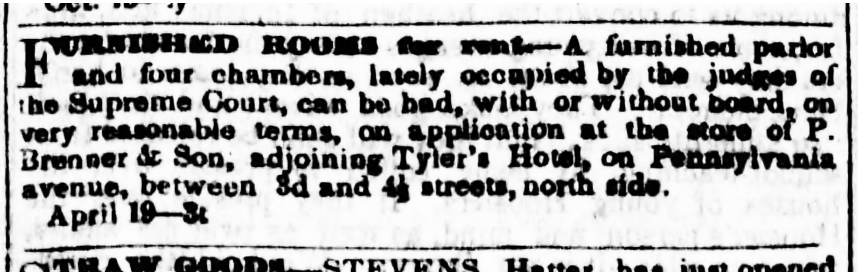
[3] *See synoptic*, adj. (and n.), OED Online (Sept. 2019, accessed Oct. 14, 2019); *almanac*, n., OED Online (Sept. 2019, accessed Oct. 14, 2019).

[4] *Cf. Supreme Court Practice 1900: A Study of Turn-of-the-Century Appellate Procedure*, 7 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (2 J. IN-CHAMBERS PRAC.) 33 (2017).

The mid-century Justices did not live all together at one address, as their predecessors often had during John Marshall's chief-justiceship. They did, however, remain close — clustered together just a block or two from the Capitol building, which housed the Court at that time (and would continue to do so until 1935, when the Court's current building was completed). Consider, for example, this advertisement in the April 27, 1848 issue of *The [Washington] Daily Union* . . .



FURNISHED ROOMS for rent.—A furnished parlor and four chambers, lately occupied by the judges of the Supreme Court, can be had, with or without board, on very reasonable terms, on application at the store of P. Brenner & Son, adjoining Tyler's Hotel, on Pennsylvania avenue, between 3d and 4½ streets, north side.
April 19—3t

. . . and then look at Waite's *Washington Directory* list of "Residences of the Justices of the Supreme Court" (page 6 below), where you will find members of the Court staying at Brenner's again in 1850. Moreover, all the Justices — except McLean (at Mrs. Carter's, 4 North A Street) and McKinley (absent) — were in the same block of Pennsylvania Avenue. Gadsby's Hotel (Justices Wayne, Catron, and Woodbury) was at the northwest corner of Pennsylvania and 3rd Street, and just a few steps to the northwest, between 3rd and 4-1/2 Streets, were Brenner's (the Chief Justice and Justices Daniel and Greer) and Potomac House (Justice Nelson) (see the map from Waite's *Washington Directory*, page 7 below). The idea of the Court not only working together (about which they had no choice), but also freely choosing (because they could) to live together, or close to it, is nice.

• • •

In other business, the *Journal of Law* is pleased to issue two welcomes, one to Joshua Cumby, the new editor-in-chief of the *Journal of Legal Metrics*, and one to the *Journal of Attenuated Subtleties*, a scholarly periodical that is new to our pages but not new to the world of legal scholarship. It was founded in 1982 and has enjoyed a devoted following ever since.

Names and Offices.	Residences.	Salary.
John Catron, *Associate Justice*	Nashville, Tenn	$4,500
John McKinley, *Associate Justice*	Florence, Ala	4,500
Peter V. Daniel, *Associate Justice*	Richmond, Va	4,500
Clerk.		
William T. Carroll	Washington, D. C	Fees&c.
Attorney General.		
Reverdy Johnson	Maryland	$4,000
Reporter of the Decisions.		
Benjamin C. Howard	Baltimore, Md	$1,000

The Supreme Court of the United States is held in Washington, and has an annual session, commencing on the first Monday of December.

Residences of the Judges of the Supreme Court.

Roger B. Taney, Chief Justice, Brenner's, south side Penn. av., between 3d and 4½ streets, post office Baltimore, Md.

John McLean, associate justice, Mrs. Carter's, Capitol Hill, post office Cincinnati, Ohio.

James M. Wayne, associate justice, Gadsby's, post office Savannah, Georgia.

John Catron, associate justice, Gadsby's, post office Nashville, Tennessee.

John McKinley, associate justice, absent, post office Louisville, Ky.

Peter V. Daniel, associate justice, Brenner's, post office Richmond, Virginia.

Levi Woodbury, associate justice, Gadsby's Hotel, post office Portsmouth, New Hampshire.

Samuel Nelson, associate justice, Potomac House, post office Cooperstown, New York.

Robert C. Grier, associate justice, Brenner's, post office Philadelphia, Pennsylvania.

Benjamin C. Howard, Reporter, Brenner's, post office Baltimore, Maryland.

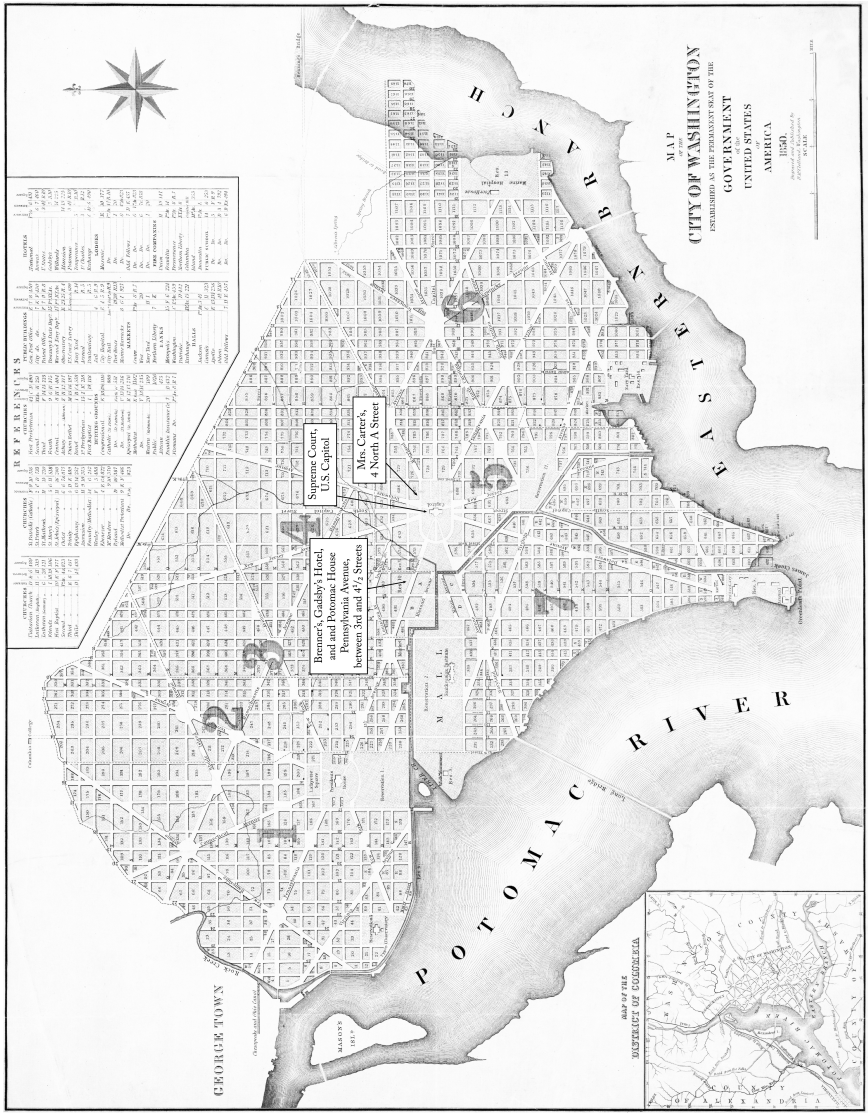
William Thomas Carroll, Clerk, corner 18th and F streets.

R. Wallach, Marshall, Louisiana avenue, between 4½ and 6th sts.

INTERCOURSE WITH FOREIGN NATIONS.

Envoys Extraordinary and Ministers Plenipotentiary in Foreign Countries, with their Residences, and Secretaries of Legation.

Countries.	Ministers, and Secretaries.	Residences.	Salary.
G. Britain	A. Lawrence	London	$9,000
	J. C. B. Davis, Sec'y of Legation	do	2,000
Russia	—— ——,	S.Petersb'g.	9,000
	—— ——, Sec'y of Legation	do	2,000


MAP
of the
CITY OF WASHINGTON
ESTABLISHED AS THE PERMANENT SEAT OF THE
GOVERNMENT
of the
UNITED STATES
of
AMERICA
1850.
REFERENCES
Supreme Court, U.S. Capitol
Mrs. Carter's, 4 North A Street
Brenner's, Gadsby's Hotel, and and Potomac House Pennsylvania Avenue, between 3rd and 4½ Streets
POTOMAC RIVER
EASTERN BRANCH
GEORGE TOWN
MAP OF THE DISTRICT OF COLUMBIA

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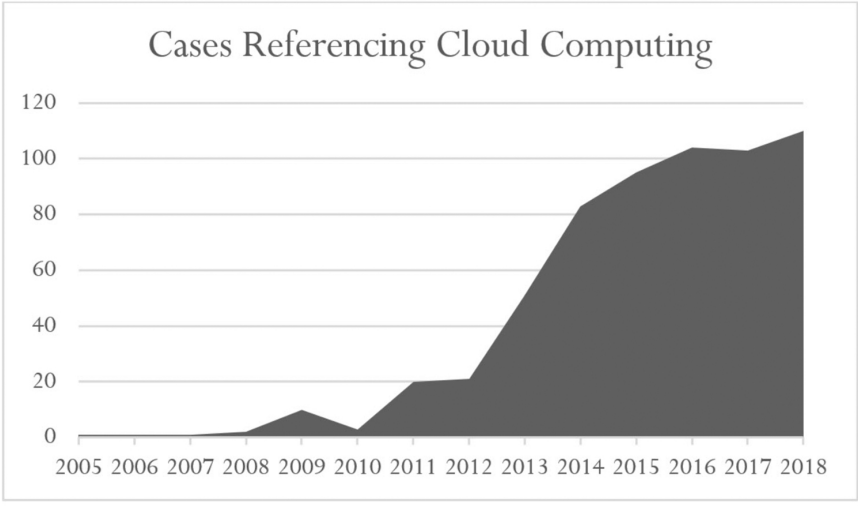

Journal of Legal Metrics

About the cover

By Adam Aft. As we have done in past issues,[1] we thought it would be interesting to see how technological developments have percolated through the courts — if a technology is worth a lawsuit or relates to an individual's liberty, it must be more than a passing fad. We searched in Lexis's "All jurisdictions/courts" database for references to cloud computing.[2] We then reviewed the cases and omitted false positives.[3] The result was a trend that started in 2005 with an injunction specifically referencing "cloud storage,"[4] and 2008 with a denial of a motion to dismiss related to "software as a service."[5] The last decade has seen a substantial increase in cloud computing references in the courts as seen on the chart on our cover. As part of this continuing trend, the federal courts have started to adopt the cloud. In its 2018 Annual Report, the Administrative Office of the U.S. Courts announced that it had begun the process of using an online web-based collaboration and communication platform.[6] Although PACER and CM/ECF remain hosted by the federal government, it will be interesting to watch the continued impact of cloud computing both on the courts and the cases they hear.

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).

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[1] *See* Adam Aft, Tom Cummins & Joshua Cumby, *Web 2.0 Citations in the Federal Courts*, 3 J.L. (2 J. LEGAL METRICS) 31 (2013).

[2] For our readers that cannot get enough legal-research syntax, we used "(cloud /s comput!) or ("software as a service" or "software-as-a-service") or SaaS or XaaS" as our search string.

[3] The courts sure used to do a lot of computing damages after resolving clouded titles. *See, e.g.*, Whittier v. Gormley, 3 Cal. App. 489 (Dist. Ct. App. 1906). There are also far more litigants with the surname Saas than we would have ever anticipated. *See, e.g.*, Great W. Stock Co. v. Saas, 24 Ohio St. 542 (1874). Perhaps our favorite false positive was the court's discussion in *Caldera, Inc. v. Microsoft Corp.* of the blue cloud image that used to be presented to computer users in DOS to obscure boot noise, the "series of confusing messages that appear on the screen during the DOS boot-up sequence." 72 F. Supp. 2d 1295, 1326 (D. Utah 1999).

[4] Le & Assocs. v. Diaz-Luong, 2005 Wash. Super. LEXIS 120.

[5] Al-Bawaba.com, Inc. v. Nstein Tech. Corp., 2008 NY Slip Op 50853(U), 19 Misc. 3d 1125(A), 862 N.Y.S.2d 812 (Sup. Ct.).

[6] www.uscourts.gov/statistics-reports/information-systems-and-cybersecurity-annual-report-2018.

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THE CASE FOR BAYESIAN JUDGES

F.E. Guerra-Pujol[†]

Do not become an artist; be a Bayesian, [there is] much more scope for the imagination![1]

INTRODUCTION

In their thought-provoking article "The Votes of Other Judges,"[2] Eric Posner and Adrian Vermeule present a theory of interdependent judicial voting and make a compelling argument for why judges on collegial, multi-member panels should engage in informal Bayesian updating when they vote on issues of law or questions of interpretation. Specifically, they propose a two-stage method of judicial voting: "in the first stage, each judge votes; in the second stage, the judges may change their votes in light of what they learned from the first stage."[3]

This paper responds to Posner and Vermeule's proposal in three ways. Part I of the paper explains why their proposal is too crude and too short on specifics. Next, Part II presents a workable method for Bayesian voting: replace the existing system of binary or "up or down" judicial voting with a new method in which judges numerically rate or score the strength of the legal arguments of the parties. This proposed Bayesian method of appellate voting is easy to operationalize and provides more information than the existing method of binary voting does: the judges' confidence levels or degrees of belief in the proper outcome. Part III then

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[1] Unattributed quotation in Brani Vidakovic, *Bayesian Fun*, https://www2.isye.gatech.edu/~brani/isyebayes/jokes.html (last visited Sept. 8, 2019).

[2] Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159 (2016).

[3] *Id.* at 189.

anticipates and responds to several potential objections to this proposed method of Bayesian voting by appellate judges.

I. A CRITIQUE OF POSNER AND VERMEULE'S APPROACH

Posner and Vermeule's Bayesian approach to judging offers valuable insights, but their two-stage voting proposal is short on specifics. After presenting a plethora of *ad hoc* examples and writing up many dense pages devoted to peer disagreement and interdependent voting, Posner and Vermeule fail to provide us with a theory of Bayesian voting by judges that is capable of being operationalized. Instead, they just offer a general exhortation: judges should be willing to change their votes in light of the way their fellow judges have voted. The problem with this exhortation, however, is that Posner and Vermeule neglect to specify the precise conditions under which a judge should actually change his or her vote.

Consider, by way of example, the internal voting procedures of the Supreme Court of the United States. At the end of a week in which the Court has heard oral arguments, the Justices hold a conference to discuss the week's cases.[4] Each judge, beginning with the Chief Justice, states the basis on which he or she would decide the case, and after all the justices have spoken, a preliminary vote is taken. If Posner and Vermeule could have their way, the justices would then take a second vote, this time taking into account how their colleagues voted the first time and changing their votes when warranted. But when would a change in one's vote be warranted?

Posner and Vermeule present several hypothetical cases in which a Justice might be warranted in changing his or her vote. Suppose, for example, five of the Justices say that the ordinary meaning of the statute is clearly X, while four say that it is clearly Y. In the words of Posner and Vermeule: "Shouldn't all nine update their views and learn from the aggregate information contained in the votes of colleagues? Shouldn't all entertain the possibility that despite their confident certainty that the statute is clear, the vote reveals the statute to be ambiguous?"[5]

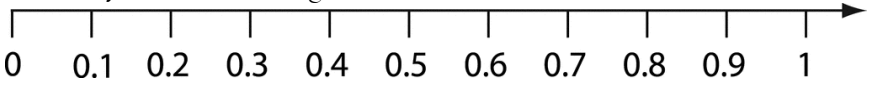
In the alternative, what if five Justices say that the statute clearly means X, while four say that it is ambiguous as between X and Y. "Should the five

[4] WILLIAM H. REHNQUIST, THE SUPREME COURT 252-66 (2d ed. 2001).
[5] Posner & Vermeule, *supra* note 2, at 163.

obtain some information from the votes of the four, albeit not as much as in the previous case? . . . And how about vice-versa—should the four update their own views, in light of the views of the five?"[6] But what if the vote was six to three or seven to two? The main reason why Posner and Vermeule's exhortation and two-stage model of voting are too crude to be of much practical use is that their model retains the traditional method of binary voting: a judge must still either vote all or nothing, either "for" or "against" the moving party.[7]

II. BAYESIAN JUDGING: DEGREES OF BELIEF

Broadly speaking, Posner and Vermeule are on the right track, for they are right to point out that a judge's vote contains information (independent of whatever reasons the judge may give to justify his or her vote), and they are also right to suggest that judges should update their initial positions before casting their final and decisive votes, especially in close cases. But is there any way of operationalizing Posner and Vermeule's theory of interdependent voting? There is: "Bayesian voting." Under this method of voting, appellate judges would not only state the reasons for their votes but also express their degrees of belief in their votes.[8] How? By rating or scoring the strength of the legal arguments of the parties, assigning a numerical score reflecting their confidence levels or relative degrees of belief in what the proper outcome of an issue or case should be (depending on whether the judge is engaged in outcome-voting or issue-voting).[9] One's degree of belief could be expressed in numerical terms anywhere in the range from 0 to 1:



[6] *Id.* at 165.

[7] For a critique of binary voting in law, see F.E. Guerra-Pujol, *The Turing Test and the Legal Process*, 21 INFO. & COMM. TECH. L. 113, 119 (2012).

[8] Ironically, Posner and Vermeule discuss the importance of degrees of belief (or "confidence levels") in their paper, *see* Posner & Vermeule, *supra* note 2, at 177-80, yet their two-stage model of judicial voting makes no use of degrees of belief or confidence levels.

[9] For an extended discussion of issue voting versus outcome voting by courts, see David Post & Steven C. Salop, *Rowing Against the* Tidewater*: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992).

The higher the score, the greater the judge's degree of belief. A score below 0.5, for example, would mean that the party with the burden of persuasion is not expected to prevail. A score above 0.5, by contrast, indicates that the party is expected to prevail, while a score of 0.5 means the judge is undecided about which party should prevail. Bayesian voting thus recognizes the subjective as well as the interdependent nature of law and legal interpretation.

This method of voting goes by various names, including range voting,[10] utilitarian voting,[11] score voting,[12] point voting,[13] and cardinal voting,[14] just to name a few variants. I, however, prefer the term "Bayesian voting," not only because judicial decision-making in close cases is ultimately a subjective exercise in legal reasoning, but also to emphasize the close connection between my proposed method of judicial voting and the theory of subjective probability developed by such giants as Frank P. Ramsey and Bruno de Finetti.[15] In brief, Ramsey and de Finetti were the first theorists to propose a *subjective* definition of probability, now referred to as "Bayesian probability."[16] According to this Bayesian or subjective view of probability, probabilities are not an objective property of the real world. Instead, probabilities are simply the subjective expression of one's personal view of the world.

On this subjective view of probability, the probability of a particular proposition being true is just a particular individual's degree of belief in the truth of that proposition. Accordingly, even if two people's subjective judgments about the probability of a proposition are vastly different at time t_1, after evidence for (or against) the statement/hypothesis is introduced at time t_2, rational individuals should then revise their initial degrees of beliefs. Moreover, according to the subjective view, their degrees

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[10] *See* Warren D. Smith, *Range Voting* (Nov. 28, 2000) (unpublished manuscript), http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.32.9150 (on file with the author).

[11] *See* Claude Hillinger, *The Case for Utilitarian Voting* (Dep't of Econ., Univ. of Munich, Munich Discussion Paper No. 2005-11, 2005), https://epub.ub.uni-muenchen.de/653/1/thecaseforutilitarianvoting.pdf (on file with the author).

[12] *See* Score Voting, THE CENT. FOR ELECTION SCI., https://electology.org/score-voting (last visited Sept. 9, 2019).

[13] *See* Aanund Hylland & Richard Zeckhauser, *A Mechanism for Selecting Public Goods when Preferences Must Be Elicited*, Kennedy School of Government Discussion Paper 70D (1980).

[14] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1970).

[15] *See generally* Maria Carla Galavotti, *The Notion of Subjective Probability in the Work of Ramsey and de Finetti*, 57 THEORIA 239 (1991).

[16] *See, e.g.*, R.T. Cox, *Probability, Frequency, and Reasonable Expectation*, 14 AM. J. PHYSICS 1 (1946).

of belief will tend to converge to the same probability as more and more evidence comes in. In short, isn't this subjective convergence toward truth a good description of how common law judges decide cases?

III. OBJECTIONS TO BAYESIAN JUDGING

As with any ambitious or novel proposal, objections will be raised. Here are three potential objections to Bayesian voting by appellate judges: (i) *impracticality*: Bayesian voting is much more cumbersome and complicated than traditional forms of binary voting; (ii) *incommensurability*: Since each voter's credence is subjective, it is meaningless to combine or aggregate such subjective and incommensurable values; and (iii) *anti-majoritarianism*: Bayesian voting can produce anti-majoritarian outcomes. Let's consider each objection in turn.

A. *Impracticality*

Bayesian voting is marginally more costly and cumbersome than the traditional, i.e. binary, method of voting that appellate judges typically use. But the question is whether the comparative costs are outweighed by the comparative benefits of Bayesian voting. As a threshold matter, traditional methods of voting also have costs; in particular, any ordinal system of binary voting can easily be manipulated in one way or another.[17] As a result, it's not enough to point out that Bayesian voting is costly or cumbersome. Instead, one must compare the costs of Bayesian voting (both the switching costs of implementing a new method of voting for appellate courts and the operational costs of using this new method) with the potential benefits of Bayesian voting, such as accuracy, coherence, and fairness. To the extent Bayesian voting methods are harder to manipulate or jury-rig than ordinal or traditional binary methods of voting, these switching and implementation costs might be well worth trading off.[18]

In any case, Bayesian voting is, in fact, not all that hard to understand or complicated to use. People engage in a form of Bayesian voting in their

[17] *See generally* Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971 (1989). *See also* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 814-831 (1982).

[18] At the very least, Bayesian voting should be tested on a trial basis.

daily lives whenever they rank or review products on Amazon, rate movies on Netflix or Rotten Tomatoes, or decide how much money to place on a bet. All of these mundane activities are everyday examples of Bayesian voting: subjective expressions of a voter's personal preferences. The more one likes a product or movie, the higher score the product or movie should receive, and conversely, the less one likes the product or movie, the lower the score. (The same Bayesian logic applies to bets: the more confident a person is in the outcome of a bet, the more money he or she should be willing place on the bet.) Cardinal ranking is useful because it conveys more information than a simple binary choice does.[19]

B. *Incommensurability*

Regardless of how easy it would be for judges to put Bayesian voting into practice, one could object that a group of Bayesian votes cannot be aggregated together because each judge's Bayesian vote (his or her degree of belief in the proper outcome of a case) is subjective or personal, since each judge's criteria for scoring a case might vary. I will make three points in reply.

First and foremost, so what? After all, even with simple binary voting, a judge's vote is already highly subjective. In many cases, especially contested cases involving issues of constitutional law, judges can have different judicial philosophies and often employ different criteria when deciding such cases—even judges with similar backgrounds and identical professional training. Second, subjectivity won't be such a big deal to the extent judges are using the same scale or numerical range (0 to 1) to score their degrees of belief. And third and last, Bayesian voting has the additional virtue of allowing judges to effectively abstain from voting (without having to recuse themselves) by assigning a score of 0.5 to their degrees of belief

[19] As an aside, many Netflix users have criticized Netflix's decision to replace its five-star rating system with a binary "thumbs up"/"thumbs down" system. By way of example, one Netflix user referred to the new binary system as "quite literally the most useless rating system I have ever seen across any form of media." Paul Tassi, *Netflix's Thumb-Based Rankings System Is the Epitome of Uselessness*, FORBES (June 26, 2017, 9:51 AM), https://www.forbes.com/sites/insertcoin/2017/06/26/netflixs-thumb-based-ratings-system-is-the-epitome-of-uselessness/#4238092713d3. For a defense of Netflix's binary method of ranking movies, see David Sims, *Netflix Believes in the Power of Thumbs*, THE ATLANTIC (Mar. 21, 2017), https://www.theatlantic.com/entertainment/archive/2017/03/netflix-believes-in-the-power-of-thumbs/520242/.

(again, assuming we are using a standard 0 to 1 point scale). If a case is close (i.e., if the arguments on both sides are equally persuasive), judges should have the ability to openly admit such closeness, an option judges don't have under binary voting.

C. *Anti-majoritarianism*

Regardless of the inherently subjective nature of judicial voting, one could criticize Bayesian voting as anti-majoritarian. With Bayesian voting, for example, a numerical minority of judges with intense preferences could, in theory, outvote a numerical majority of judges with weak preferences. But is this theoretical possibility a bug or a feature?

As Jeremy Waldron notes, it's not obvious why the principle of majority rule should apply to law.[20] When the law is contested and a case is appealed to a higher court, the higher court must, at a minimum, make two decisions. First, it must decide whether the lower court committed any legal errors (Decision #1), and if so, it must decide whether any of those legal errors are serious enough to warrant a reversal of the lower court's decision (Decision #2). Formally, let's call Decision #1 (did the lower court make a legal error?) the choice between *e* and not *e*, and let's call Decision #2 (if there is an error, is it serious enough for a reversal?) the choice between small *e* and large *e*.

For ease of exposition, I shall limit my discussion to Decision #1, the choice between *e* and not *e*. (The same logic applies to the choice between small *e* and large *e*.) Under the traditional method of judicial voting (one-judge, one-vote), the votes of each judge are equally weighted. Thus the one-judge, one-vote rule can only tell us whether *e* has garnered more votes than not *e* (or vice versa). By contrast, with Bayesian voting, judges would have to disclose their degrees of belief in *e* and not *e*. As a result, Bayesian voting generates more information than a simple majority-rule vote: a Bayesian voting procedure would reveal the comparative intensities of the judges' beliefs about *e* and not *e*.

Why should anyone want to know the relative intensities of the judges' beliefs? The answer (in two words) is fairness and accuracy. By way of

[20] *See, e.g.*, Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L. J. 1692 (2014).

illustration, consider a non-legal example.[21] A population of TV viewers are asked to rank two TV series using simple majority voting and Bayesian voting: *Breaking Bad* versus *Mad Men* (or *Nurse Jackie* versus *Orange Is the New Black*). Under majority voting, viewers can only vote for one show, even though both TV shows are very good. Under Bayesian voting (such as Netflix's five-star rating system), however, each viewer could express the intensity of his or her preferences.[22] In ethical terms, Bayesian voting is more fair and more accurate than simple majority rule, for Bayesian voting is not only more immune to strategic voting than simple majority rule, it also generates a more accurate picture of the voters' relative preferences.

To sum up, the problem with majority rule in ordinal or binary voting systems is precisely the fact that the final tally of votes does not reflect the intensity of the voters' beliefs. Furthermore, as William Riker and others have shown, simple majority voting can produce incoherent results and can be easily gamed to produce almost any outcome.[23] In short, if we care about accuracy, coherence, and fairness, then simple majority rule must give way to a more nuanced account of preferences.

CONCLUSION

Posner and Vermeule are definitely on to something. The votes of appellate judges do indeed provide additional relevant information about the case under review. The problem, however, is not *whether* judges should engage in Bayesian updating, but rather *how* they should do so. Why not give Bayesian voting a try? After all, there is no reason why the logic of Bayesian voting cannot be applied to appellate judicial procedure. Instead of voting up or down (e.g., affirm or reverse), with Bayesian voting judges would score the strength of their credences or degrees of belief in a given legal proposition or a legal outcome. Such a method promotes the values or accuracy, simplicity, and fairness more than binary or two-stage voting does.

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[21] I thank Paul Tassi for this example.

[22] For example, although I liked *Mad Men*, I considered *Breaking Bad* to be one of the best TV series of all time.

[23] *See generally* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1988), especially Chapter 4.

AN AGENT-BASED MODEL OF JUDICIAL POWER

Alex Schwartz[†]

INTRODUCTION

The power of courts to exercise judicial review of legislation and government action cannot be taken for granted. Even in long-established constitutional democracies, courts are occasionally ignored, defied, or attacked in retaliation for decisions that frustrate the goals of the political branches.[1] The resistance of many southern American states to the United States Supreme Court's decision in *Brown v. Board of Education* is one well-known example of outright defiance.[2] More recently, the Supreme Court's decision to recognize a constitutional right to same-sex marriage was, at least initially, met by various kinds of evasion.[3] Periodically, in

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[1] For an influential theoretical account of why political branches decide to attack or, alternatively, tolerate independent judicial review, see generally Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446 (2003).

[2] For discussion, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008), and Christopher W. Schmidt, *"Freedom Comes Only From the Law": The Debate over Law's Capacity and the Making of* Brown v. Board of Education, 4 UTAH L. REV. 1491 (2008).

[3] *See, e.g.*, James M. Oleske, Jr., *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1 (2016).

response to unpopular or inconvenient decisions, the United States Congress has also flirted with court-curbing measures that would weaken the Supreme Court in one way or another.[4]

As these examples illustrate, courts can and do survive episodic defiance and threats to their authority (albeit maybe with their confidence a little shaken). But for some courts, particularly new courts, the risks would seem to be more immediate and existential. In the early 1960s, for example, the Supreme Constitutional Tribunal of the fledgling Republic of Cyprus was openly defied because of a series of politically sensitive cases and eventually made defunct (the country soon descended into a conflict that is still unresolved).[5] In the early days of the Russian Federation, the newly established Constitutional Court boldly asserted its power of judicial review only to be defied by the Federation's constituent republics, police authorities, and President Boris Yeltsin (who subsequently suspended the Court and reconstituted it with more pliant judges and a much-diminished jurisdiction).[6] Likewise, independent judicial review did not survive long into the post-socialist era in Belarus.[7]

More mature courts can also be neutralized by court-curbing attacks. For example, the Federal Court of Malaysia, established in 1957, was effectively cowed into submission in 1988 after it provoked the wrath of the executive.[8] And, more recently, in Hungary,[9] Poland,[10] and Turkey,[11]

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[4] *See* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009). *See also* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2010), *and* Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 LAW & SOC'Y REV. 309 (1980).

[5] See the discussion in Alex Schwartz, *International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia*, 44 LAW & SOC. INQUIRY 1 (2019).

[6] *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001), *and* ALEXEI TROCHEV, JUDGING RUSSIA: THE ROLE OF THE CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990–2006 (2008).

[7] *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 7 (2d ed. 2014).

[8] *See* A.J. Harding, *The 1988 Constitutional Crisis in Malaysia*, 39 INT'L & COMP. L.Q. 57 (1990).

[9] *See* Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland–and the European Union*, 51 COMMUNIST AND POST-COMMUNIST STUD. 189 (2018). *See also* Bojan Bugaric & Tom Ginsburg. *The Assault on Postcommunist Courts*, 27 JOURNAL OF DEMOCRACY 69 (2016).

[10] *See* WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

[11] *See* Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187 (2017). For further empirical study of the Turkish context, see Aylin Aydin-Cakir, *The*

governments have purged, packed, or restructured courts in an apparent effort to snuff out any potential for independent judicial review.

Episodes like these suggest that judicial power is a fragile good, one that may not endure a collision with the political branches. Accordingly, the virtual consensus in the academic literature is that the growth and maintenance of judicial power depends, at least in part, on the strategic behavior of judges.[12] But despite the considerable body of empirical evidence on strategic judicial behavior, we still know very little about which judicial strategies are best for the growth and maintenance of judicial power.[13]

This article attempts to shed fresh light on this topic. Using a method of computer simulation called agent-based modeling, it explores how new courts can act strategically to build their power while mitigating the risk of retaliation by the political branches. The use of an agent-based model (or "ABM") for these purposes breaks new methodological ground. Although agent-based modeling has been fruitfully employed for a wide variety of topics in the social sciences, from cultural change[14] to political-party competition,[15] this article is the first attempt to develop an ABM to simulate judicial review. The results of the ABM simulations vindicate the intuition that the growth of judicial power will normally depend on relatively restrained and incremental (as opposed to sudden and bold) assertions of judicial review. A court that avoids challenging the preferred policies of the political branches in high-salience disputes will, ultimately, tend to

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Impact of Judicial Preferences and Political Context on Constitutional Court Decisions: Evidence from Turkey, 16 INT'L J. CONST. L. 1101 (2019).

[12] *See* Epstein, *supra* note 6; TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2004); JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO (2010); GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2012); *and* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS (2015). *Cf.* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009).

[13] For recent surveys and discussion of this literature, see Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 ANN. REV. POL. SCI. 167 (2015), and Lee Epstein & Jack Knight, *Strategic Accounts of Judging*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 48-61 (Robert M. Howard & Kirk A. Randazzo eds., 2017).

[14] *See* Robert Axelrod, *The Dissemination of Culture: A Model with Local Convergence and Global Polarization*, 41 J. CONFLICT RESOL. 203 (1997).

[15] *See* MICHAEL LAVER & ERNEST SERGENTI, PARTY COMPETITION: AN AGENT-BASED MODEL (2011).

exert more influence on constitutional law than a court that moves to establish its power early on in landmark cases.

I. BUILDING JUDICIAL POWER: BABY STEPS OR BIG BREAKS?

Arguably, the question of how courts become consequential institutions, despite their weakness relative to the political branches, is the central concern at the intersection of the fields of comparative constitutional law and political science.[16] One influential perspective proposes that the growth of judicial power requires courts to proceed cautiously at first, gradually building authority in cases that are unlikely to provoke defiance or retaliation.[17] Later, once patterns of compliance with judicial decisions have become established, it is thought that courts will be less vulnerable and can therefore afford to be ever more assertive.[18] In short, the idea here is that judicial power grows by way of "baby steps."

The "baby steps" theory of judicial empowerment emphasizes the strategic behavior of judges. To discern when to be assertive or cautious, judges need some reasonably reliable way to anticipate how political elites will react to their decisions (how likely is defiance? how likely is retaliation? etc.). To explain how judges might make this appraisal, Epstein and others introduced the useful concept of "tolerance intervals": the range of potential, non-ideal case outcomes that a political actor is nevertheless prepared to accept.[19] The idea is that courts can build their power gradually by making decisions that either fall within the intersection of the tolerance intervals of the relevant political elites or, when no such intersection exists, by avoiding those decisions altogether. For simplicity's sake, let us call both of these moves "strategic avoidance."

To a large extent, the viability and mode of strategic avoidance will depend on the constitutional context. Some courts can use docket control

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[16] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004), Ginsburg, *supra* note 12. *See also* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013), *and* THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds., 1997).

[17] *See* Epstein, *supra* note 6; Ginsburg, *supra* note 12.

[18] Ginsburg, *supra* note 12, at 73.

[19] *See* Epstein, *supra* note 6.

to eschew high-risk cases in favor of low-risk cases. Other courts may lack docket control but have the benefit of well-established justiciability doctrines, or doctrines that allow the implementation of their judgments to be postponed.[20] But in many instances, either because there is little or no docket control or no available doctrinal excuse, there may be no way for a court to avoid provoking an inter-branch conflict other than to straightforwardly uphold the impugned law or policy ("strategic avoidance" in this last instance might also be called "strategic deference"). Furthermore, the real world is likely to generate noisy signals that might mislead courts as to what the political branches really care about. Political posturing may exaggerate or downplay the intensity of elite preferences; legislatures are not single-minded entities; even the same political party, depending on party discipline, may be a cacophonous mess of rival factions and back-bench mavericks; the executive–particularly if it is a coalition government–may be just as polyphonic. In such circumstances, it will be difficult to anticipate how the political branches will actually respond to a court decision when push comes to shove; the cognitive load of trying to estimate the relevant tolerance intervals may simply be too much to bear.[21] Accordingly, a court wishing to avoid defiance or retaliation may have to rely instead on a much cruder heuristic: avoid or uphold in cases that seem *too* politically salient and be assertive in cases that seem *less* politically salient.

To be sure, there are also important potential tradeoffs in adopting a strategy of avoidance. For one thing, a court trades short-term influence for the sake of uncertain future gain. Not only does the court lose opportunities to win victories when it upholds disagreeable law or policy simply to avoid confrontation, it also does nothing to build a record of compliance with its decisions. Furthermore, by upholding a law or policy that it would otherwise oppose, the court may discourage potential litigants by leading them to wrongly believe that it is hostile to their claims.[22]

But strategic avoidance is not the only way that a court might take "baby steps" toward greater power. Instead of avoiding risky cases, one

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[20] *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016), *and* Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683.

[21] *See* Epstein & Knight, *supra* note 13.

[22] Gretchen Helmke & Jeffrey K. Staton, *The Puzzling Judicial Politics of Latin America*, *in* COURTS IN LATIN AMERICA 306-31 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

possible alternative is for courts to limit the scope of their decisions, confining rulings to the particulars of the disputes that they are asked to resolve and saying only what is necessary to justify a determinate result. Cass Sunstein calls this style of judicial decision making "minimalism," its hallmark being a preference for narrow and shallow judgments.[23] Minimalist judgments are narrow in the sense that they "decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases."[24] And they are shallow in the sense that they are "unaccompanied by abstract accounts about what accounts for those judgments."[25] Sunstein claims that minimalism is, normatively speaking, often the optimal approach to constitutional adjudication because it reduces the costs incurred by courts in making decisions, as well as the costs borne by society if the courts get things wrong. Moreover, minimalism promotes democracy because it leaves more to be debated and decided by elected officials.[26]

Sunstein's minimalism is not explicitly concerned with building judicial power per se.[27] But there is a very straightforward way in which judicial minimalism might be part of a long-term "baby steps" strategy. By limiting the scope of their decisions, courts can also limit the range of political branches and public authorities affected by their decisions and, consequently, mitigate the risks of defiance, widespread opposition, and retal-

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[23] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

[24] *Id.* at 10.

[25] *Id.* at 13. Examples of supposedly minimalist decisions cited by Sunstein include: United States v. Virginia, 518 U.S. 515 (1996) (striking down sex discrimination at military institute); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down an affirmative-action policy); Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment limiting the rights of sexual minorities); and United States v. Lopez 514 U.S. 549 (1995) (invalidating a ban on the possession of guns near schools).

[26] *Id.*

[27] Indeed, with only a few exceptions, the potential strategic dimension of judicial minimalism has not received much scholarly attention. One of these exceptions is a recent article by Justin Fox and Georg Vanberg, *Narrow Versus Broad Judicial Decisions*, 26 J. THEORETICAL POL. 355 (2013). They argue that, from the perspective of a court confronted with uncertainty about the implication of constitutional doctrine, minimalism is probably not good strategy. Rather, maximalist decisions are to be preferred because they stimulate policy responses that more accurately probe these consequences in future decisions. Another exception is a pair of articles by Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast (writing under the pseudonym "McNollgast"). *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995), *and* McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006).

iatory attacks. It also seems reasonable to assume that the more laws or policies that are invalidated by a court's decision, the more likely it is that the decision will provoke widespread dissatisfaction among political elites who–sharing a common target–may then coordinate an attack of some kind on the court. And so, by spacing out those decisions that frustrate the goals of political elites, minimalist courts will be less likely to provoke a broad and simultaneous backlash. For these reasons, a court might stick to narrow decisions when it has yet to establish its authority (or when its authority is in jeopardy), but favor broad (and therefore more rewarding) decisions when its authority looks secure. Call this "strategic minimalism."

Strategic minimalism also comes with its own potential tradeoffs. A minimalist court may challenge the political branches on politically salient issues. But by limiting the scope of its decisions, the court sacrifices the potential for more systemic policy interventions. In other words, minimalism trades opportunities for big victories, *à la Brown*, for small ones of relatively narrow consequence. Furthermore, narrow decisions may well generate fewer discrete instances of defiance, but their capacity to build a court's reputation for compliance is, for this same reason, also diminished.

Both of the strategies canvassed so far–strategic avoidance and strategic minimalism–are consistent with the "baby steps" theory of judicial power. But there is another way of thinking about the creation of judicial power. Following David Law, we might imagine that judicial power depends on a kind of coordination equilibrium.[28] Because courts are public institutions, political elites will be aware of judicial decisions and have reason to believe that other political elites are also aware of those same decisions.[29] What is more, out of all the various people or institutions that might make pronouncements on questions of constitutional law, courts are uniquely placed because that is their putative public function, that is, to provide authoritative interpretations of law.[30] And so, assuming a context in which unilateral defiance of court decisions will be costly in some way, political elites' expectation that other political elites will comply with court decisions is itself sufficient reason to comply with court deci-

[28] *See* Law, *supra* note 12.
[29] *Id.* at 774.
[30] *Id.*

sions.[31] Ultimately, what matters is the widespread belief that the court's decisions will coordinate behavior: "Because everyone expects everyone else to comply, and because the best strategic response to compliance by everyone else is to comply, the expectation that people will comply is self-fulfilling."[32]

This way of thinking about judicial power shares something important with the "baby steps" theory outlined earlier; significantly, both assume that judicial power is path dependent, in so far as past compliance with judicial decisions is thought to affect the likelihood of future compliance. Whereas the "baby steps" theory might counsel strategic avoidance of high-salience cases, however, this second way of thinking about judicial power would actually counsel the opposite. A high-salience and controversial decision (assuming it is obeyed) provides an especially powerful reinforcement of the court's authority. The more often a court issues decisions like this, "the greater the court's power to coordinate may become."[33] And even a single case like this might have a dramatic effect on expectations.[34] Moreover, although a newly established constitutional court might face a greater risk of defiance (because it has yet to establish a reputation for compliance), a single, highly salient decision that commands obedience early on might be such a powerful signal that it solidifies a court's reputation for compliance.[35]

We can take this idea one step further. The *best* time to decide highly salient, controversial cases might be early on, at the beginning of a court's career. This proposal may seem counterintuitive, but there are reasons to take it seriously. If an independent court with the power of judicial review has been established, it could only have been established with the support of some substantial portion of the governing political elites. Indeed, the literature on this topic has identified a variety of basically self-serving, or "rational-strategic," reasons why elites come to support the creation of an independent court with the power of judicial review. A very influential line of argument, advanced by Tom Ginsburg and others, proposes that political elites facing uncertain electoral prospects may create independent

[31] *Id.* at 764
[32] *Id.*
[33] *Id.* at 780.
[34] *Id.* at 782.
[35] *Id.* at 796.

judicial review as a kind of "insurance" to protect themselves and their interests in the event that their rivals come to power.[36] A similar rationale also applies in the context of federal systems,[37] or indeed any system with multiple units of government or autonomous sites of power.[38] If power is fragmented across multiple factions, each faction may tolerate independent courts with the power of judicial review as a check on rivals.

Whatever the reasons elites may have for creating independent courts, those reasons will presumably be freshest early in a court's career, before subsequent events have a chance to change the calculus. Consider the insurance rationale. At first, and for some time, political elites may continue to believe that the political environment is just as competitive as it was when they decided to create independent judicial review. But as conditions change, or expectations turn out to be mistaken, elites may come to believe that electoral contests are not as competitive as they initially expected. Having paid for insurance up front, they may come to feel a kind of buyer's remorse and be increasingly inclined to disobey the court or engage in court-curbing retaliation as time goes on. The best strategy for the court, then, might be to make a bold move early on, seizing the opportunity of a high-salience case to establish authority when the original reasons for supporting the court are still fresh and the odds of compliance are consequently more favorable.

To accentuate the contrast between this view and the "baby steps" theory outlined earlier, let us call this the "big breaks" view of judicial

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[36] For the definitive statement of this "insurance thesis," see Ginsburg, *supra* note 12. Although Ginsburg is responsible for articulating and popularizing the analogy with insurance, it should also be noted that the theory is foreshadowed in earlier work by J. Mark Ramsayer in *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994). And a formal, game-theoretic formulation of the same logic is articulated in by Matthew C. Stephenson in "*When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003).

[37] *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997), discussed in Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith Whittington and Daniel Keleman eds., 2008). *See also* Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 264 (2008), *and* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011).

[38] On the "fragmentation hypothesis," see John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002), and Rebecca Bill Chávez et al., *A Theory of the Politically Independent Judiciary*, *in* COURTS IN LATIN AMERICA 219-47 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011). *See also* Stephenson, *supra* note 36, *and* Mark V. Tushnet, *Political Power and Judicial Power: Some Observations on Their Relation*, 75 FORDHAM L. REV. 755 (2006).

power. Rather than counseling courts to favor low-salience decisions that gradually build judicial power over time, the "big breaks" theory favors big gambles in high-salience cases that have the potential to decisively establish the court's authority. The logic of this wager rests on the assumption that compliance with decisions in high-salience cases has a greater impact on the probability of future compliance than low-salience cases. This may seem like a risky gamble. Presumably, the effect on defiance is symmetrical: defiance of high-salience cases will also have a greater impact on the probability of future defiance. But the gamble may not be so foolhardy. If political elites do have some provisional reason to support the creation of independent judicial review in the first place (which is a reasonable assumption), the court might capitalize on this friendly disposition to win some big victories in high-salience cases early on.

Which of these approaches is more conducive to growth and survival of judicial power, "baby steps" or "big breaks"? This is a difficult question to answer. Both approaches assume path dependency: the history of compliance, as well as initial predispositions, are thought to influence the likelihood of future compliance. Formal game-theoretic methods are not much help in determining which of the two approaches does better—answering the question is not a matter of solving for the "best response" equilibrium at any given point in time. To answer the question, rather, we need to see how the system behaves over time: How does the court's record of compliance change? Does judicial power survive, or does it fail? If so, when is failure most likely to occur?

Traditional empirical methods also limit our ability to answer these questions. We can observe what look like "baby steps" or "big breaks" in particular times and places, but we can never observe what would have happened had a court taken a different approach in a counterfactual context. Conceivably, a cross-national empirical study might be able to overcome this problem of causal inference. But even if the data are comparable across contexts, unobserved or unobservable factors would present an obvious threat to valid inference. Moreover, if courts tend to behave strategically to promote compliance and avoid attack, as the extant empirical evidence suggests, then there are likely to be few observable cases of court failure.

II. AGENT-BASED MODELS

Partly in response to the difficulties canvassed above, the novel approach taken here is to develop an ABM that can simulate the performance of several stylized strategies in a variety of stylized conditions. As the name suggests, the fundamental building blocks of an ABM are autonomous "agents." Agents behave according to pre-programmed "procedures." Typically, the procedures that agents follow are relatively simple behavioral responses to events that occur within the "world" of the simulation. Agents may have individual characteristics and states that change over the course of the simulation. Agents may be mobile, moving around the world and interacting with other agents according to their respective procedures. Agents may also be sedentary units that affect or are affected by neighboring agents. An ABM will play out over a series of "steps," but the world of the simulation need not be an explicit geometric space; it may represent a logical or network space in which relationships between agents are arranged and interactions between them occur according to those arrangements.

It is a characteristic feature of an ABM that the interactions of many autonomous agents, each following their respective procedures, can lead to complex system-level patterns.[39] The emergent complexity displayed by an ABM, though not readily predictable from the initial state of the simulation, can be made intelligible by comparing how the model performs with different procedures or different parameters. For this reason, agent-based modeling provides a distinct way to explore the macro-level implications of micro-level theories and assumptions.[40]

Agent-based modeling has been widely applied to a variety of topics. In the natural sciences, it has been used to simulate phenomena such as the spread of contagious diseases[41] and the behavior of ant colonies.[42] Agent-based modeling has arguably had an even greater impact in the social sci-

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[39] *See* Axelrod, *supra* note 14.

[40] Joshua M. Epstein, *Agent-Based Computational Models and Generative Social Science*, COMPLEXITY, May/June 1999, at 41.

[41] *See* Liliana Perez & Suzana Dragicevic, *An Agent-Based Approach for Modeling Dynamics of Contagious Disease Spread*, 8 INT'L J. HEALTH GEOGRAPHICS 50 (2009).

[42] *See* Stephen C. Pratt et al., *An Agent-Based Model of Collective Nest Choice by the Ant* Temnothorax albipennis, 70 ANIMAL BEHAV. 1023 (2005).

ences,[43] where it has been used to study a diverse range of topics from everyday ethnocentrism[44] to sophisticated financial markets.[45] Indeed, agent-based modeling is said to facilitate a distinct research paradigm of "generative social science" in which macroscopic social regularities are explained in terms of "decentralized local interactions of heterogeneous autonomous agents."[46]

Though still relatively rare, agent-based modeling has also been applied to legal studies in inventive ways.[47] Some studies have used agent-based modeling to simulate how different regulatory regimes influence individual agent behavior and how that agent-level behavior in turn generates systemic effects. For example, Daria Roithmayr created an ABM to demonstrate how residential segregation along racial lines can "lock in" despite laws that formally prohibit racial discrimination.[48] Other studies have used ABMs to investigate the diffusion of legal norms or legal knowledge within a network, including the ABM developed by Daniel Katz and others to complement a computational model of intellectual influence within the American legal academy.[49]

There are several important advantages in using an ABM to explore the growth or failure of judicial power under varying conditions. For one

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[43] *See* Flaminio Squazzoni, *The Impact of Agent-Based Models in the Social Sciences After 15 Years of Incursions*, 18 HIST. ECON. IDEAS 197 (2010).

[44] *See* Ross A. Hammond & Robert Axelrod, *The Evolution of Ethnocentrism*, 50 J. CONFLICT RESOL. 926 (2006).

[45] *See* Blake LeBaron, *A Builder's Guide to Agent Based Financial Markets*, 1 QUANTITATIVE FIN. 254 (2001).

[46] Epstein, *supra* note 40.

[47] For a good, if now somewhat dated, overview of the diverse applications of ABMs, see Robert Axelrod & Leigh Tesfatsion, *Appendix A: A Guide for Newcomers to Agent-Based Modeling in the Social Sciences*, *in* 2 HANDBOOK OF COMPUTATIONAL ECONOMICS 1647-59 (Leigh Tesfatsion & K.L. Judd eds., 2006). *See also* JOSHUA M. EPSTEIN, GENERATIVE SOCIAL SCIENCE: STUDIES IN AGENT-BASED COMPUTATIONAL MODELING (2006); Scott de Marchi & Scott E. Page, *Agent-Based Models*, 17 ANN. REV. POL. SCI. 1 (2014); *and* Charles M. Macal & Michael J. North, *Tutorial on Agent-Based Modelling and Simulation*, 4 J. SIMULATION 151. 156-57 (2010). For an overview and discussion of the use of agent-based modeling for legal studies, see Alex Schwartz, *Agent-Based Modeling for Legal Studies*, *in* COMPUTATIONAL LEGAL STUDIES: THE PROMISE AND CHALLENGE OF DATA-DRIVEN LEGAL RESEARCH (Ryan Whalen ed., forthcoming 2019).

[48] *See* Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197 (2004).

[49] *See* Daniel Martin Katz et al., *Positive Legal Theory and a Model of Intellectual Diffusion on the American Legal Academy*, COMPUTATIONAL LEGAL STUDIES (Aug. 26, 2009), https://www.computationallegalstudies.com/2009/08/26/model-of-intellectual-diffusion-on-the-american-legal-academy-repost-from-422/, *and* Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76 (2011).

thing, unlike the formal models typically employed by game theory, an ABM does not require a mathematically tractable "solution" premised on "best responses."[50] Consequently, ABMs can readily incorporate "bounded rational" (or even irrational) heuristic behavioral rules inspired by simple intuitions or empirical evidence about how fallible actors pursue their goals. Furthermore, there is virtually no limit, apart from computing power, to the number and variety of the agents that an ABM can accommodate within a simulation.[51] ABMs thus provide great flexibility because they are not constrained by the limits of mathematical tractability, limits that would easily be strained by trying to solve for "best responses" in a strategic setting that includes the interdependent and adaptive behavior of multiple heterogeneous agents.

A second and more important advantage of using ABMs has already been alluded to: the ability to explore path dependency and system robustness. As we have seen, there are good reasons to think that the emergence and maintenance of judicial power is path dependent. Initial conditions and early choices (for example, to uphold or invalidate a politically salient law; to comply with or defy a landmark judicial decision) are thought to influence the probability of later choices and events. Moreover, this series of choices and events–as the examples from Russia or, more recently, Hungary show us–may ultimately result in a system-level failure of judicial power. ABMs are also particularly well suited to exploring the emergent properties of systems that result from the interaction of many agents; the agents can have individual memories, and they can learn (or fail to learn) from their respective histories.[52] Thus, an ABM allows us to simulate how judicial power might evolve along different trajectories depending on the adoption of different strategies and the values of various parameters.[53] By systematically varying strategies and parameters, we can observe how the resultant trajectories lead to the growth or failure of judicial power.[54]

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[50] *See* de Marchi & Page, *supra* note 47, and Eric Bonabeau, *Agent-Based Modeling: Methods and Techniques for Simulating Human Systems*, 99 PROC. NAT'L ACAD. SCI. 7280 (2002).

[51] *See* Uri Wilensky & William Rand, AN INTRODUCTION TO AGENT-BASED MODELING: MODELING NATURAL, SOCIAL, AND ENGINEERED COMPLEX SYSTEMS WITH NETLOGO 37 (2015).

[52] *See* Bonabeau, *supra* note 50. *See also* Axelrod & Tesfatsion, *supra* note 47, at 1649.

[53] *See* Paul E. Smaldino et al., *Theory Development with Agent-Based Models*, 5 ORGANIZATIONAL PSYCHOL. REV. 300 (2015).

[54] *See* Axelrod & Tesfatsion, *supra* note 47, at 1650.

Like all methods, agent-based modeling has its limitations. An ABM is a kind of hi-tech thought experiment. Like the formal models used in game theory, there is always a tradeoff between apparent realism and parsimony. Although ABMs can accommodate more complex (and therefore seemingly realistic) assumptions, each assumption comes with the potential cost that the model is either relevant to a narrower range of circumstances than it might otherwise be or, if the assumption is really misguided, not relevant at all. For these reasons, ABM methodologists recommend building models that are only as complex as they need to be for the modeler's purposes.[55]

III. AN ABM OF JUDICIAL POWER

A. *Model Overview and Assumptions*

The ABM presented here simulates how judicial power might evolve over the course of a sequence of interactions between two types of agents: a constitutional court ("the Court") and the political branches ("the Government Agents"). As constitutional challenges arise, the Court must decide to uphold or invalidate a challenged law or policy. In doing so, the Court is influenced by the direction and strength of its own policy preferences, its belief about how likely the Government Agents are to comply with its decisions, and its strategic sensibilities (a pre-programmed decision rule it follows in each case). If the Court invalidates a law or policy, the Government Agents may decide to comply with or defy the Court's decision. The Government Agents are influenced by the direction and strength of their own policy preferences, as well as existing expectations about compliance and defiance. If at any time the Government Agents decide that the Court's decisions cost them too much in preferred policy outcomes, they can attempt to coordinate a court-curbing attack that terminates independent judicial review. If they succeed in doing so, the simulation ends.

Like all models, this ABM makes several simplifying assumptions. It is assumed that both the Court and the Government Agents are "policy seek-

[55] *See* Wilensky & Rand, *supra* note 51.

ers"; they have preferences about policy and derive some utility (a "payoff") when they are able to influence case outcomes in accordance with those preferences. The model also assumes that the policy preferences of the Court and the Government Agents are static and fixed at the outset. In other words, the ABM does not include compositional change to the agents (for example, retirement, elections, etc.), ideological drift, or other events or processes that might alter the agents' preferences over time.

It is further assumed that the Court and the Government Agents are unitary entities, as opposed to collegial bodies that make decisions collectively. Obviously real courts, legislatures, and executives are not like this. But the internal dynamics of these bodies are not of interest for purposes of this investigation, and modeling inter-branch relations is much more manageable if those dynamics are assumed away (indeed, this is a common simplifying assumption in analyses of inter-branch relations).[56] If the reader prefers, she is free to think of the agents' decisions as those of the "median justice," in the case of the Court, or the "median legislator," in the case of the Government Agents.

A fourth simplifying assumption is that the Court and the Government Agents make binary choices; the Court must uphold or invalidate, and the Government Agents must comply or defy (there are no intermediate responses). In the real world, of course, there is a range of responses that might be possible. For example, a court might formally uphold a challenged law but effectively rewrite it by interpretation so that the constitutionally approved meaning is significantly different from what the legislature originally ratified. A court might also invalidate a law but delay the operation of its decision. Likewise, a range of responses would be open to the political branches, from full compliance, partial or uneven compliance, surreptitious disobedience, to outright defiance. The ABM simplifies all this into simple binary choices.

Finally, it is assumed that the Court and the Government Agents have incomplete information about each other and neither can predict the actions of the other without error; Government Agents cannot know if the Court will uphold or invalidate a law or policy, and the Court cannot know if the Government Agents will defy a decision. But it is also assumed that the Court and the Government Agents have perfect information about

[56] *See, e.g.*, Epstein, *supra* note 6; and Vanberg, *supra* note 12.

the history of their interactions, and they can rely on the past to predict what is likely to happen in the future.

It should be emphasized that these simplifying assumptions are not merely for modeling convenience. By subtracting much of the complexity that one would expect to see in the real world, the ABM can help us to isolate the influence of certain parameters on the outcomes of interest.

B. *Simulation Sequence and Parameters*

At the very beginning of the simulation, the ABM generates the Court and a number of the Government Agents determined by an adjustable parameter (NUMBER-OF-GOV-AGENTS). This parameter allows the simulation to model varying degrees of institutional complexity. A very simple context would include the Court and just a single Government Agent; a more complex context–for example, a federal system like the United States–might include dozens of Government Agents representing a set of autonomous legislatures and executives. Two other adjustable parameters model the policy preferences of the Court and the Government Agents. The first, POLARIZATION, determines how likely the Court is to disagree with an existing law or policy and how likely, on average, the Government Agents are to disagree with the Court. The second, FRAGMENTATION, models the variance in policy preferences among Government Agents, that is, how likely the Government Agents are to disagree with one another.

Once these elements are in place, the simulation runs through a series of "steps." At the beginning of each "step" in the simulation, a case is generated and assigned a random value (CASE-SALIENCE), ranging from 0 to 1 (drawn from a normal distribution). This variable represents how politically important the case is to the agents in the simulation. As in the real world, not all cases will attract the same level of attention. Some cases will have a very high profile and be especially divisive; think of the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), finding a constitutional right to the legal registration and recognition of same-sex marriage. Other cases will have a relatively low profile. Each case is also assigned a random interval (CASE-SCOPE) that determines the range of Government Agents that may be affected by the case in question, depending on how the Court decides. Some cases will inevitably

have very broad policy consequences across the system, while others–even if highly salient–will have relatively narrow consequences (for example, *Obergefell* only had direct legal consequences for those 14 states that had not already legalized same-sex marriage in one way or another).

Once a case is generated, and the salience and scope values are assigned, the Court will either agree or disagree with the impugned law or policy. If it disagrees, it makes a decision to either uphold or invalidate the impugned law or policy and whether to do so narrowly (minimalist) or broadly (non-minimalist). If the Court decides to invalidate the law or policy, the Government Agents must respond by either complying or defying. The number of Government Agents that must respond is determined by the CASE-SCOPE interval and whether the Court invalided narrowly or broadly. If the Court decides to invalidate broadly, then a higher number of Government Agents must respond. If the Court decides to invalidate narrowly, then a lower number of Government Agents must respond.[57]

Once the Court and affected Government Agents have made their respective decisions, each agent collects a payoff in utility according to the following scheme:

i. If the Court invalidates a law or policy, then the Court collects a payoff equivalent to the product of CASE-SALIENCE and the number of affected Government Agents that comply with the decision. Meanwhile, affected Government Agents that agree with the law or policy suffer a loss equivalent to CASE-SALIENCE.

ii. If the Court upholds a law or policy that it disagrees with, affected Government Agents that agree with the law or policy collect a payoff equivalent to CASE-SALIENCE. Meanwhile, the Court suffers a loss equivalent to the product of CASE-SALIENCE and the number of affected Government Agents.

iii. If the Court upholds a law or policy that it agrees with, then the Court suffers no loss and affected Government Agents that agree

[57] For simplicity's sake, intermediate outcomes between these two poles are excluded from the simulations.

with the law or policy collect a payoff equivalent to CASE-SALIENCE.

When a Government Agent's utility score drops below zero, it becomes UNHAPPY and it will consider launching a court-curbing attack (for example, impeachment, jurisdiction stripping, suspension, etc.). The success of this attack depends on two threshold parameters. The first, DEFIANCE-THRESHOLD, represents theoretical expectations about the influence of past defiance on the probability of a present court-curbing attack. Setting this parameter very high models a world in which Government Agents are cautious about court curbing and, even if they are UNHAPPY, will not attempt an attack until a recent history of defiance suggests that the Court's authority is already failing. Conversely, setting this parameter at a relatively low level will model a world in which Government Agents are more cavalier about the costs of court curbing and do not need to perceive much, if any, weakness in the Court's authority before launching an attack. The second parameter, DISSATISFACTION-THRESHOLD, determines the proportion of Government Agents that must simultaneously be UNHAPPY for a coordinated court-curbing attack to succeed. The idea here is to model the influence of institutional veto points that make a court-curbing attack require the coordinated effort of several Government Agents at once.

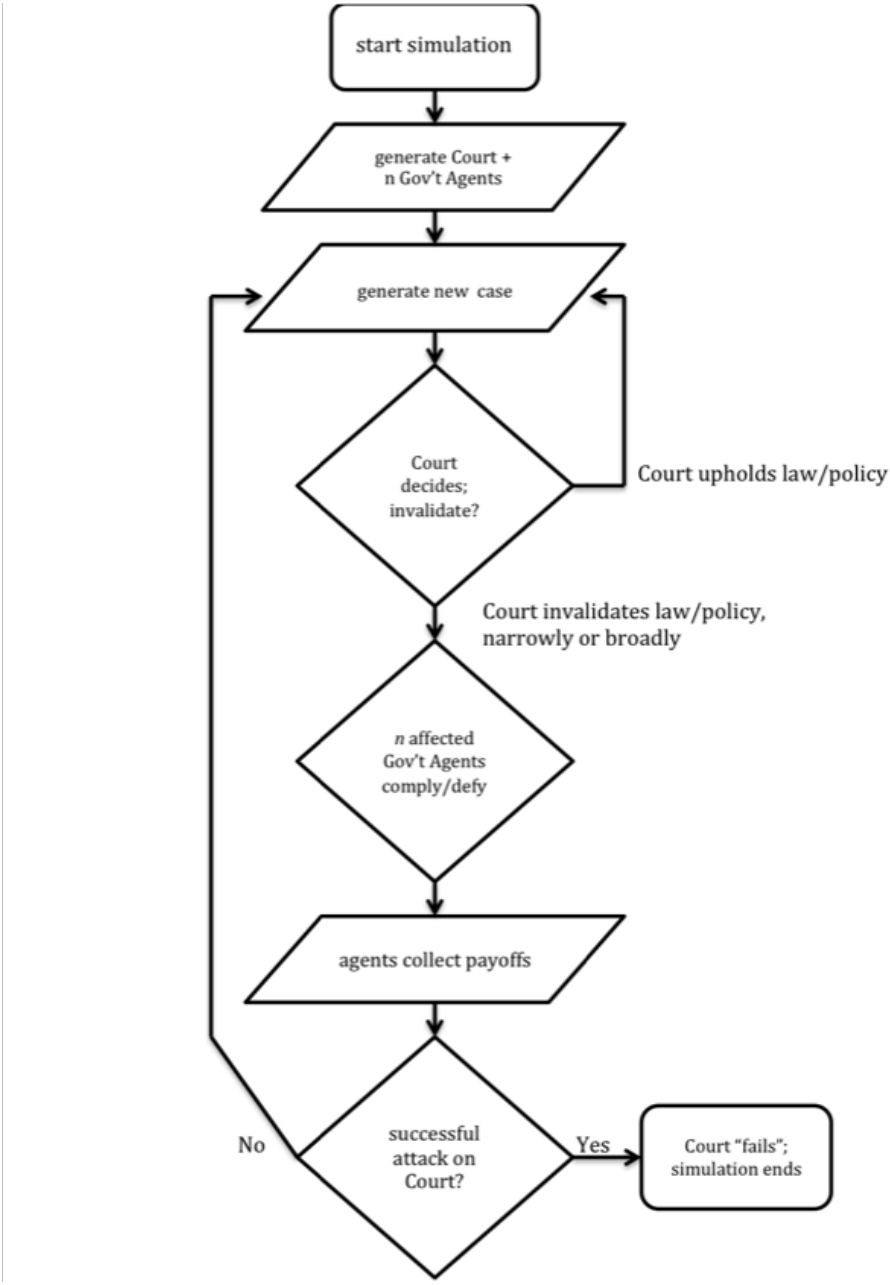

Figure 1. Simulation Flow Chart

C. *Decision Rules*

The Court's decision rule is the real focus of this investigation. We want to know what sort of behavior is best for building judicial power: a strategy premised on "baby steps" or one premised on "big breaks." But before explaining the Court's stylized decision rules, the way the ABM models the Government Agents' decisions to comply with or defy the Court's decisions requires some explanation.

Presumably, a decision to defy a court is not costless. There might be a negative public reaction to government defiance of judicial decisions, a reaction that could translate into adverse consequences for political elites. Indeed, the idea that diffuse public support for the judiciary encourages the political branches to obey judicial decisions is a key tenet in much of the literature on judicial power.[58] In addition to costs associated with adverse public reactions, government defiance of the judiciary may also sacrifice international prestige, jeopardize foreign direct investment, and risk incurring international sanctions.[59] Furthermore, governments might have genuine ideational commitments (say, a sincere belief in the rule of law) that militate against defying the courts. Rather than attempt to model all of these influences individually–which would necessitate a very complex simulation–the ABM presented here lumps them together and allows them to vary randomly from case to case. Thus, the decision to defy in any given case is a function of whether the random costs of defiance (for example, a negative public reaction) happen to be outweighed by other factors in that instance.

To keep things relatively simple, the ABM models only two such factors, each inspired by the scholarly literature. The first of these, CASE-SALIENCE, has already been introduced and defined. As previous literature suggests, the more political elites care about the outcome of a case, the more prepared they will be to absorb the associated costs of defiance.[60]

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[58]For an overview, see Vanberg, *supra* note 13. *See also* Clark, *supra* note 4; Staton, *supra* note 12; *and* Vanberg *supra* note 12.

[59] For an influential theory of how the protection of constitutional rights might work as a signal to attract investment, see Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

[60] *See, e.g.*, Epstein, *supra* note 6, at 129. For a general overview of the literature on compliance, see Diane Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 LAW & SOC. INQUIRY 803 (2013).

Thus, other things being equal, the Government Agents will be more likely to defy the Court in a high-salience case.

The second factor (EXPECTATION-OF-DEFIANCE) models common beliefs about how likely defiance is. The rationale for this factor has already been suggested: judicial authority depends on "self-fulfilling" expectations about compliance, expectations which are themselves built on a court's reputation for securing compliance with its decisions.[61] Thus, the more a court is defied, the more people will expect it to be defied, and the less authority it will actually wield. This parameter is adjustable so that the initial beliefs about judicial authority can be set to simulate a continuum of contexts, from a state in which there is a very strong expectation of judicial power to a state in which judicial power is tenuous and generally expected to fail. Once the simulation is underway, EXPECTATION-OF-DEFIANCE is simply the standing average of defiance, weighted by CASE-SALIENCE to account for the greater effect that defiance in high-salience cases should have on beliefs about the Court's authority. The combination of CASE-SALIENCE and EXPECTATION-OF-DEFIANCE is intended to capture the generic calculus of defiance and compliance. These two parameters are averaged together to produce a value from 0 to 1 that determines the working probability of defiance at any given time.

Holding the Government Agents' decision rule constant, how then does the Court behave? The ABM allows the Court's decision rule to take one of six styles (these remain fixed for the duration of each "run" of the simulation). The first of these, called *basic-random*, is used simply as a benchmark for comparison. If the Court follows this decision rule, it will uphold or invalidate a challenged law or policy with equal probability, and if it does invalidate the law or policy, the scope of the decision is equally likely to be narrow (that is, minimalist) or broad.

The next two decision rules are called *avoider* and *minimalist*. If the Court uses *avoider* it will only invalidate a law or policy if the case is a relatively low salience one. Following this decision rule, the Court is also consistently maximalist in its decisions; it will seek to influence policy as much as possible, albeit in relatively low-salience cases. In contrast, if the

[61] Law, *supra* note 12, at 764. *See also* Dothan, *supra* note 12.

Court uses the *minimalist* decision rule it will be consistently minimalist in its decisions, but without regard to the salience of the cases.

The fourth and fifth decision rules–called *strategic-avoider* and *strategic-minimalist*–are inspired by the "baby steps" theory of judicial power. Both of these "strategic" decision rules make the Court cautious at first and become more assertive with time, but return to a cautious approach if a court-curbing attack seems imminent. Initially, a Court using the *strategic-avoider* decision rule behaves the same way as a Court using the *avoider* decision rule does. But the Court will drop any constraint related to case salience once a track record of compliance is established,[62] provided that the moving average of defiance is safely below the DEFIANCE-THRESHOLD parameter setting.[63] Thereafter, the Court will revert to only invaliding low-salience cases if the moving average of defiance approaches the DEFIANCE-THRESHOLD parameter.[64] Similarly, a Court using the *strategic-minimalist* decision rule will be consistently minimalist in its decisions until a track record of compliance is established,[65] after which it will shift to broad, maximalist decisions so long as the moving average of defiance is safely below the DEFIANCE-THRESHOLD parameter.

The final decision rule, called *gambler*, is inspired by the "big breaks" theory of judicial power. A Court using *gambler* tries to leverage high-salience cases in an effort to establish its power as soon as possible. Thus, if the Court disagrees with the law or policy, it will invalidate it with a probability equivalent to the case's salience (the higher the value of CASE SALIENCE, the more likely the Court is to invalidate the impugned law or policy).

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[62] Arbitrarily, this is set at 50 invalidations.

[63] This is a distance of more than .1. The results presented below are robust to alternative specifications that use a distance of less than or greater than .1.

[64] This is a distance within .1. The results presented below are robust to alternative specifications that use a distance of less than or greater than .1.

[65] As before, this is set at 50 invalidations. *See* note 62, *supra*.

Decision Rule	Pseudocode
random	Uphold or invalidate with equal probability; if invalidate, invalidate broadly or narrowly with equal probability.
avoider	If agree with challenged law/policy, uphold it; if disagree and CASE-SALIENCE is less than .5, invalidate broadly.
minimalist	If agree with challenged law/policy, uphold it; if disagree, invalidate narrowly.
strategic-avoider	If agree with challenged law/policy, uphold it; if disagree and moving average of defiance is more than .1 below the DEFIANCE-THRESHOLD, invalidate broadly; if disagree and moving average of defiance is less than .1 below, equal to, or above DEFIANCE-THRESHOLD, invalidate if CASE-SALIENCE is less than .5; if invalidate, invalidate broadly.
strategic-minimalist	If agree with challenged law/policy, uphold it; if disagree and moving average of defiance is more than .1 below the DEFIANCE-THRESHOLD, invalidate broadly; if disagree and moving average of defiance is less than .1 below, equal to, or above DEFIANCE-THRESHOLD, invalidate narrowly.
gambler	If agree with challenged law/policy, uphold it; if disagree, invalidate with probability equivalent to CASE-SALIENCE; if invalidate, invalidate broadly.

D. *Results and Analysis*

As should be apparent, the ABM not only incorporates a great deal of randomness but also several parameters which, depending on what value they take, may affect the ultimate results. Multiple simulations, in which the parameters are systematically varied, are therefore required to robustly evaluate how the various decision rules perform. In the jargon of agent-based modeling, this is called a "parameter sweep."

To conduct a parameter sweep of the ABM, I ran the simulation 20 times for 1,000 steps for every possible combination of a meaningful range of values for each parameter.[66] At the conclusion of each of these "runs," measures are taken of the Court's accumulated payoffs, whether or not the Court "failed" (that is, was the victim of a successful attack) and, if it did fail, at what "step" in the simulation. All told, this process yields a dataset of 67,492 observations.[67] The data are then analyzed in much the same way as an empirical dataset might be. A regression model is used to determine the effect of each decision rule on the Court's ultimate payoff. The Court's accumulated payoff (or final *score*) is the outcome variable. The explanatory variables are the several decision rules (taking *basic-random* as the benchmark reference category for estimating the effect of the other five decision rules) and the various parameter settings described above. The coefficient estimates of the effect of the decision rules are plotted below in Figure 2.

[66] The baseline EXPECTATION-OF-DEFIANCE is varied in increments of .2, from .2 to .8. The NUMBER-OF-GOV-AGENTS is varied in increments of 2, ranging from 2 to 8. POLARIZATION is varied in increments of .2, ranging from a low of .2 to .8. FRAGMENTATION ranges from .25 to .55, in increments of .1. Finally, to explore the preconditions for a successful attack, the DISSATISFACTION-THRESHOLD is varied from .25 to .75 (in increments of .25), and the DEFIANCE-THRESHOLD is varied from 0 to .5 (also in increments of .25).

[67] These data are available from the Harvard Dataverse repository, online at https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi%3A10.7910%2FDVN%2FHKYOS3.

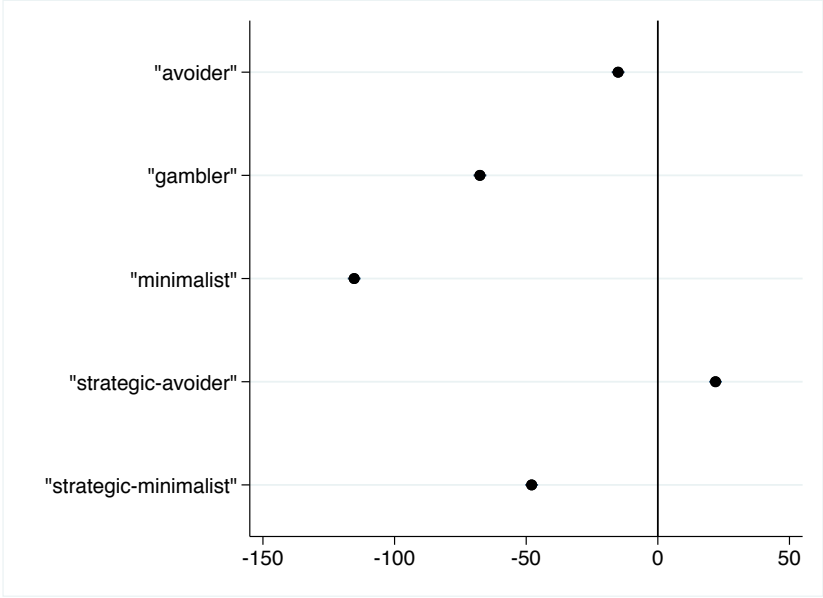

Figure 2. Results of OLS Regression for Court Score by Court Strategy

The results show that the *strategic-avoider* decision rule is the only rule that performs better than a random strategy (it can be expected to win about 22 more points of policy utility than the basic benchmark of a random decision rule). The other decision rules do significantly worse. The *minimalist* decision rule does particularly poorly, which is perhaps not surprising because this rule limits the potential policy payoff of the Court's decisions. Likewise, the simple *avoider* rule–although it does better than the *minimalist* rule–also does worse than the *basic-random* rule; under this rule, the Court is deliberately eschewing opportunities for big policy wins. Interestingly, the *gambler* decision rule–which is premised on the "big breaks" theory of judicial power and therefore makes the Court more likely to invalidate law and policy in high-salience cases–also performs very poorly (on average, about -68 utility points worse than a random decision rule).

Perhaps the most striking result from the simulations, however, is the radical difference between the two "strategic" decision rules, *strategic-avoider* and *strategic-minimalist*. Both of these rules are premised on the "ba-

by steps" theory of judicial power, and under them the Court begins cautiously but becomes more assertive once it has had time to build a record of compliance. Under both rules, the Court will also revert to a more cautious approach if its authority starts to falter. Despite these similarities, the *strategic-avoider* rule achieves a score 70 points greater than the *strategic-minimalist* rule.

What explains the distinctive success of strategic avoidance? Part of the answer is that strategic avoidance does not require the Court to forego all opportunities to score big policy victories; if the circumstances are right, the Court can be assertive and issue broad rulings in politically charged cases. But the other part of the explanation is that this decision rule helps the Court avoid a court-curbing attack. Avoiding a court-curbing attack is a key ingredient of success; if independent judicial review is eliminated, then the Court cannot go on to score any further policy victories.

In fact, the simulations show how different parameter settings make a court-curbing event more or less likely, conditional on the decision rule that the Court follows. Figure 3 illustrates how the decision rules perform in this respect at different parameter settings for POLARIZATION.

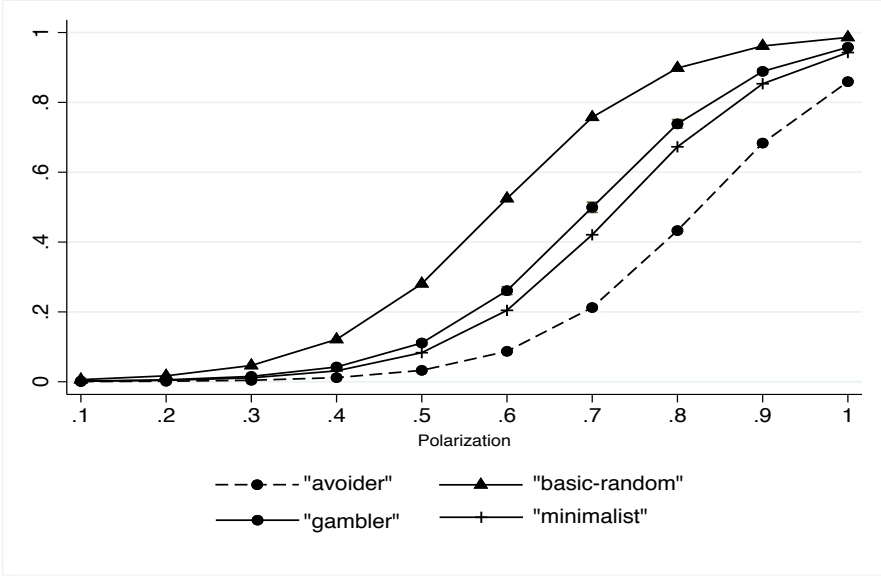

Figure 3(a). Probability of Court Failure by Polarization

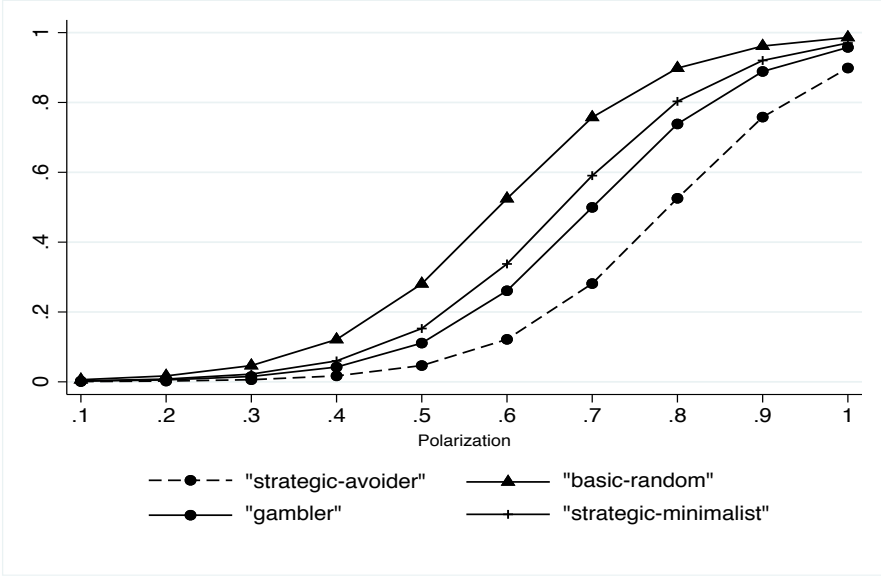

Figure 3(b). Probability of Court Failure by Polarization

First, it is worth noting that there is no real difference between the various decision rules until POLARIZATION reaches .4 (that is, a 40% probability of disagreement). In other words, in a context in which the agents are more likely than not to agree with one another on matters of constitutional law, the simulations suggest that the Court's survival is so likely that strategic judicial behavior has virtually nothing to contribute. There is also not much difference between the several decision rules at the very highest levels of POLARIZATION, when failure becomes so likely as to be virtually certain regardless of how the Court behaves. At the intermediate levels of POLARIZATION, however, the different decision rules lead to very different probabilities of Court failure. The *gambler* rule and both minimalist rules are about twice as likely to lead to Court failure in this range as the *avoider* and *strategic-avoider* rules, which are, respectively, the safest and second safest decision rules. In fact, even at the very highest level of POLARIZATION, the *avoider* and *strategic-avoider* decision rules are still significantly safer rules to follow (although there is an 85% chance of the Court failing).

Another influential parameter is NUMBER-OF-GOV-AGENTS. Though not as powerful a factor as POLARIZATION, the influence of this parameter is still notable. The simulations suggest that the greater the complexity of the Court's institutional environment, the more likely a court-curbing attack becomes. This makes intuitive sense: the more Government Agents there are, the more potential court-curbing attackers there will be. Notably, as Figure 4 shows, both the *avoider* and *strategic-avoider* decision rules help to insulate the Court from the increased risk that comes with greater institutional complexity.

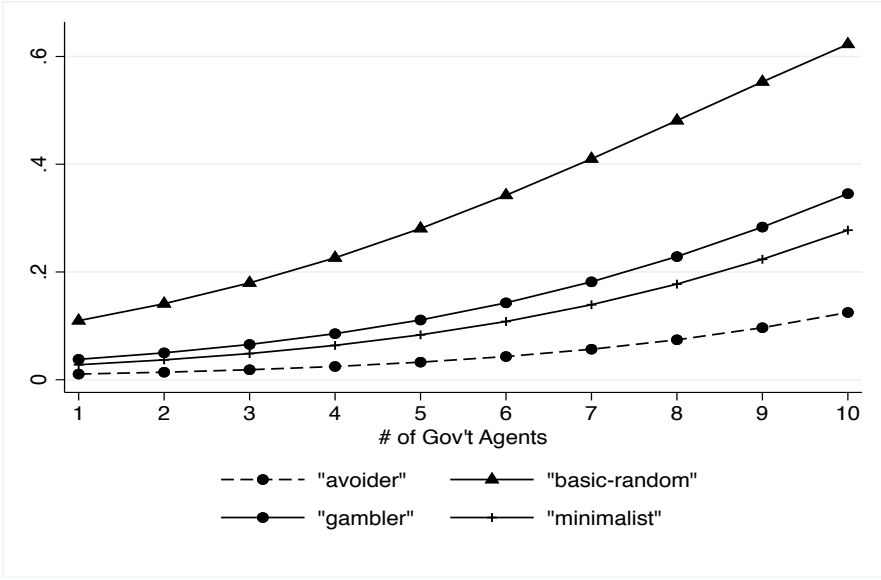

Figure 4(a). Probability of Court Failure by Number of Gov't Agents

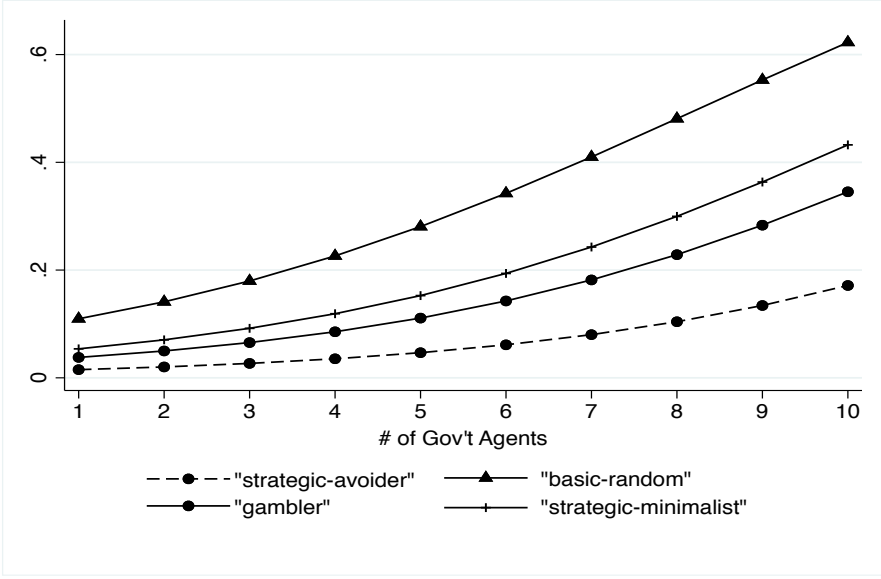

Figure 4(b). Probability of Court Failure by Number of Gov't Agents

At the highest level for this parameter, the *strategic-minimalist* rule is about 2.5 times more failure-prone than the *strategic-avoider* rule (and about 3.5 times more failure-prone than the simple *avoider* rule). The *gambler* rule is also outperformed by both the *avoider* and *strategic-avoider* rules, which are at least half as failure-prone in the upper range of this parameter setting.

In addition to exploring how the different decision rules perform at various parameter settings, the ABM also allows us to see how the rules affect the probability of the Court's survival across time. To this end, Figure 5 displays the smoothed "hazard estimates" of Court failure. Controlling for variation in the parameter settings, the graphs show the probability that the Court will be the victim of a successful court-curbing attack at every "step" in the simulation.

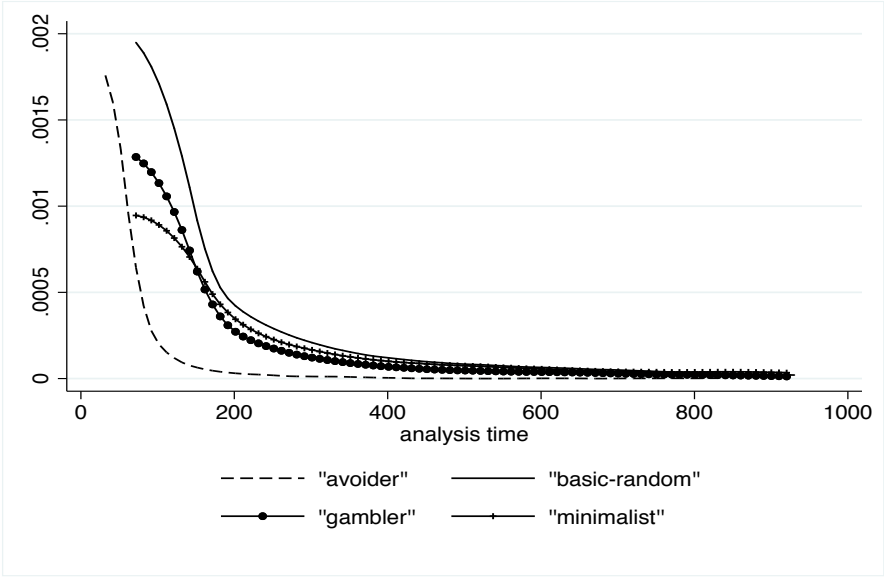

Figure 5(a). Hazard Estimates of Court Failure by Court Strategy

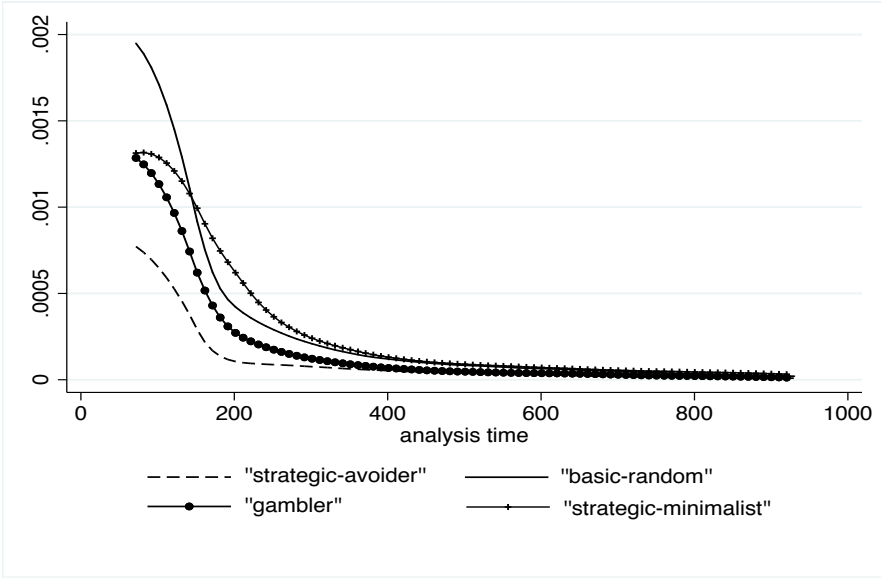

Figure 5(b). Hazard Estimates of Court Failure by Court Strategy

During the earlier stages of the Court's existence, it is evident that the decision rules create very different risks. Some of these differences could be anticipated from what we have already seen. For example, the *avoider* and *strategic-avoider* rules are the safest and, generally, the *basic-random* rule is the most failure-prone. Interestingly, however, there is a window of time in the simulation in which the *strategic-minimalist* rule is actually more failure-prone than even a random rule. This is likely the downstream consequence of the Court changing gears and adopting broad decisions after an initial phase of minimalism. Because the *strategic-minimalist* rule only restrains the Court with respect to the scope of its decisions, it seems that the rule leaves the Court in a very vulnerable position: Government Agents will gradually turn against the Court because of its disagreeable decisions, even if these are narrowly tailored. Eventually, once the Court starts issuing broad decisions, the built-up opposition to the Court culminates in a coordinated court-curbing attack.

At a more general level, it is important to note that the risks of failure for all decision rules eventually converge. Furthermore, there is really no risk of a court-curbing attack after about the half-way point in the simula-

tion ("step" 500); if the Court is going to fail, it will fail relatively early on. But a Court that can survive this phase will tend to survive for the duration of the simulation, and so any contribution that the decision rules make to the Court's survival is made during this early period. This pattern is very much in line with the "baby steps" theory of judicial power, according to which it is dangerous for a court to assert itself too boldly before it has established a record of compliance. In contrast, the *gambler* decision rule–which is premised on the "big breaks" theory of judicial power–is a relatively imprudent approach. To be sure, this rule fares much better than a random decision rule. This much suggests that the wager it makes (that is, that the Court can quickly establish its authority in high-salience cases) is not completely misguided. But a Court that relies on these "big breaks" also takes big risks. The simulation suggests that a more cautious strategy, premised on "baby steps," improves the chances that the Court will survive and thus, as we saw above, is more likely to maximize the Court's long-term influence on policy.

CONCLUSION

The simulations presented here support the view that courts are more likely to establish their power by incremental "baby steps" than by sudden "big breaks." The second approach turns out to be so risky that the big policy victories it might achieve in high-salience cases are completely offset (and then some) by the increased likelihood of court-curbing retaliation during the early stage of a court's career. The better approach, it seems, is to build judicial power gradually by avoiding invalidating law and policy in high-salience cases. The simulations suggest that a court that picks its battles in this way–using a simple heuristic focused on case salience–can nevertheless achieve significant influence over law and policy while avoiding a catastrophic court-curbing attack. When a court's record of compliance looks strong, it can afford to challenge the political branches even in high-salience cases. Indeed, by issuing broad rulings with more systemic consequences, courts can maximize their influence in otherwise less-important cases. This approach also appears to mitigate the influence of ideological polarization and institutional complexity, factors which, according to this ABM, increase the chances of a court-curbing

attack. If the simulations have captured something true about the real world, we should expect courts that have survived in contexts that are politically polarized or institutionally complex to have adopted something like the strategic avoidance heuristic modelled here.

This analysis deliberately shies away from the ethical question of how judges *ought* to decide cases. The proposition that judicial power is most likely to be established by modest decisions does not necessarily deny or defeat whatever ethical reasons there may be for judges to decide cases in some other way. Obviously, strategic considerations about the growth and maintenance of judicial power are not the only considerations that judges should heed in adjudicating disputes; upholding the rule of law is presumably the core of their mandate. But, assuming some scope for consequentialist reasoning, there may also be strong ethical reasons for heeding strategic considerations. A court that takes bold stands only to scuttle its authority in losing battles with the political branches also forfeits future opportunities to do anyone any good. And the broader imperatives of preserving constitutional democracy might sometimes outweigh the immediate questions of justice in a particular dispute.[68] In sum, the right thing to do may also be the strategic thing to do. This study supports the intuition that incrementalism is the best long-term strategy for building judicial power. Other scholars are encouraged to consider the ethical implications of this strategy in greater depth and detail.

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[68] *See* Dixon & Issacharoff, *supra* note 20. *Cf.* TOM GERALD DAY, THE ALCHEMISTS: QUESTIONING OUR FAITH IN COURTS AS DEMOCRACY-BUILDERS (2017).

APPELLATE REVIEW V

OCTOBER TERM 2014

Joshua Cumby[†]

Rather than counting up the Supreme Court's explicit affirmances and reversals of the federal appellate courts' decisions—what we call the "primary review" affirmance rate—the founding editors of the Journal of Legal Metrics devised a system for counting up implicit approvals and disapprovals of the appellate courts' decisions in cases where the Court reviews and resolves "circuit splits."[1]

Consider an exemplary case, *Reyes Mata v. Lynch*, decided by the Court during its October 2014 term. Mata, a Mexican citizen who entered the United States unlawfully and was later convicted of assault, was ordered to leave the country.[2] When Mata's motion to reopen his removal proceedings was denied, "a federal court of appeals ha[d] jurisdiction to consider a petition to review th[at] decision."[3] "Notwithstanding that rule," the U.S. Court of Appeals for the Fifth Circuit "declined to take jurisdiction over such an appeal."[4] The Court granted cert (and reversed the Fifth Circuit) because "[e]very other Circuit that reviews removal orders has affirmed its jurisdiction to decide an appeal" like Mata's.[5]

Here, only the Fifth Circuit's loss counts toward the primary review affirmance rate. But our metric also counts wins for the First, Second,

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

[2] 135 S. Ct. 2150, 2153 (2015).

[3] *Id.* (citing Kucana v. Holder, 558 U. S. 233, 242, 253 (2010)).

[4] *Id.*

[5] *Id.*; *see also id.* at n.1 (citing decisions from the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits. This is the parallel review affirmance rate, and it is a better metric because it counts both winners and losers, expanding the sample size and mitigating the Supreme Court's "decided propensity" to review lower court decisions it intends to reverse.[6] In the October 2014 Term, for example, the Court reversed or vacated decisions in 53 of 76 cases[7] (or 70% of the time). The parallel review affirmance rate also compares appellate courts' performance on the same legal questions with the same degree of difficulty—in each case, the players play the same game governed by the same rules—and acknowledges that not all affirmances and reversals are created equal.

THE RULES

In the course of compiling statistics for previous installments in this series,[8] and with a little help from our friends,[9] we've refined our method:

> 1. Because we limit the term "circuit split" to conflicts between federal appellate courts or "inter-circuit" splits, "intra-circuit" splits and disagreements between lower federal and state courts don't count.[10] For simi-

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[6] *See* Thomas Baker, *The Eleventh Circuit's First Decade Contribution to the Law of the Nation*, 1981-1991, 19 NOVA. L. REV. 323, 327 (1994) ("The 'decided propensity' of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse.").

[7] *See generally*, Opinions of the Court - 2014, https://www.supremecourt.gov/opinions/slipopinion/14 (last visited Sept. 14, 2019).

[8] *See* Appellate Review I; Tom Cummins & Adam Aft, *Appellate Review II – October Term 2011*, 3 J.L. (2 J. LEGAL METRICS) 37 (2013) ("Appellate Review II"); Tom Cummins, Adam Aft & Joshua Cumby, *Appellate Review III – October Term 2012 and Counting*, 4 J.L. (3 J. LEGAL METRICS) 385 (2014) ("Appellate Review III"); Joshua Cumby, *Appellate Review IV – October Term 2013 – The Prodigal Sums Return,* 8 J.L. (5 J. LEGAL METRICS) 65 (2018) ("Appellate Review IV").

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

[10] *See, e.g.*, Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015) (granting cert "to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff" exemplified by the Eighth Circuit's decision in United States v. Morgan, 270 F. 3d 625, 632 (2001) (postcompletion delay of "well under ten minutes" permissible) and the Utah Supreme Court's decision in State v. Baker, 229 P. 3d 650, 658 (2010) ("[W]ithout additional reasonable

lar reasons, opinions reviewing state or federal district court decisions aren't counted.[11]

2. Because its jurisdiction is statutorily distinct, opinions reviewing decisions by the U.S. Court of Appeals for the Federal Circuit also aren't counted.[12]

3. To be counted, the circuit split must be identified within the four corners of an opinion (including majority opinions, concurrences, and dissents),[13] which must also resolve the circuit split so that we can confidently count winners and losers.[14]

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suspicion, the officer must allow the seized person to depart once the purpose of the stop has concluded."); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1599 (2015) (granting cert "to resolve confusion in the lower courts as to whether the Natural Gas Act preempts retail customers' state antitrust law challenges to practices that also affect wholesale rates" and comparing the Nine Circuit's decision below with the Tennessee Supreme Court's decision in Leggett v. Duke Energy Corp., 308 S.W.3d 843 (2010)).

[11] *See, e.g.*, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (reviewing the decision of a three-judge panel of the United States District Court for the Middle District of Alabama).

[12] *But see* Hana Financial, Inc. v. Hana Bank, 135 S. Ct. 907, 910 (2015) (resolving a circuit split between the Ninth Circuit on the one hand, and the Sixth and Federal Circuits on the other). *See also* note 17, *infra*.

[13] Cert petitions violate our four corners rule in part because they are susceptible to advocacy bias. A circuit split is one of only a few "compelling" reasons for granting review. *See* SUP. CT. R. 10(A); Reyes Mata, 135 S. Ct. at 2156 ("[A]ll appellate courts to have addressed the matter have held that the Board [of Immigration Appeals] may sometimes equitably toll the time limit for an alien's motion to reopen. . . . Assuming the Fifth Circuit thinks otherwise, that creates the kind of split of authority we typically think we need to resolve. See this Court's Rule 10(a)."). But we can't assume that a split identified in a petition is the reason the Court grants cert, or that the Court's opinion necessarily resolves that split. *See, e.g.*, City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1778-79 (2015) ("The petition assured us (quite accurately), and devoted a section of its argument to the point, that 'The Circuits Are In Conflict On This Question.' . . . And petitioners faulted the Ninth Circuit . . . [and] expressly advocated for the Fifth and Sixth Circuits' position in the Court of Appeals. . . . Imagine our surprise, then, when the petitioners' principal brief, reply brief, and oral argument had nary a word to say about that subject.") (Scalia, J., concurring in part and dissenting in part).

[14] This rule—and our conservative approach overall—means that our sample size is likely underinclusive. For example, the Court decided four cases in the October 2014 term that involved (and in most instances resolved) circuit splits, but that we don't count because we aren't confident about who the winners and losers are. *See* Young v. UPS, 135 S. Ct. 1338, 1348 (2015) (granting cert "[i]n light of lower-court uncertainty about the interpretation" of the Pregnancy Discrimination Act and citing decisions from the Fifth, Sixth, Seventh, and Eleventh Circuits without indicating which (if any) interpreted the act correctly); Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1691 (2015) (observing only that the First Circuit "examined whether a bankruptcy court's denial of plan confirmation is a final order, a question that it recognized had divided the Circuits."); Elonis v. United States, 135 S. Ct. 2001, 2013 (2015) (stating that the Court's holding is "clear[ly] . . . contrary to

The reasons for these rules are explained in greater detail elsewhere.[15] And if we change or add to them, we'll tell you all about it.

THE RESULTS

Applying our rules to the Supreme Court's work in the October 2014 term, we count 12 circuit splits:

October Term 2014 Circuit Splits				
Caption	**Cite**	**Split**	**Winners**	**Losers**
Warger v. Shauers	135 S. Ct. 521, 525	3-2	8, 3, 10	9, 5
Dart Cherokee Basin Operating Co. v. Owens	135 S. Ct. 547, 553	2-1	4, 7	10
T-Mobile South, LLC v. City of Roswell	135 S. Ct. 808, 813-14	2-3	11,[16] 4	1, 6, 9
Hana Financial, Inc. v. Hana Bank	135 S. Ct. 907, 910	1-2	9	6[17]

the view of nine Courts of Appeals"), 2014 ("We granted review in this case to resolve a disagreement among the Circuits. But the Court has compounded—not clarified—the confusion.") (Alito, J., concurring in part and dissenting in part), 2018 ("We granted certiorari to resolve a conflict in the lower courts . . . Save two, every Circuit to have considered the issue—11 in total—has held that [18 U.S.C. § 875(c)] demands proof only of general intent . . . The outliers are the Ninth and Tenth Circuits . . . Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place.") (Thomas, J., dissenting); Kingsley v. Hendrickson, 135 S. Ct. 2466, 2471-72 (2015) (granting cert to resolve "disagreement among the Circuits" about "whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard" and comparing exemplary decisions from the Second, Eleventh, Sixth, and Ninth Circuits without indicating which standard each applies).

[15] *See* Appellate Review III at 388-92.

[16] Although reversed, the Eleventh Circuit applied the correct rule. *See*, 135 S. Ct. at 811 ("The question presented is whether, and in what form, localities must provide reasons when they deny telecommunication companies' applications to construct cell phone towers. We hold that localities must provide or make available their reasons, but that those reasons need not appear in the written denial letter or notice provided by the locality."); *see also id.* at 813 (explaining that the Eleventh Circuit's decision below relied on Circuit precedent, which held that a locality's decision is sufficient even if its reasons are contained in different documents that the applicant has access to.). So, although reversal usually indicates a loss, here we chalk it up as a win.

October Term 2014 Circuit Splits				
Caption	**Cite**	**Split**	**Winners**	**Losers**
United States v. Kwai Fun Wong	135 S. Ct. 1625, 1630	2-1	9, 7	5
Mach Mining, LLC v. EEOC	135 S. Ct. 1645, 1651 n.1	2-1	11, 6	7
Harris v. Viegelahn	135 S. Ct. 1829, 1836	1-1	3	5
Coleman v. Tollefson	135 S. Ct. 1759, 1762-63	1-1	6	4
Henderson v. United States	135 S. Ct. 1780, 1784 n.2	2-2	2, 7	11, 8
Reyes Mata v. Lynch	135 S. Ct. 2150, 2154 n.1	10-1	1, 2, 3, 4, 6, 7, 8, 9, 10, 11	5
King v. Burwell	135 S. Ct. 2480, 2488	1-1	4	DC
Obergefell v. Hodges	135 S. Ct. 2584, 2597, 2608 (App. A)	6-1	1, 2, 4, 7, 9, 10	6, 8

This year's winners are the Second and Third Circuits, tied for first place with three wins, no losses, and a 100% parallel review affirmance rate. The Fourth Circuit (last year's winner) and the Seventh Circuit are tied for second place with an 83% affirmance rate, and the Tenth and Eleventh Circuits are tied for third with a 75% affirmance rate.

October Term 2014 Parallel Review Affirmance Rates				
Circuit	**Wins**	**Losses**	**AB**	**Rate**
2nd	3	0	3	100%
3rd	3	0	3	100%
4th	5	1	6	83%
7th	5	1	6	83%
10th	3	1	4	75%
11th	3	1	4	75%
1st	2	1	3	67%

[17] The Federal Circuit joined the Sixth Circuit on the losing side of this split. *See* 135 S. Ct. at 910. But we don't count wins and losses for the Federal Circuit (as you know). *See* note 12, *supra*, and accompanying text.

October Term 2014 Parallel Review Affirmance Rates				
Circuit	**Wins**	**Losses**	**AB**	**Rate**
9th	4	2	6	67%
6th	3	3	6	50%
8th	2	2	4	50%
5th	0	4	4	0%
DC	0	1	1	0%

Looking back over the years, this is something of an upset.[18] October Term 2014's winners came in fifth (Second Circuit) and sixth (Third Circuit) place in October Term 2013, and one of that term's second place finishers (the First Circuit) dropped to fourth place in October Term 2014. The Ninth Circuit improved its position; the Fifth Circuit did not.

Historic Parallel Review Affirmance Rates by Place[19]									
OT2010		**OT2011**		**OT2012**		**OT2013**		**OT2014**	
Cir.	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**	**Cir.**	**Rate**
10th	100%	4th	78%	10th	88%	4th	86%	2nd	100%
1st	86%	11th	56%	1st	80%	10th	83%	3rd	100%
5th	79%	DC	50%	7th	67%	1st	83%	4th	83%
3rd	78%	6th	50%	2nd	64%	6th	80%	7th	83%
4th	67%	9th	44%	5th	60%	8th	75%	10th	75%
7th	62%	2nd	40%	4th	57%	7th	75%	11th	75%
2nd	60%	3rd	40%	8th	40%	2nd	67%	1st	67%
9th	60%	10th	38%	11th	40%	3rd	57%	9th	67%
6th	50%	7th	36%	DC	40%	DC	50%	6th	50%
8th	50%	1st	33%	3rd	36%	11th	50%	8th	50%
11th	45%	5th	33%	6th	33%	9th	27%	5th	0%

[18] The presentation of historical data is a relatively new feature of the Appellate Review and one that we hope will prove more useful as we collect even more data. But it comes with a couple of caveats. First, we altered our method in Appellate Review III (October Term 2012), so while we continue to compare apples to apples, the way we pick them has changed. *See* Appellate Review III at 388-92 ("[T]he metric compares the courts' performance on the same legal questions. Apples-to-apples, as they say."). Second, our sample size is still very small. The Supreme Court has been deciding circuit splits for more than two centuries, but we've only counted them for five terms.

[19] *See* Appellate Review I at 69; Appellate Review II at 40; Appellate Review III at 394; Appellate Review IV at 68.

Historic Parallel Review Affirmance Rates by Place[19]									
OT2010		OT2011		OT2012		OT2013		OT2014	
Cir.	Rate	Cir.	Rate	Cir.	Rate	Cir.	Rate	Cir.	Rate
DC	33%	8th	25%	9th	18%	5th	0%	DC	0%

Historic Parallel Review Affirmance Rates by Circuit[20]					
Cir.	OT2010	OT2011	OT2012	OT2013	OT2014
	Rate	Rate	Rate	Rate	Rate
1st	86%	33%	80%	83%	67%
2nd	60%	40%	64%	67%	100%
3rd	78%	40%	36%	57%	100%
4th	67%	78%	57%	86%	83%
5th	79%	33%	60%	0%	0%
6th	50%	50%	33%	80%	50%
7th	62%	36%	67%	75%	83%
8th	50%	25%	40%	75%	50%
9th	60%	44%	18%	27%	67%
10th	100%	38%	88%	83%	75%
11th	45%	56%	40%	50%	75%
DC	33%	50%	40%	50%	0%

CONCLUSION

In the next installment in our series, we'll be counting up circuit splits and tabulating parallel affirmance rates for the 81 decisions from the October 2015 term, more than half of which were decided by an eight-justice Court. Then on to the October 2016 term where, again, more than 50% of the cases were considered and decided by an incomplete Court. We look forward to sharing our findings with you.

# # #

[20] *Id.*

THE JOURNAL OF ATTENUATED SUBTLETIES

VOLUME ONE, NUMBERS ONE AND TWO (1982)

WITH AN

INTRODUCTION BY THE EDITORS (2019)

THE JOURNAL OF ATTENUATED SUBTLETIES

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• Issue Number Two •

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PREFACE

UNATTENUATED ENTHUSIASM

Ross E. Davies[†]

The *Green Bag* has been yearning for this moment — or one like it — for more than 20 years. Rob James introduced us to the *Journal of Attenuated Subtleties* in 1998 (see the letter with the lovely logo on the next page), and we have been pestering him ever since to give us more of the similar. He has delivered ten little treasures to us over the years, including several updates to *The Supreme Court and the Westward Movement*, his transcontinental collaboration with Ben Zuraw that first appeared in the first issue of the *Journal of Attenuated Subtleties* and is reproduced in all its formidable originality — along with the rest of the original *JAS* — below.

For a long time, the wishful thinking at *Green Bag* World Headquarters was that Rob and his colleagues would continue to dole out bits and pieces of the *JAS* to us for publication in the *Bag*. Then, a few months ago, a grand old pillar of the modern bar mentioned the *JAS* fondly on Twitter:

> Moving my office, I came across one of my treasures: a ratty old photocopy of the first issue of the Journal of Attenuated Subtleties, kind of a proto-@GB2d. The first issue began, "The law may not care about trifles, but lawyers certainly do."[1]

And we went from wishfully thinking of the *JAS* in our cubicles to cheerfully riding a groundswell of enthusiasm for the *JAS* in our email in-boxes.

The surge of good feeling for their old journal overwhelmed the natural, admirable, unfeigned reticence and modesty of the *JAS* editors. In response to the *Green Bag*'s renewed appeals, they agreed not only to permit full republication of the *JAS* here in the *Journal of Law*, but also to reflect on their great, late-20th-century work from a 21st-century perspective. As you will soon learn (if you don't know it already), they were quick in youth, and they haven't lost a step.

[†] Ross Davies is a *Green Bag* editor.

[1] @johnpelwood (June 28, 2019).

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March 20, 1998

Mr. Ross E. Davies
Editor-in-Chief
The *Green Bag*
Post Office Box 14222
Cleveland, Ohio 44114

Dear Ross:

I enclose photocopies of the entire run, two issues, of *The Journal of Attenuated Subtleties.* In re-reading our adolescent rag and comparing it with your tony review, I was struck that ours is a kind of Bizarro, parallel-universe version of yours. Where you "prefer[] substance over form" ("A Short Profile"), I noted that "[a] 'case is not to be decided by attenuated subtleties,' but the fancy of the lawyer is surely to be struck by them" and raised a toast "to form over substance." But as your predecessor Horace Fuller warned that lawyers would "seek in vain" for practical information in the *Green Bag,* I opined that colleagues who do not appreciate entertainments in a legal vein "must find their recreation outside the law, in alcohol or bowling."

Please let me know which, if any, of these pieces would merit further consideration. (No hard feelings if they don't, by the way; these are so tongue-in-cheek as to be damn-near serious in parts.) I and my classmates would greatly appreciate the opportunity to polish and update our pieces before they are published.

I enclose my subscription. Since you sent me the first two issues, I'd like it to begin with the third issue of Volume 1 unless that blows an accounting fuse. Best of luck with a great publication!

Very truly yours,

Rob James

Robert A. James

Encs.

INTRODUCTION

ATTENUATED MEMORIES

Robert A. James, Benjamin C. Zuraw,
Manley W. Roberts & John J. Little[†]

In meetings held at Yale Law School in 1982, an organization was launched that has had a distinctive impact. No, no, we speak not of *that* society, but of the *Journal of Attenuated Subtleties*. This short-lived experiment by five twenty-four-year-old 2Ls addressed legal trivia in a mock-serious fashion, a practice that has been taken to ever greater heights with the second series of the *Green Bag*.

The *Attenuated Subtleties* standard is that while the articles may be funny, they are not jokes. In piece after piece, we described a subject of unlikely but not impossible relevance to daily practice and applied to it the powerful (but pretentious) tools of research and analysis employed in the law review literature. If the questions ever did come up, in a case or a more substantial publication, our articles would be good authority. They have in fact been cited on some of those rare subsequent occasions.

We editors thank the *Journal of Law* for reproducing the entire run, uncut, in its original dot-matrix glory. Here, we recall the founding era.

PART ONE
Foreword: Form Over Substance

Robert A. James (RAJ): The *Foreword* has been appraised in the pages of the *Green Bag* itself by our classmate Dave Douglas, now Dean of the William &

[†] Rob James is a partner in the San Francisco and Houston offices of Pillsbury Winthrop Shaw Pittman LLP. Ben Zuraw is a retired Pillsbury partner, high-school teacher, and owner of minor league baseball clubs. Manley Roberts is a partner in the Charlotte office of McGuireWoods LLP. John Little is a founding partner of Little Pedersen Fankhauser LLP in Dallas. The other founder and the managing editor of the *Journal of Attenuated Subtleties*, J. David Kirkland, Jr., passed away in 2018. He was a longtime partner in the Houston office of Baker Botts L.L.P.

Mary Law School.[1] We of course encountered *Lucas v. Earl* and "attenuated subtleties" in our income tax course. I may have written "Our colleagues of this ilk must find their recreation outside the law, in alcohol or bowling" under the influence of one or the other.

The exact date when time formerly became out of memory, September 23, 1189, was stated without explanation in the edition of *Black's Law Dictionary* I was then using. The back story is supplied in Lewis Hyde's new book on what might be called the passive virtues of forgetting things.[2]

Instructions in Supreme Court Jury Trials

RAJ: Again, Dave Douglas covered the genesis of this piece. Every law student who reads *Marbury v. Madison* is exposed to the Judiciary Act of 1789, and some have glanced at its section 13 confirming the right to a jury trial on issues of fact in original jurisdiction actions at common law. I dug in, and found Charles Alan Wright's casual mention of one such jury trial, but no other treatment. I learned of two more trials (from an ABA piece on courthouse history!) and discussed them all in the law school dining hall with David Kirkland, Manley Roberts, and Ben Zuraw. We laughed at the thought of an article that would simultaneously identify and solve a problem that had never arisen. Soon, the *Journal* was born.

The principal trial, *Georgia v. Brailsford*, has turned out to be an important precedent on a related topic, jury nullification; we had no idea at the time. The citation of Kenneth Arrow was a thinly veiled jab at the law review practice of dropping highfalutin names to support rather ordinary points. Jacques Derrida, Jürgen Habermas, Friedrich Nietzsche and Susan Sontag might agree that this was rather clever.[3]

The Supreme Court and the Westward Movement

Benjamin C. Zuraw (BCZ): My memories of the *Journal*'s creation are somewhat hazy because by my second year, I had fully committed to enjoy-

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[1] Davison M. Douglas, Attenuated Subtleties *Revisited,* 1 GREEN BAG 2D 375 (1998).

[2] *See* Lewis Hyde, A PRIMER FOR FORGETTING: GETTING PAST THE PAST 286-87 (2019); *cf.* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues,* 75 HARV. L. REV. 40 (1961).

[3] *Cf.* Jacques Derrida, OF GRAMMATOLOGY (1967); Jürgen Habermas, LEGITIMATION CRISIS (1973); Friedrich Nietzsche, ALSO SPRACH ZARATHUSTRA (1883); Susan Sontag, AGAINST INTERPRETATION (1966).

ing what might be called the academic freedom of the law school student. I was spending most weekends in New York City with my girlfriend, who luckily is still married to me today. For this purpose the term "weekend" often embraced Thursday through, uh, Tuesday.

I was usually in New Haven on Wednesdays, though — to hang out with friends, play some pickup basketball on the fifth floor of Payne Whitney Gymnasium, and enjoy the underrated cuisine of the law school cafeteria. It was on one of those Wednesdays that my good friend Rob James told me about the idea to create the *Journal* along with David Kirkland and Manley Roberts.

My concept, an article comparing the geographic center of the Supreme Court over time to the geographic center of the overall United States population, was enthusiastically received. The idea sprang from my personal interest in geography. I had spent parts of seven summers, starting my junior year of high school, driving across the country. I developed an in-depth knowledge of the Interstate Highway System and dazzled friends by rattling off the highway numbers connecting any two given U.S. cities.

I cited the frontier theories of Frederick Jackson Turner, and my data showed a rough symmetry between the nation's westward movement and the geographic center of the Court. There were some interesting outlying data points like the birthplaces of Justice Frankfurter in Vienna, Austria and Justice Brewer in Smyrna, Ottoman Empire. Rob suggested that we include data for the location of Justices upon appointment to the Court in addition to birthplace data, to account for geographic influences in their professional lives. David added the citation to *Shapiro v. Thompson* and the constitutional right to interstate travel. Since my original article, regular updates have been published to reflect changes on the Court thanks to Rob's efforts.[4]

While my article was intended to be largely whimsical, our nation's increasing polarization makes the subject of geographic diversity increasingly important. After all, is the Court reflective of our nation's diversity when in the last ten years, four of the Justices hailed from four boroughs of New York City?

The complication of course is that it is no longer clear that degrees longitude are helpful in understanding much about the backgrounds of our

[4] *See* Robert A. James, *The Roberts(dale) Court*, 22 GREEN BAG 2D 137 (2019) (citing prior updates).

Justices. San Francisco is west of Lubbock, Texas, but that directional relationship does not tell us anything useful about the influences of growing up in these distinct locations. Neither does the fact that Hickory, North Carolina is west of Chapel Hill, North Carolina furnish insight into living in those locales.

Today much of our polarization is reflected in the urban/rural divide. This separation is clearly illustrated in the now familiar colored county-level election maps showing a wide sea of red Republican party voting in the nation's sparser heartland, broad swaths of blue Democratic party voting in coastal America, and blue dots across the country representing large urban city centers and smaller college and university towns. This polarization is quite real when analyzing voting patterns, but hard to characterize with a center point.

While I still think that it is important to analyze whether our Supreme Court reflects the diversity of our country, we need a different tool. Perhaps we should generate a number rather than a map — say, the average distance in miles of each Justice's data point from the nearest office location of Alphabet Inc., or U.S. college or university with a "top 100" ranking. I bequeath this exercise to a new generation of scholars who enjoy the academic freedom that I found in school.

Rethinking Detroit Timber

RAJ: David Kirkland was the genius behind this piece. He also made the *Journal* possible with his homebrew computer (built from parts years before the Macintosh or IBM PC, mind you) and a program he personally wrote to integrate texts and footnotes.

David read *U.S. Law Week* regularly as a law student, and was struck by the *Detroit Timber* "shrink-wrap" warning on every Supreme Court syllabus. Professor Paul Gewirtz called our attention to a case where the opinion cited dual standards for equal protection review, but the syllabus only mentioned the less restrictive of the two.[5]

David's grandfather Robert Wales clerked for Justice Oliver Wendell Holmes, Jr. and provided the recollection that only the Reporter wrote or edited the syllabi in years past. We marveled that a relative he personally

[5] *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

knew had served a Civil War veteran and American icon. David was surprised but delighted to report on the split in authority and the logic for "the Ohio rule." The topic has since been addressed in depth by others, including "Gil Grantmore" (Daniel Farber) in "The Headnote," published in the *Green Bag*.[6]

The Titles of Nobility Clauses: Rediscovering the Cornerstone

Manley W. Roberts (MWR): In my case, work on the *Journal of Attenuated Subtleties* was an exercise in stress reduction. Even at Yale (a famously philosophical institution), the level of competitiveness was high. The halls were full of self-motivated, driven individuals, striving for the best jobs, the best judicial clerkships, and the intellectual respect of their classmates.

To a large extent, the articles in the *Journal* were a parody of legal scholarship, and self-parody was the tool I (and I think the other editors) used to cope with the currents around us and inside us. (It is no surprise that several of us also performed in the law school's parody musical comedy show, the Yale Law Revue, and Rob James and I co-directed that Revue for two years.)

Nor did those extracurriculars end at graduation. I have been involved in similar outlets during most of my professional life, including performing in the Charlotte, North Carolina bar's musical parody group (the Mecklenburg Bar Revue), singing with a number of vocal groups (including the Charlotte Symphony chorus), and playing keyboards with various bands and choirs around the South (including a church choir that sings African-American gospel; last month, we loaded the choir and my keyboard on a float and rocked the crowd at the Charlotte Pride Parade). Both the study and the practice of law have been more humane and enjoyable as a result of these outside passions.

I was interested in writing about the twin "titles of nobility" clauses of the U.S. Constitution, precisely because at first glance the topic seemed virtually irrelevant to the modern American scene. Much to my surprise, my research revealed a few modern cases that in fact cited those provisions.

The case holdings were often strange and sometimes sad. One decision prevented a man from changing his name from "Jama" to "von Jama," be-

[6] 5 GREEN BAG 2D 157 (2002).

cause the prefix "von" often occurred in the names of German and Austrian nobles. But I found other authorities, especially dissents by Justice John Paul Stevens, that championed what I called a "radical equality principle" underlying the clauses.

We mined those few cases and our own imaginations to create a "multi-factored" balancing test. This output was itself a parody of a common approach to legal analysis: tossing up a laundry list of "factors," and allowing the decision-maker to decide whether the factors in a particular case supported ruling for the plaintiff or the defendant.

Somewhere along the way, I had read that the children of Congressional Medal of Honor winners receive special treatment when they apply to military academies. Naturally, we applied our factors to those facts and concluded that the Medal of Honor and its ancillary benefits (festooned with "ribbons and appurtenances," as the statute says) violated the federal nobility clause.

I am pleased to report that a later (2007) article by a professor at U.C. Davis Law School reached the same conclusion: the special treatment of the children of Medal of Honor winners "is a clear violation of the federal Nobility Clause."[7] The equality principle for which the nobility clauses have been cited turns out to be relevant to the college admissions practices featured in today's news headlines. We live in a time when titles of nobility may no longer be a laughing matter.

PART TWO

The *Journal* was produced in small, photocopied production runs. The first issue sold out quickly to students and faculty, and we made a second printing correcting some errors (attention, collectors). The second issue sold out in one printing, and that was all she wrote.

Suing Satan: A Jurisdictional Enigma

John J. Little (JJL): I was the last of the five to join the *Journal* effort. The precise memories are beyond faded, but I am relatively sure I came on board while the first issue was still in the works. I was immediately in-

[7] *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1435.

trigued by the mission and resolved to come up with something worth exploring.

I came upon *U.S. ex rel. Mayo v. Satan and his Staff*,[8] which became the launch point for this article. It was then (and may still be) the only reported federal decision in which the Devil is a named defendant.[9] While the court expressed grave doubts concerning the exercise of personal jurisdiction and mused about the possibility of the case proceeding as a class action, it ultimately issued the most narrow of rulings, denying leave to proceed *in forma pauperis* and assigning the case a miscellaneous docket number.

Courts continue to cite *Mayo* primarily to cast doubt on jurisdiction over other kinds of defendants: parties who are dead or may not ever have existed.[10]

What about Satan, though? The specifically diabolical issues addressed in this article and alluded to in *Mayo* have received some attention in the legal literature. The most well-known treatment is Charles Yablon, *Suing the Devil: A Guide for Practitioners*.[11] Other authors have touched ever so lightly upon the topic.[12]

Recently, *Mayo* has been routinely, and erroneously, cited in a series of decisions out of the Eastern District of Texas, which lies both east and north[13] of my adopted city of Dallas. These decisions incorrectly reference

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[8] 54 F.R.D. 282 (W.D. Pa. 1971).

[9] In researching my contribution to this piece, I came upon *Harris v. Attorney General of Philadelphia*, 2011 WL 3653504 (W.D. Pa. July 22, 2011), in which a *pro se* plaintiff had named God as a party defendant. The Court, citing *Mayo*, expressed doubt that it could serve process upon or exercise jurisdiction over God. *See also Collins v. Henman*, 676 F.Supp. 175, 176 (S.D. Ill. 1987) (*Mayo* cited in action where plaintiff "claimed to be the prophet Muhammed").

[10] See, for example, *Ely v. Cabot Oil & Gas Corp.*, 2016 WL 4169197 at *1, n. 1 (M.D. Pa., Feb. 17, 2016) (presumably beyond the court's power to compel deceased witness to testify); *Driskell v. Homosexuals*, 533 B.R. 281, 282 (D. Neb. 2015) (no defendant "has been identified with sufficient specificity for service of process"); *Krawec v. Allegany Co-op Ins. Co.*, 2009 WL 1974413 at *1, n.1 (N.D. Ohio, July 7, 2009) (assuming court had jurisdiction to transfer case against a defendant "who may or may not exist"); *Water Energizers Ltd. v. Water Energizers, Inc.*, 788 F. Supp. 208, 211 (S.D.N.Y. 1992) (defendant's existence is a necessary prerequisite for personal jurisdiction).

[11] 86 VA. L. REV. 103 (2000).

[12] *See* Christine Alice Corcos, *"Who Ya Gonna C(S)ite?"* Ghostbusters *and the Environmental Regulation Debate*, 13 J. LAND USE & ENVTL. L. 231, 262 & n. 147 (1997) (arguing that Gozer the Destructor is not subject to personal jurisdiction); James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1687-88 (1991) (supposing plaintiff in *Mayo* proceeded *pro se* "because suing the devil would present lawyers with an obvious conflict of interest").

[13] Oddly enough, the Eastern District of Texas contains four counties (Denton, Collin, Cooke, and Grayson) that lie *due north* of Dallas County, which is in the Northern District. 28 U.S.C § 124(c)(3).

Mayo as having concluded that the plaintiff's pleading was "frivolous";[14] as noted above, the *Mayo* court declined to go that far.

Without doubt, the crowning achievement for this piece (and likely for any other writing I have ever attempted) was its citation by none other than Guido Calabresi[15] in his 1985 book, *Ideals, Beliefs, Attitudes and the Law*. At page 158, he wrote, "The pains of hell surely are costly, but it is not clear that they are cognizable in a court of law." To this passage he added endnote 193: "*Cf.* Little, *Suing Satan: A Jurisdictional Enigma*, 1 JOURNAL OF ATTENUATED SUBTLETIES 27 (1982)."[16] For that, and for the opportunity to participate in the *Journal*, I am forever grateful.

Are Footnotes in Opinions Given Full Precedential Effect?

RAJ: I learned about the *Melancon* case in David Mellinkoff's lucid book *The Language of the Law*. If an opinion footnote could cite a footnote as authority on the Footnote Argument, I reasoned, why couldn't a law review footnote do the same with the entire caselaw?

The word "indeed" was in common use by one of our professors at the time, when he wanted to endorse a student's comment mildly before moving to another topic. Note the obligatory citation to Immanuel Kant (supposedly in the original German, no less).

At the time, I thought it would be funny for a footnote to have an Appendix. It was not. The humor was sophomoric, and my only defense is that I was a sophomore. I am thankful the *Green Bag* gave me a chance in 1999 to elevate the *Melancon* quotation to the "body" of the footnote, where it belongs. That version has been cited in judicial decisions concerning cocaine

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The Northern District also includes three counties (Kaufman, Rockwall and Hunt) that lie *due east* of Dallas County. 28 U.S.C § 124(a)(1).

[14] *Grohoske v. Fontner*, 2019 WL 2463222 at *1 (E.D. Tex. March 11, 2019); *Lynn v. Summers*, 2018 WL 3431996 at *7 (E.D. Tex. April 30, 2018); *Brown v. U.S. Government*, 2013 WL 4417679 (E.D. Tex. Aug. 13, 2013).

[15] Guido Calabresi is a 1957 graduate of Yale Law School and joined its faculty in 1959. He served as Dean of the Law School from 1985 through 1994. He currently serves as Sterling Professor of Law Emeritus. In 1994, he was appointed to the U.S. Court of Appeals for the Second Circuit, where he continues to serve as a Senior Judge.

[16] Dean Calabresi was certainly aware that the five of us preferred to have the *Journal* cited as J. ATTEN. SUBT. That citation form appears throughout both issues, including my article (1 J. ATTEN. SUBT. 27, 28 n.5). One can only surmise that his editors at Syracuse University Press would accept only those abbreviations that had been blessed by the *Bluebook*.

and eminent domain,[17] and in articles addressing internet gambling, tribal jurisdiction, the World Trade Organization, the Australian constitution, and international arbitration. It is handy for anyone who wishes to bolster the authority of a helpful footnote.

On the Spelling of Daniel M'Naghten's Name

RAJ: This again is the work of David Kirkland, who saw the *Ohio State Law Journal* article cited in a draft criminal law casebook authored by visiting professor John C. Jeffries, Jr., later dean of the University of Virginia Law School. David secured consents from the then-regnant law-journal editor and from Dr. Diamond himself.

A System of Citation for Phonograph Records

RAJ: This article was our joint effort. It stems from the footnote crediting Bruce Springsteen in Mark J. Tushnet's "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory," published in the *Yale Law Journal*. At the time, the *Bluebook* had no provision for citing music.

Proposing "*hear*" as a signal equivalent to "*see*" was facetious, and references to "phonograph records" and "phonorecords" are downright quaint. However, we also made a serious point: in any setting where a shibboleth is overly valued, worthy voices that lack that shibboleth are silenced. That shibboleth could be an approved citation form. But it could likewise be an elite-law-school degree, membership in a privileged group, or articles written exclusively in a mainstream style.

Nowadays, the *Bluebook* has elaborate forms in Rule 18 for citing music as well as other electronic media. A Canadian law review article opined: "The editors of *The Journal of Attenuated Subtleties* were the real pathbreakers in the field of musical legal citation."[18]

The article notes that the *Yale Law Journal* of the time observed a "harmless error" standard on matters of citation. David and I spotted some typos

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[17] *Are Footnotes in Opinions Given Full Precedential Effect?,* 2 GREEN BAG 2D 267 (1999); *State v. Hansen,* 627 N.W.2d 195, 243 Wis. 2d 328 (2001); *In re Condemnation by Mercer County Area School Dist.,* No. 2269 C.D. 2012 (Pa. Commonwealth Ct. Mar. 17, 2014). See also Ira Brad Matetsky's elegant extension, *The Footnote Argument — Sustained At Last?,* 6 GREEN BAG 2D 33 (2002).

[18] Vaughan Black & David Fraser, *Cites for Sore Ears (A Paper Moon),* 16 DALHOUSIE L.J. 217 (1993).

in the first issue of Volume 92. I suggested to Managing Editor Bob Cooper (later Attorney General and Reporter of Tennessee) that since we were going to read all the issues sooner or later, we might as well report those errors ahead of publication. Bob agreed, and David and I started final-proofing the articles, notes, and book reviews of that volume. To that end, I created letterhead of a shadowy quasi-military grammar-police organization, ÆSTHETIC CENTRAL COMMAND, and signed my comments S.Æ.C., *Supreme Æsthetic Commander*.

This article featured the appearance of both dot-matrix printed text and exotic laser-printed examples generated by a friend of David in the Yale computer science department. It is a 1982 Rosetta stone.

Case Note

RAJ: Old law reviews ended with short pieces critiquing recent decisions in the manner of Harvard Law School dean C.C. Langdell. During his trusty *U.S. Law Week* reading, David found a case where Justices dissenting from a cert denial wrote in shorthand that a motorcycle had been stolen "along with title," meaning the paper certificate. I intentionally misread this phrase to mean that the dissenters believed a thief takes title to a pilfered object, and proceeded to rail against the opinion in the manner of Miss Emily Letella in an old *Saturday Night Live* routine. Two passages merit mention in despatches: "these forgotten stanzas of the lost Langdellian idyll" and "a new and ugly trend in Anglo-American legal thought."

Advertisement

RAJ: The "trivial pother" Learned Hand quote and most of the pejoratives are from copyright infringement claims dismissals, cited in the Kaplan & Brown casebook. David found the clincher, quoted by Justice Thurgood Marshall and originally penned by Judge Hutcheson of the Fifth Circuit: "a harking back to the formalistic rigorism of an earlier and outmoded time."[19]

[19] Benjamin Kaplan & Ralph S. Brown, CASES ON COPYRIGHT . . . (3d ed. 1978); *Crump v. Hill*, 104 F.2d 36 (5th Cir. 1939).

PART THREE

We had vague thoughts of publishing more issues after graduating, but they did not materialize. The lack of execution was not for want of imagination, though. First, John Little drafted an article on "Sports Officiating and the Limits of Judicial Review."

JJL: Preparing these reflections reminds me why I got involved in the *Journal*. Simply put, it was a lot more interesting than law school. It was far easier to find time to research "sports officiating" cases than, say, one's third-year paper (even though the latter was required for graduation). Thirty-eight years later, it remains far more interesting than working on discovery responses (which is what I ought to be doing as I write this).

The sports officiating piece was inspired by a then-recent state court decision, *Georgia H.S. Ass'n v. Waddell*.[20] *Waddell* arose out of a football game between Lithia Springs High School and R.L. Osborne High School, the winner of which would advance to the state playoffs. Osborne led 7-6 with 7:01 remaining in the game, had the ball, and faced fourth down with 21 yards to go on its own 47-yard line. Osborne punted, but roughing the kicker was called. The referee assessed a 15-yard penalty and the ball was placed on the Lithia Springs 38-yard line, *but no first down was awarded* (an obvious error by the official). Osborne punted again. Lithia Springs received the punt, drove down the field and kicked a field goal, and later scored again, making the final score 16-7 in its favor.

Osborne protested the erroneous call to the sports association. The protest was denied by the association's Executive Secretary, then by its Hardship Committee, and finally by its Executive Committee, which sounds like an exhausting exhaustion of administrative remedies.

Suit was filed by the parents of Osborne players in the Superior Court of Cobb County. The trial court found that it had jurisdiction, that the plaintiffs had "a property right in the game of football being played according to the rules, and that the referee denied the plaintiffs and their sons this property right and equal protection of the laws by failing to correctly apply the rules."

The trial judge entered an order cancelling a Lithia Springs playoff game scheduled for November 13 and ordered Lithia Springs and Osborne

[20] 285 S.E.2d 7 (Ga. 1981).

to meet on the football field on November 14, resuming the game with 7:01 remaining, with Osborne in possession at the Lithia Springs 38-yard line, still leading 7-6, and this time with *first down and 10*. (Many of us would love the opportunity to turn back the clock to redo something that happened in high school, or something that did not happen in high school.)

The Supreme Court stayed the trial court order. It cited its prior decision in *Smith v. Crim*,[21] holding that a high school football player has no right to participate in interscholastic sports[22] and no protectable property interest which would give rise to a due process claim. The opinion concluded that courts of equity in Georgia "are without authority to review decisions of football referees because those decisions do not present judicial controversies."

Unfortunately, I have no recollection of what I concluded in the sports officiating piece. The article was complete, or nearly so, but prepared in the most analog of fashions — typed on a Smith-Corona portable electric typewriter with neither memory nor back-up (as if any of us, save David, would have known what that meant in 1982). The manuscript has been lost to history.

Having now done a little more current research, I admit the topic would now be neither sufficiently "attenuated" nor "subtle" for inclusion in the *Journal*. Sports officiating decisions have regularly found their way into our courts.[23] There has been an explosion of law journals devoted to sports and entertainment, which routinely carry articles that could all have traced their lineage to this *Journal of Attenuated Subtleties* piece on sports officiating had we published it (in the subjunctive mood of sports lingo, "woulda, coulda, shoulda").[24]

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[21] 240 Ga. 390, 240 S.E.2d 884 (Ga. 1977).

[22] RAJ, interrupting JJL: I cannot resist citing *Spath v. Nat'l Collegiate Athletic Ass'n*, 728 F.2d 25 (1st Cir. 1984): "There being no fundamental right to education, see *San Antonio Independent School Dist. v. Rodriguez* [citation omitted], there could hardly be thought to be a fundamental right to play intercollegiate ice hockey."

[23] *See, e.g., Bain v. Gillispie*, 357 N.W.2d 47 (Iowa Ct. App. 1989) (affirming summary judgment for college basketball official on claims brought by sports memorabilia vendor that official's erroneous call constituted malpractice and injured vendor to the tune of $175,000). *Cf. McDonald v. John P. Scripps Newspaper*, 257 Cal. Rptr. 473 (Cal. Ct. App. 1989) (citing *Waddell* in dismissing action brought by loser of county spelling bee based upon official's error).

[24] *See* Richard J. Hunter, Jr., *An "Insider's" Guide to the Legal Liability of Sports Contests Officials*, 15 MARQ. SPORTS L. REV. 369 (2005); S. Christopher Szczerban, *Tackling Instant Replay: A Proposal to Protect the Competitive Judgments of Sports Officials*, 6 VA. SPORTS & ENT. L.J. 277 (2007); Russ VerSteeg &

A most provocative piece in this vein is John Cadkin, *Sports Official Liability: Can I Sue If the Ref Missed a Call?*[25] The author concludes (correctly, I would say) that generally, the "decision of the referee should be left on the playing field." But he argues that a cause of action should lie where "only monetary relief is requested and where the allegedly negligent call is an: (1) on-the-spot judgment, (2) made in good faith, (3) absent instant replay, and (4) is outcome determinative."

The author argues the official's conduct should be judged against an ordinary negligence standard. While I do not recall what I concluded in 1982, I am relatively certain that I would have disagreed with this cause of action and liability standard (and I still respectfully disagree).

RAJ: I wrote a draft of "The Jurisprudence of Paper Clips," an essay on the affixation of allonges to negotiable instruments by various fastening devices, which appeared in the *Green Bag* recently and which has been enriched by correspondence from Paul Kiernan and Shale Stiller.[26]

I looked into "Admiralty Jurisdiction Over Collisions Between Ships and Trains," but it turned out that such accidents have happened with alarming frequency.

In a fragment of "The Mess of Dillegrout," which is still in existence and has been delivered to the editors of the *Green Bag*,[*] I described unusual English serjeanty tenures in which land rights were issued on condition of the holder's serving chicken soup at a coronation or making a "passing of wind" before the monarch.

David Kirkland whimsically suggested "Time Travel: It's Not Just Impossible, It's Illegal," pointing out the problems that journeys into the past could cause for the first-to-file system under Article 9 of the Uniform Commercial Code. Sadly, we do not know his solution. Perhaps he envisioned a Turing Test to determine whether someone who files a UCC-1 today is an interloper from the future.

Years later, I contributed to *The Copyright Infringement Quarterly*, a compendium of legal humor edited by my friends John Morris and Adam Sachs. In that context, I mentioned one of my favorite appellate cases, *Lyon County*

Kimberley Maruncic, *Instant Replay: A Contemporary Legal Analysis*, 4 MISS. SPORTS L. REV. 153 (2015).

[25] 5 U. DENV. SPORTS & ENT. L. J. 51 (2008).

[26] 19 GREEN BAG 2D 249 (2016).

[*] *General Editor's note:* And it may well appear in print here or there, someday.

Bank v. Lyon County Bank.[27] In 1998, John Morris introduced me to Professor Ross Davies, and the connection of the *Journal of Attenuated Subtleties* to the *Green Bag* was established.

• • •

ALL: We are grateful that our works will live online for another day, now complete and in their native format. In the realm of publication, we may have peaked a bit early with our student output of nearly forty years ago. We look forward to the useful and entertaining contributions of those who, like us, appreciate the world of legal scholarship enough to go to *so, so much trouble* parodying it.

[27] 58 P.2d 803 (Nev. 1936), spotted in Fleming James, Jr. & Geoffrey C. Hazard, Jr., CIVIL PROCEDURE (2d ed. 1977).

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Foreword: Form Over Substance

De minimis non curat lex.[1]

The law may not care about trifles, but lawyers certainly do. From time out of memory,[2] members of the bar have delighted in advancing the arcane argument, in drawing the strained analogy, and in resuscitating the outmoded doctrine; even today, when "exalt[ing] form over substance" is reversible error,[3] the fascination with long dead and unimportant detail continues to pervade the legal mind. A "case is not to be decided by attenuated subtleties,"[4] but the fancy of the lawyer is surely to be struck by them.

It is to this fascination with the defunct, trivial, recherché, and inconsequential that this Journal is dedicated. In this and forthcoming issues, we propose to present short scholarly essays, gracefully written, cogently argued, and copiously referenced, which treat subjects long and justifiably neglected in the "substantial" legal literature[5]--legal topics made obsolete by time or logic.

1. Taverner v. Cromwell, 1 Cro. Eliz. 353, 353, 78 Eng. Rep. 601, 602 (C.P. 1594).
2. That is, since before Sept. 23, 1189. See 2 W. BLACKSTONE, COMMENTARIES *31.
3. Parker v. Flook, 437 U.S. 584, 598 (1978), rev'g In re Flook, 559 F.2d 21 (C.C.P.A. 1977).
4. Lucas v. Earl, 281 U.S. 111, 114 (1930) (Holmes, J.).
5. It must be acknowledged that there is a small body of legal writing which deals in the humorous. See, e.g., Review, 79 YALE L.J. 1198 (1970) (review of the "With the Editors" section of The Harvard Law Review); Note, Crossing the Bar, 78 YALE L.J. 484 (1969) (analysis of ceremonials in the Federal Reporter and the Federal Supplement honoring or in memory of federal judges). Legal trivia, on the other hand, have been heretofore ignored by "serious" scholars.

This Journal, however, is not for every lawyer. The attorney who has never stopped to wonder about the odd footnote affixed to Supreme Court syllabi, for example, will find nothing of interest in these pages. The practitioner who dismisses thoughts of Supreme Court jury trials or claims based on the Titles of Nobility Clauses because of their extreme infrequency and improbability will take no delight in our forays; nor will the lawyer who looks to the Court only for holdings and not for historical richness appreciate an analysis of its geographical center. Our colleagues of this ilk must find their recreation outside the law, in alcohol or bowling.

The Journal is for those steeped in the law who love the subtle and the attenuated. To them we extend our invitation to read our works and to submit their own efforts for publication. Here, then, is to form over substance; here is to trifles.

– The Editorial Board

Instructions in Supreme Court Jury Trials

Robert A. James*

The United States Supreme Court has, by virtue of Constitutional grant, original jurisdiction over all controversies in which a State or foreign emissary is a party.[1] Although the number of categories of cases in which the Court has exclusive jurisdiction is extensively limited by statute, the Court is still the court of first resort for all controversies between two or more States;[2] the Court also occasionally exercises its nonexclusive original jurisdiction.[3] The Seventh Amendment to the United States Constitution[4]

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1. U.S. CONST. art. III, § 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

The intent of the framers on this provision is thoroughly unascertainable. Professor Farrand has concluded that "surprisingly little [is] found in the records of the convention" regarding jurisdiction and the judicial branch in general. M. FARRAND, THE FRAMING OF THE CONSTITUTION 154 (1913). See, however, the speculation in Note, The Original Jurisdiction of the United States Supreme Court, 11 STAN. L. REV. 665, 665 & n.3 (1959) (purpose of clause to insure prestige of tribunal hearing claims involving sovereign or quasi-sovereign entities).

2. 28 U.S.C. § 1251(a) (Supp. IV 1980): "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." Formerly, the exclusive original jurisdiction extended to suits brought against foreign emissaries, but jurisdiction with respect to these actions was made nonexclusive by the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 809, 810, sec. 8(b)(1).

3. For a recent instance, see United States v. California, 449 U.S. 408 (1981).

Relatively few original cases have been heard in the Supreme Court's reported history. See Note, supra note 1, at 701-719 (123 reported original jurisdiction cases counted as of 1959); 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 107 n.1 (1978) (hereinafter cited as WRIGHT & MILLER) (eight cases docketed in 1974, 1975, and 1976 Terms combined).

4. U.S. CONST. amend. VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

and a statutory enactment[5] guarantee the right to trial by jury in the resolution of cases at common law before the Court.[6] There have been very few jury trials in the Court's history,[7] but the assertion in an original jurisdiction action of a party's Seventh Amendment right "remains a theoretical possibility."[8] Once the possibility is acknowledged, a procedural problem becomes apparent: how is a multimember Court to deliver jury instructions where the Justices are not in agreement?

5. Judiciary Act of 1789, c. 20, 1 Stat. 73, 80-81, § 13, codified at 28 U.S.C. § 1872 (1976): "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

6. The right to trial by jury was addressed most recently in United States v. Louisiana, 339 U.S. 699 (1950). Mr. Justice Douglas for the Court held that the State of Louisiana was not entitled to a jury trial where it sought the equitable remedies of injunction and accounting: "The Seventh Amendment and the statute [28 U.S.C. § 1872], assuming they extend to cases under our jurisdiction, are applicable only to actions at law." Id. at 706 (footnote omitted).

Commentators have inferred from the conditional nature of Justice Douglas's discussion that the right to a Supreme Court jury trial may be in doubt. See WRIGHT & MILLER, supra note 3, at 197-98 & n.27. This inference gains no support from Justice Douglas's opinion or the relevant provisions. The language of 28 U.S.C. § 1872 is explicit in its assurance of the right in actions against citizens, see note 5 supra; the text of the Seventh Amendment, moreover, contains no limitation of the jury right to actions in district courts. See note 4 supra. It is apparent that governmental bodies, like all other parties, are entitled to assert the right, see United States v. Pfitsch, 256 U.S. 547, 553-54 (1921); Collins v. Gov't of Virgin Islands, 366 F.2d 279, 283 (5th Cir.), cert. denied, 386 U.S. 958 (1966), so the exclusive category of actions between States is not immune from the prospect of a jury demand. Furthermore, it is sound judicial practice to refrain from deciding more issues than the essential elements of the case at bar. See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 568 (1851); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 734 (1838) (where Court found original jurisdiction suit equitable in nature, no discussion of right to jury trial for legal actions).

7. There have apparently been only three such trials, all in the eighteenth century. Only one is officially reported, that in Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794), discussed in the text accompanying notes 9-12 infra. Two others are evidenced by other Court records, and are discussed in 1 H. CARSON, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 169 n.1 (rev. ed. 1902), and in The Supreme Court--Its Homes Past and Present, 27 A.B.A. J. 283, 286 & n.3 (1941). In Oswald v. New York (U.S. Feb. 6, 1795), a jury verdict for $5,315.06 was entered; in Cutting v. South Carolina (U.S. Aug. 8, 1797), the jury found $5,502.84 in damages. See also Casey v. Galli, 94 U.S. 673, 681 (1876) (parties waived "intervention of a jury").

8. WRIGHT & MILLER, supra note 3, at 197. Of course, the Supreme Court may avoid such a jury trial in nonexclusive cases by redirecting proceedings to the appropriate district court. Even in exclusive cases, the Court typically encourages parties to pursue factual disputes before a special master. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 734 (1981).

In Georgia v. Brailsford,[9] the only reported Supreme Court jury trial, the Justices were able to agree on the charge. Mr. Chief Justice Jay for the Court remarked: "It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous . . . ."[10] When the jurors returned to ask additional questions, the Court was also unanimous in its responses;[11] the jury then rendered its decision.[12] In the future, however, the Court may not be fortunate enough to agree on the form and content of jury instructions.

Jury charges, unlike other judicial actions, require more than an affirmative or negative response to a motion; the body vested with interpretive authority must present a single algorithm, a single formulation of logical argument, to guide the jury in rendering a decision on factual issues. Where the Justices cannot come to agreement upon a single jury instruction, a decision rule must be adopted to determine which of alternative charges is to be delivered.[13] Several potential decision rules may be summarily dismissed. A "pure race" rule, under which the first instruction presented by a Justice would be adopted,[14] is clearly unjust and unworkable in this context. A rule under which the Chief Justice's proposal wins is also unacceptable, as it would appear to place more power in that position than is contemplated by the judicial system.

A plurality rule, one which recognizes the jury instruction endorsed by the largest number of Justices, appears to represent the sound and just resolution of the problem. Although opportunities for negotiation and strategy may be present,[15] and the

9. 3 U.S. (3 Dall.) 1 (1794). The case involved the postwar effect on various creditors of a State's wartime sequestration of debts.
10. Id. at 4.
11. Id. at 5.
12. Id.; the jury found that property in the debts revested in the creditors after the wartime sequestration was nullified by the treaty of peace.
13. The jury instruction issue is therefore inextricably intertwined with the problems addressed by modern social choice theory. See K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).
14. Cf. UNIFORM COMMERCIAL CODE § 9-312(5)(a) (1978) ("pure race" rule for priorities among secured creditors).
15. Cf. J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953).

possibility of a tie would have to be addressed,16 incentives would be placed on the Justices to subscribe to the charge which most closely approximates their own views of the legal issue. The result under the plurality rule test would be the adoption of a single jury instruction which commands the widest support among the members of the Court and which is consistent with the unarticulated yet powerful principle of equality among Justices of the Supreme Court.17

16. Perhaps the Chief Justice Rule could here be profitably used; this situation requires a thorough analysis. Indeed, the problem of the equally divided court is one long neglected by commentators and courts alike. Cf. United States v. Barnett, 330 F.2d 369 (5th Cir. 1963) (en banc), certified question answered, 376 U.S. 681 (1964) (Court of Appeals equally divided in contempt proceeding against state governor).

17. It is not incomprehensible to imagine the guarantee of "one person, one vote" applied generally to the entire federal judiciary. Cf. Reynolds v. Sims, 377 U.S. 533 (1964) (principle of one person, one vote in state legislature apportionment); Bolling v. Sharpe, 347 U.S. 97 (1954) (Fifth Amendment Due Process Clause contains equal protection component).

The Supreme Court and the Westward Movement: A Demographic Study

Benjamin C. Zuraw*

Ever since the first days of the Republic, America's population steadily has been moving west.[1] This westward migration has had important effects on America's political, economic, and social history.[2] To the present day, the cry "Go West, young man!"[3] has left its indelible mark on American institutions. This study examines whether the United States Supreme Court has moved westward along with the American public. It is important to know whether the Court has kept pace with America'a westward migration, for a correlation between the two migrations could influence the way scholars analyze decisions of our highest tribunal.[4]

The geographical locations of Supreme Court Justices at various times in their careers were compiled and analyzed (see Table 1). Figure 2 plots the population shift of the Court based on its mean birthplace as of each decennial census year. As can be seen, the results are quite erratic, with the mean birthplace shifting back and forth from the Atlantic Ocean to the mainland. One problem with this approach is its inclusion of several Justices who were born overseas.[5] Figure 3, therefore, displays the adjusted

* B.A., Dartmouth College, 1980; J.D. candidate, Yale Law School, 1983. I am grateful to David Kirkland for invaluable assistance in technical aspects of this article. Any errors, however, are mine.

1. WORLD ALMANAC AND BOOK OF FACTS FOR 1982 at 199 (1981); see also Table 1 infra.

2. See Turner, The Significance of the Frontier in American History, REP. AM. HIST. A. 190 (1893).

3. Soule, Terre Haute (Ind.) Express (1851); cf. J. PARTON, LIFE OF HORACE GREELEY (1855). Contra W.O. DOUGLAS, GO EAST, YOUNG MAN (1974).

4. Decisions of a particular Court, for example, could be explained by the predominance on that Court of an eastern or frontier perspective. Indeed, a fuller theory of "Demographic Determinism" might be articulated.

5. Justice Brewer, for example, was born in Smyrna, Asia Minor (now part of Turkey) (lat. 38 25' N, long. 27 10' E), but moved to Leavenworth, Kansas (lat. 39 19' N, long. 95 55' W). Justice Frankfurter was born in Vienna,

mean birthplace of the Supreme Court, with all Justices born overseas removed from the data. This analysis yields results which are certainly more consistent than those of Figure 2; however, because a study based on birthplace neglects movements of people after their birth, it inadequately examines the mobile American society.[6]

Figure 1, instead of being based on the birthplaces of the Justices, as were Figures 2 and 3, displays the population shift of the Court as measured by the place of residence of each Justice at the time of his or her appointment to the Court. In this way, the study can take into account the large number of Justices who migrated to the West after being born on the eastern seaboard.[7] Figure 1 displays both the mean appointment location of the Court and the geographical center of the United States population, and demonstrates that the Supreme Court's geographical shift has been suprisingly consistent with America's westward migration.

Until 1860, the Court moved steadily westward, although lagging slightly behind the American population. From 1860 to 1870, however, the Court's population center shifted dramatically from near White Sulphur Springs, West Virginia, to Portland, Indiana; from this decade through the 1920's, the Court's westward movement was slightly in front of that of the American people. Since the 1920's, the Court's westward migration has been more inconsistent, but still remarkably similar to America's steady westward shift. The 1982 Supreme Court's population center (near Stoutsville, Missouri) is quite close to the current United States population center (near De Soto, Missouri). Indeed, in a demographic sense, the Supreme Court has come home to the American people.

Austria (lat. 48 13' N, long. 16 22' E).

6. Cf. Dunn v. Blumstein, 405 U.S. 330 (1972) (fundamental right of interstate travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (same).

7. For example, Justice Field was born in Haddam, Connecticut (lat. 41 28' N, long. 72 30' W), but left for the Marysville, California gold field (lat. 39 10' N, long. 121 34' W). Justice Rehnquist was born in Milwaukee, Wisconsin (lat. 43 03' N, long. 87 56' W), but headed for the sunnier climes of Phoenix, Arizona (lat. 33 30' N, long. 112 03' W).

10

TABLE 1

Arithmetic Mean Location of
American Population and Supreme Court, 1790-1982

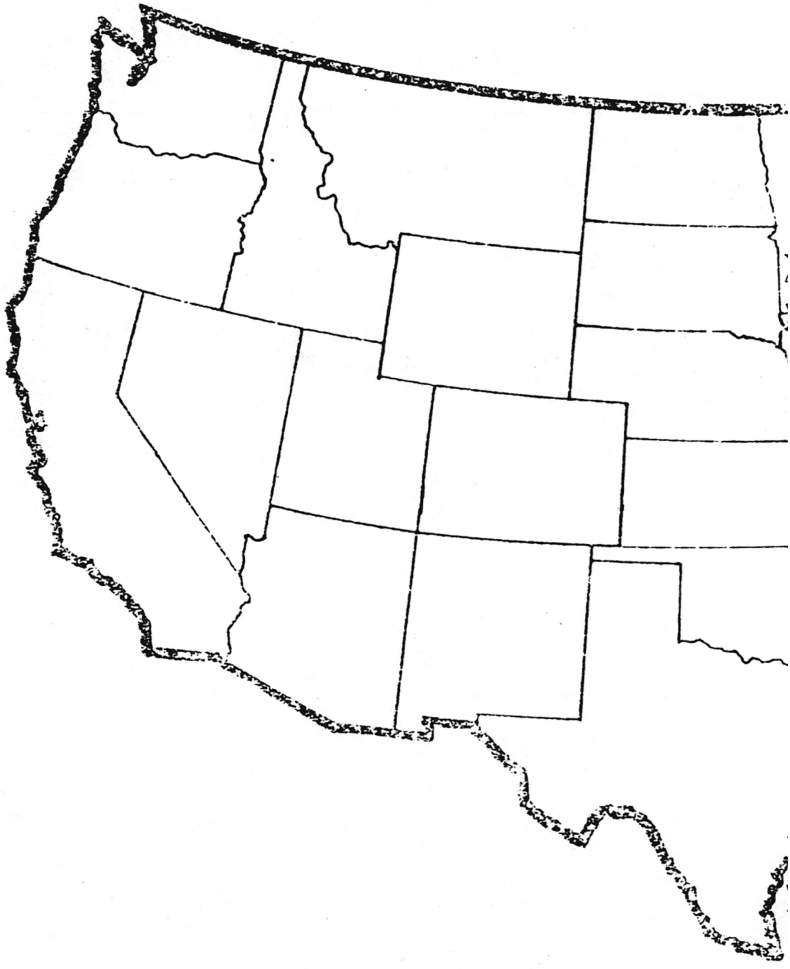
Year	American Population§	Supreme Court* Birthplace		Supreme Court* Adjusted Birthplace¶		Supreme Court* At Time of Appointment	
	N Lat. W Long.	N Lat.	W Long.	N Lat.	W Long.	N Lat.	W Long.
1790	39 16' 76 11'	43 18'	50 42'	38 14'	75 18'	38 12'	75 50'
1800	39 16' 76 56'	41 17'	64 1'	38 38'	75 34'	39 27'	75 23'
1810	39 11' 77 37'	38 11'	76 8'	38 11'	76 8'	38 17'	77 20'
1820	39 5' 78 33'	38 16'	76 13'	38 16'	76 13'	38 22'	77 25'
1830	38 57' 79 16'	39 30'	75 3'	39 30'	75 3'	38 58'	77 40'
1840	39 2' 80 18'	39 6'	75 53'	39 6'	75 53'	38 22'	79 38'
1850	38 59' 81 19'	39 10'	76 59'	39 10'	76 59'	38 32'	79 56'
1860	39 0' 82 48'	38 40'	77 26'	38 40'	77 26'	37 46'	80 4'
1870	39 12' 83 35'	41 12'	75 19'	41 12'	75 19'	40 37'	85 17'
1880	39 4' 84 39'	40 34'	77 25'	40 34'	77 25'	40 32'	85 21'
1890	39 11' 85 32'	40 15'	64 8'	40 29'	75 33'	39 32'	86 18'
1900	39 9' 85 48'	39 43'	65 53'	39 52'	77 31'	39 23'	87 47'
1910	39 10' 86 32'	38 32'	81 8'	38 32'	81 8'	37 49'	88 46'
1920	39 10' 86 43'	38 57'	81 29'	38 57'	81 29'	39 17'	87 12'
1930	39 3' 87 8'	41 50'	72 40'	40 34'	81 37'	40 30'	85 36'
1940	38 56' 87 22'	40 50'	71 15'	39 55'	82 12'	39 41'	84 13'
1950	38 48' 88 22'	39 39'	74 2'	38 35'	85 21'	39 0'	88 4'
1960	38 35' 89 12'	39 30'	80 14'	38 25'	92 19'	38 49'	91 58'
1970	38 27' 89 42'	40 27'	88 4'	40 27'	88 4'	41 4'	89 29'
1980	38 8' 90 34'	40 52'	86 8'	40 52'	86 8'	40 15'	88 56'
1982	-- -- -- --	39 53'	89 12'	39 53'	89 12'	39 38'	92 0'

* CONGRESSIONAL QUARTERLY, GUIDE TO THE SUPREME COURT 793-866 (1979).

§ WORLD ALMANAC AND BOOK OF FACTS FOR 1982 at 199 (1981).

¶ Justices born outside the United States were removed from computation.

11



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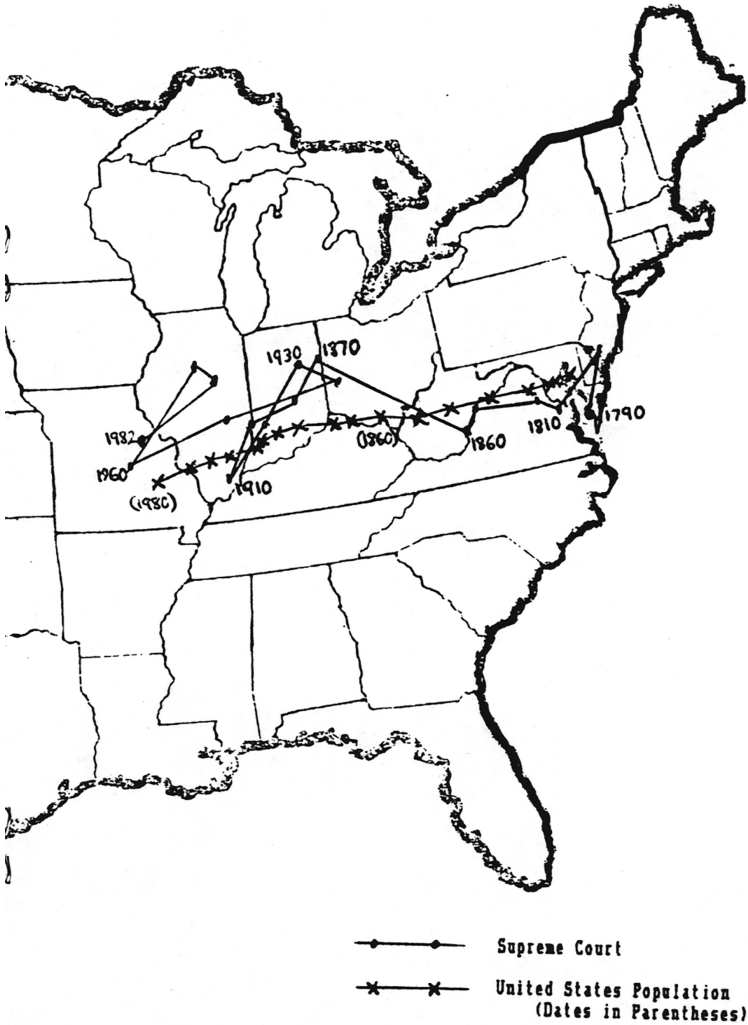

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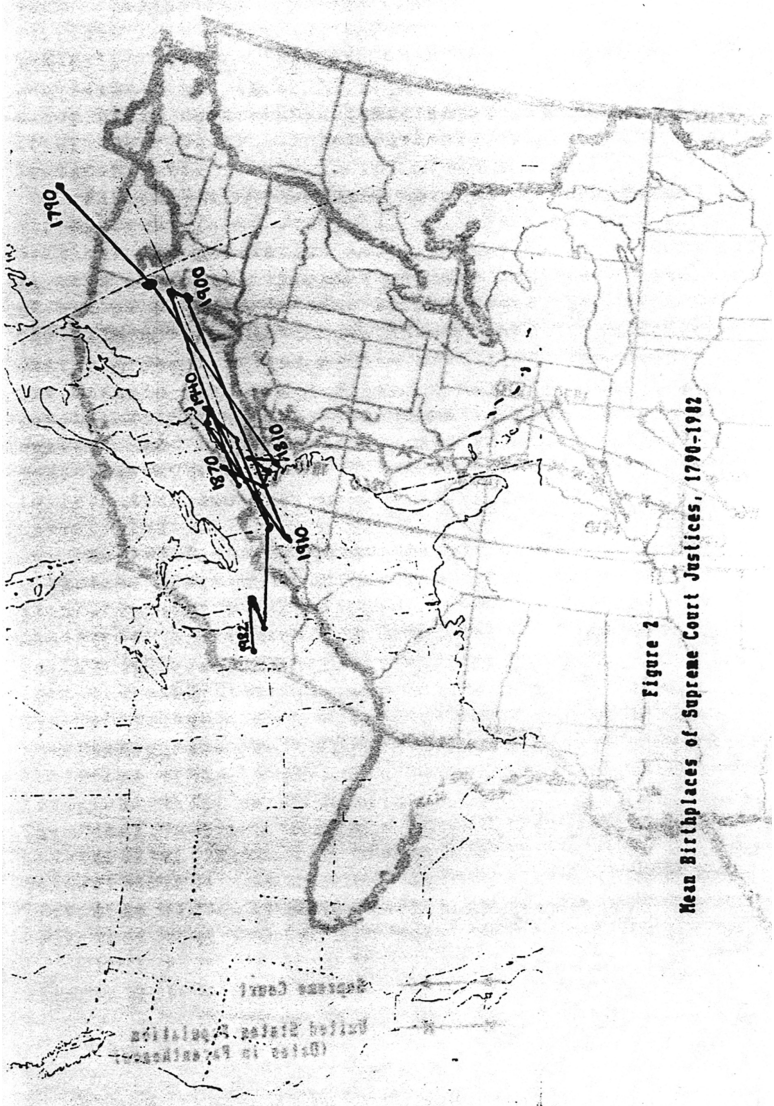

Figure 2
Mean Birthplaces of Supreme Court Justices, 1790-1982

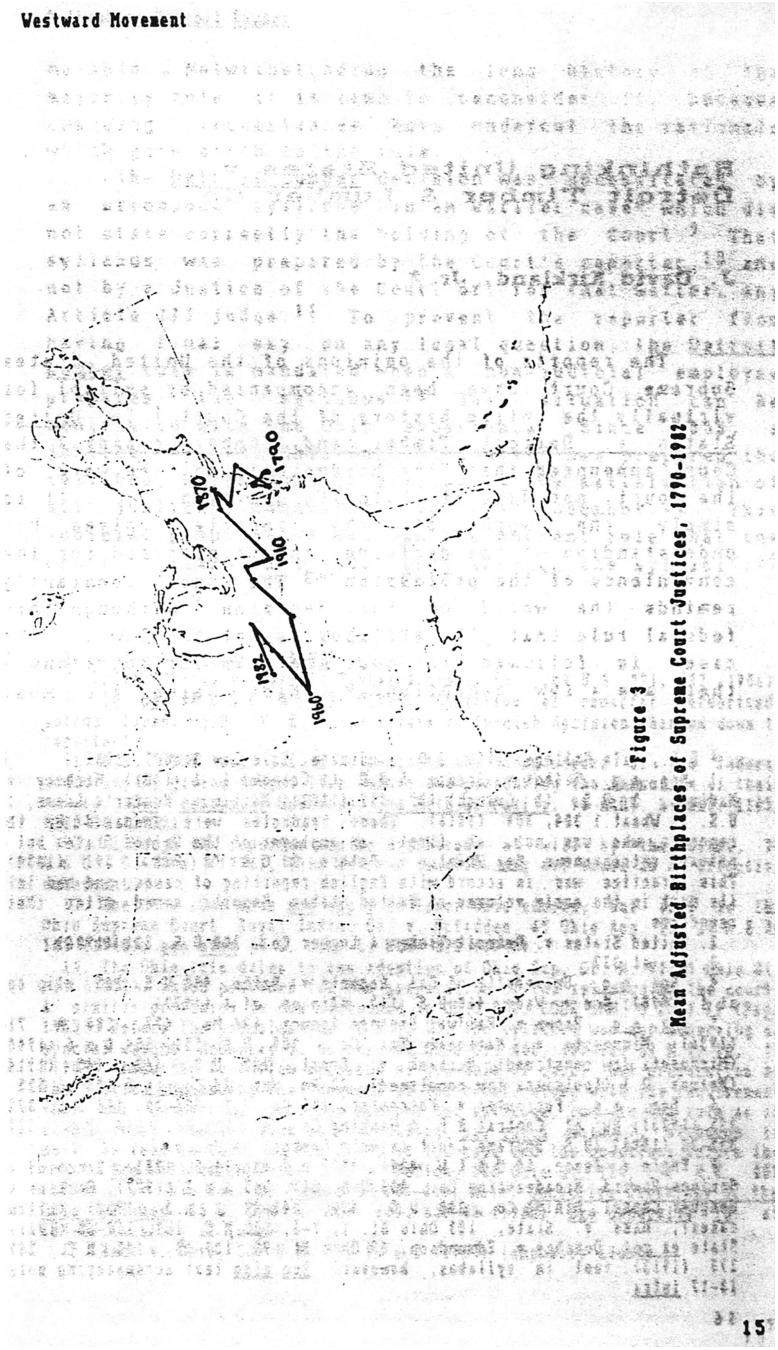

Figure 3
Mean Adjusted Birthplaces of Supreme Court Justices, 1770-1902

Rethinking United States v. Detroit Timber & Lumber Co.

J. David Kirkland, Jr.*

The reports of the opinions of the United States Supreme Court have been accompanied by syllabi for virtually the entire history of the Court.[1] In United States v. Detroit Timber and Lumber Company,[2] the Court announced that "the headnote is not the work of the court, nor does it state its decision. . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession."[3] The Court constantly reminds the world of this decision.[4] Although this federal rule that "the syllabus is not the law of the case" is followed in most American jurisdictions,[5] there are a few exceptions,[6] Ohio[7] being the most

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1. See, e.g., Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 1 (1801); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803); Martin v. Hunter's Lesee, 14 U.S. (1 Wheat.) 304, 304 (1816). These headnotes were prepared by the reporter, who was not, at first, an employee of the United States but a private entrepreneur. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). This practice was in accord with English reporting of cases, and has left its mark in the early volumes of United States Reports named after their reporters.

2. United States v. Detroit Timber & Lumber Co., 200 U.S. 321 (1906).

3. Id. at 337.

4. See, e.g., University of Cal. Regents v. Bakke, 438 U.S. 265, slip op. at 1 (1978); Roe v. Wade, 410 U.S. 115, slip op. at 1 (1973).

5. See, e.g., Brown v. Railway Express Agency, 134 Me. 477, 188 A. 716 (1936); Minnesota v. National Tea Co., 309 U.S. 551, 554 & n.6 (1940) (Minnesota law construed); Burbank v. Ernst, 232 U.S. 162, 165 (1914) (Holmes, J.) (Louisiana law construed); 20 Am. Jur. 2d Courts § 189 at 525.

6. See, e.g., Forrester v. Forrester, 155 Ga. 722, 726-27, 118 S.E. 373, 375 (1923); Buf cf. Central R.R. & Banking Co. v. Wright, 164 U.S. 327, 332-33 (1896) (U.S. Supreme Court rejects Georgia headnote).

7. Engle v. Isaac, 50 U.S.L.W. 4376, 4377 n.7 (April 5, 1982); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 & n.2 (1977); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 441-42 & n.3 (1952) (citing cases); Hass v. State, 103 Ohio St. 1, 7-8, 132 N.E. 158, 159-60 (1921); State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913) (not in syllabus, however). See also text accompanying notes 13-17 infra.

notable. Notwithstanding the long history of the majority rule, it is time to reconsider it, because changing circumstances have undercut the rationale which gave birth to the rule.

The Detroit Lumber decision was necessitated by an erroneous syllabus in an earlier case[8] which did not state correctly the holding of the Court.[9] That syllabus was prepared by the Court's reporter,[10] and not by a Justice of the Court or, for that matter, any Article III judge.[11] To prevent the reporter from having final say on any legal question, the Detroit Lumber rule is mandated when a non-judicial employee prepares the syllabus.[12] This situation can be contrasted with the Ohio experience. Since 1858, a justice of the Ohio Supreme Court[13] has prepared the syllabus, which must be drafted to the satisfaction of all justices concurring in the judgment.[14] This judicial preparation led to the current rule that the court "speaks as a court only through the syllabi";[15]

8. Hawley v. Diller, 178 U.S. 476 (1900).

9. United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337 (1906).

10. Id. See 28 U.S.C. § 673 (1976) (position of reporter authorized, duties fixed); SUP. CT. R. 55(1) (clerk to furnish decisions handed down to reporter).

11. U.S. CONST. art. III, § 1, protects the independence of the federal judiciary by giving judges life tenure and preventing the reduction of their salary. See generally Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1120-30 (1977).

12. Although the reporter can be discharged at will by the Court, 28 U.S.C. § 673(a) (1976), this extreme sanction may not serve as an effective deterrent.

13. The Ohio rule does not apply to lower Ohio courts, but only to the Ohio Supreme Court. Royal Indem. Co. v. McFadden, 65 Ohio App. 15, 29 N.E.2d 181 (1940); see also 14 U. CIN. L. REV. 573 (1940).

14. The Ohio rule dates to the adoption of Ohio Sup. Ct. R. VI, 5 Ohio St. vii (1858), which provided for the preparation of the syllabus by the court. A similar provision is now contained in OHIO REV. CODE ANN. § 2503.20 (Page 1953). Before the promulgation of Rule VI, the syllabus was not deserving of special weight. McCorray v. Sutter, 80 Ohio St. 400, 409-10, 89 N.E. 10, 11 (1909) (refusing to follow syllabus of pre-Rule VI case). But preparation by the justice announcing the judgment of the court, along with the requirement that the concurring justices approve the syllabus, led to the rule as it stands today: the syllabus is controlling, see supra note 7, although it must be read in light of the facts of the case and the questions before the court. See Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934); 14 Ohio Jur. 2d Courts §§ 246-249; Note, Deceptive Certainty of the Ohio Syllabus, 35 U. CIN. L. REV. 630, 637-43 (1966). See generally id. at 634-37 (history of rule).

15. Beck v. Ohio, 379 U.S. 89, 93 n.2 (1964) (emphasis added).

the written opinion is mere dictum.[16] Because the syllabus is written and approved by the court, it is fitting that it be given special status.[17]

In the recent[18] past it has become common for the Justices of the United States Supreme Court substantially to revise and redraft the syllabi in conjunction with writing the opinion of the Court.[19] The changes made by the Justices to the reporter's draft often reflect a change in emphasis given various parts of the Court's opinion; but on some occasions a Justice may insert into the syllabus matter which he is unable to place in the opinion because the concurring Justices refuse to accept the language at issue.[20]

While the extent of this editing is not publicly known,[21] it is clear that the rationale for the Detroit Lumber rule is no longer valid. This compels a rejection of the rule and a rethinking of possible alternatives. The Ohio rule seems appealing; it would greatly reduce the reading required of members of the bar, which has increased dramatically as the number of clerks assigned to each Justice has grown. However, the appeal of the Ohio rule is deceptive, because the rule is based on a syllabus which a majority of the court must approve. Because at present only the Justice who drafts a United States Supreme Court opinion revises the syllabus, a rule which made the

16. State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913).

17. But cf. Note, supra note 14, 35 U. CIN. L. REV. at 634-37 (recounting history of Ohio rule; concludes that point taken too far).

18. The reporter prepared the syllabus during October Term, 1930. Telephone interview with Robert W. Wales, Esq., Law Clerk to Justice O.W. Holmes, October Term, 1930 (April 27, 1982) (notes on file with Journal of Attenuated Subtleties).

19. Interview with Prof. Paul Gewirtz, Law Clerk to Justice T. Marshall, October Term, 1971 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties); Interview with Prof. John C. Jeffries, Jr., Law Clerk to Justice L. Powell, October Term, 1973 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties).

20. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (Rehnquist, J.). In this case, which involved an equal protection challenge to a California statutory rape law only applied to male defendants, the opinion cites both Reed v. Reed, 404 U.S. 71 (1971) ("fair and substantial relationship" test) and Craig v. Boren, 429 U.S. 190 (1977) (acknowledging a "sharper focus" when gender-based classifications are challenged). 450 U.S. at 468. The syllabus, however, cites only the less restrictive Reed standard. Id. at 464.

21. The Supreme Court is very secretive about almost all of its internal activities. See generally R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

syllabus controlling is unacceptable.22 However, a compromise between the current federal rule and the Ohio rule is obviously appropriate: the syllabus should be treated as one part of the Court's decision, not controlling but certainly not irrelevant.

22. Cf. James, Instructions in Supreme Court Jury Trials, 1 J. ATTEN. SUBT. 5, 8 & n.17 (1982) (discussing "unarticulated yet powerful principle of equality among Justices").

The Nobility Clauses: Rediscovering the Cornerstone

Manley W. Roberts*

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.
>
> Alexander Hamilton[1]

The framers of the United States Constitution recognized that the prohibition on titles of nobility was the fundamental source of a republican government. The prohibition appeared in the Articles of Confederation,[2] and the framers, making few comments but implying great reverence,[3] included the prohibition in two clauses of the new Constitution (one applicable to the federal government[4] and one applicable to the states[5]).

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1. THE FEDERALIST No. 84, at 512 (A. Hamilton) (C. Rossiter ed. 1961).
2. U.S. ARTICLES OF CONFEDERATION art. VI, cl. 3.
3. "The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment." THE FEDERALIST No. 44, at 283 (J. Madison) (C. Rossiter ed. 1961).
4. U.S. CONST. art. I, § 9, cl. 8: "No Title of Nobility shall be granted by the United States."
5. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . grant any Title of Nobility." The division of the prohibition into two clauses located in different parts of the Constitution has proven to be a blunder. The state version is located in the same clause as the frequently cited prohibition of impairment of contracts, making it difficult for researchers to locate headnotes pertaining to the Nobility Clause. See U.S.C.A. Const. art. I, § 10, cl. 1 (West 1981 Supp.). In this respect, at least, the Articles of Confederation were more intelligently constructed. See note 2 supra (federal and state prohibitions in same clause).

For two centuries the courts followed Hamilton's lead and said nothing about the Nobility Clauses.[6] In the last two decades, however, the clauses have experienced a major renaissance, as courts have come to recognize a radical equality principle inherent in the clauses. Judges have invoked the Nobility Clauses to prevent a citizen from changing his name,[7] to halt discriminations against illegitimates,[8] and to cast doubt upon the constitutionality of Indian laws.[9] Justice Stevens has championed the Nobility Clauses in the Supreme Court, authoring ringing dissents in Fullilove v. Klutznick[10] and Mathews v. Lucas.[11]

Yet the cases reveal ad hoc application of the clauses, and no scholar has developed a systematic framework for identifying violations. This Article proposes a multi-factored balancing test. The factors include: (i) whether the government has granted or recognized an actual title; (ii) whether that title

6. The only prominent cases call on the wording of the clauses to support broad generalities concerning the structure of the Constitution. See Downes v. Bidwell, 182 U.S. 244, 277 (1901) (Nobility Clause exemplifies a per se restriction on Congressional power); Legal Tender Case, 110 U.S. 421, 447 (1884) (Congress and states both prohibited from granting titles, unlike other prohibitions applying only to states).

7. In re Jama, 272 N.Y.S.2d 677 (Sup. Ct. 1966). Judge Maurice Wohl denied Robert Paul Jama's petition to change his surname to "von Jama." The court declared that for the state to authorize such a change would violate the Nobility Clause, since "von" is a prefix "occurring in many German and Austrian names, especially in the nobility." Id. at 678. However, Judge Wohl's reasoning was based on a xenophobic aversion to the German people, whom he described as morally reprehensible followers of "the philosophies of a monstrosity and his cohorts." Id. He continued: "An American should measure himself by the American standard, and paraphrasing the bold Romans of old, proudly proclaim himself Civis Americanus Sum." Id. See also Roberts, The Sorry State of New York Name Change Law, 2 J. ATTEN. SUBT. (1983) (forthcoming).

8. Eskra v. Morton, 524 F.2d 9, 13 n.8 (7th Cir. 1975) (opinion of then-Circuit Judge Stevens); see also note 11 infra.

9. Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 687 (1968) (en banc) (asking "whether the law has not conferred upon tribal Indians and their descendants what amounts [sic] to titles of nobility").

10. 100 S. Ct. 2758, 2803 & n.1 (1980) (Stevens, J., dissenting) (affirmative action plan violates equality principle of Nobility Clause).

11. 427 U.S. 495, 522 n.3 (1976) (Stevens, J., dissenting) (discriminating against illegitimate children attaches "badge of ignobility"). Justice Stevens's argument is textually and historically unsound. The framers of the Constitution permitted certain badges of ignobility. See, e.g., U.S. CONST. art. IV, § 2, cl. 3 (states required to deliver up fugitive slaves). Bastardy, moreover, was certainly known to the founding fathers. See, e.g., F. BRODIE, THOMAS JEFFERSON: AN INTIMATE BIOGRAPHY (1976).

bears a relation to the noble orders of Europe;[12] (iii) whether the "noble" individual also receives the traditional trappings and perquisites of nobility; (iv) whether the noble receives a tenurial interest in such trappings and perquisites which clearly distinguish the noble and his progeny from the common man; and (v) whether the perquisites include civil or military power. This test would apply equally to a grant of nobility by a state or by the federal government.[13]

The effect of the test is demonstrated by application to two governmental actions which might be challenged as grants of titles of nobility. One is the policy of certain state universities to recognize an elite cadre of undergraduates. For example, the University of North Carolina officially recognizes and provides facilities for the Order of the Golden Fleece.[14] The title derives directly from an order of eighteenth-century Austrian nobles, and membership insures unofficial but extraordinary influence in the University hierarchy.[15] However, the University does not itself select the members; more importantly, it grants none of the trappings of nobility. Finally, the benefits of membership are not tenurial. Weighing all of these factors leads to the conclusion that official recognition of the order does not rise to the level of a constitutional violation.

By contrast, the federal government's grant of a Congressional Medal of Honor together with all its ancillary benefits does violate the Nobility Clause.

12. The framers were particularly concerned about titles bearing a relation to noble orders of Germany and England. See 4 M.FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 32-36 (rev. ed. 1937) (statement of Charles Pinckney).

13. One might speculate that the use of the passive voice in the federal clause, see note 4 supra, distinguishes it from the state clause, which uses the active voice, see note 5 supra. However, the Supreme Court has stated that "Congress and the States equally are expressly prohibited from . . . granting any title of nobility." Legal Tender Case, 110 U.S. 421, 447 (1884).

14. The University provides meeting rooms for the order, and all members are automatically invited to the annual banquet given by the Chancellor. Interview with B. Steven Toben, former head of the Order of the Golden Fleece (April 24, 1982) (notes on file with Journal of Attenuated Subtleties).

15. Order members have easy access to the Chancellor's office to express their views on university policy. Interview with Steven W. DeVine, member of the Order of the Golden Fleece (April 28, 1982) (notes on file with Journal of Attenuated Subtleties).

Although the medal does not derive explicitly from an Old World title, it does bear a resemblance to an elite military order. The medal itself is an elaborate trapping of nobility.[16] Furthermore, legislation prevents both the medal and its concomitant pension from falling into the hands of common creditors.[17] Most significantly, the medal brings with it a tenurial right of special access to the corridors of power: the children of medal winners may bypass the ordinary admission process and apply directly to the President for admission to the service academies.[18] In sum, it is the exalting of military heroes and their families that currently poses the gravest threat to the republican form of government envisioned by the framers.

16. See 10 U.S.C. §§ 3741 (Army), 6241 (Navy), 8741 (Air Force) (1976) (medals authorized with "ribbons and appurtenances").

17. See, e.g., N.Y. CIV. PRAC. LAW § 5205(e) (medal exempt from bankrupt's estate); 38 U.S.C. § 562(c) (1976) (pension not subject to attachment, levy, or seizure).

18. 10 U.S.C. §§ 4342(c) (Military Academy); 6954(c) (Naval Academy); 9342(c) (Air Force Academy) (1976).

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ROBERT JAMES

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Suing Satan: A Jurisdictional Enigma

John J. Little*

American legal systems have witnessed a remarkable growth in the use of litigation as a means of redress for personal grievances and injuries.[1] This expansion has been fueled in part by the adoption of increasingly liberalized rules of procedure[2] and jurisdiction[3] and by the emergence of innovative theories whereunder liability is imposed.[4] Despite

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1. The increase in the quantity of litigation over the past few decades has been widely documented, particularly as it has greatly increased the workload of the judiciary and led to a need for more judicial clerks. See, e.g., Betten, Institutional Reforms in the Federal Courts, 52 IND. L.J. 63, 63 (1976) (discussing "law explosion" and "overloaded dockets found at all levels of our federal and state judiciaries").

2. For example, the federal rules governing class actions, joinder of claims and parties, and third-party practice have been greatly liberalized to allow all potentially interested parties to resolve common disputes in one proceeding. See FED. R. CIV. P. 1, 13, 14, 18-20, 23; BULL. YALE U., Aug. 20, 1982, at 46 (Yale Law School) (Procedure II course description characterizing "simple bipolar disputes" as "pretty much the stuff of history"). Expanded concepts of standing have also contributed to the boom in litigation. See, e.g., United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

3. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Cf. UNIF. INTERSTATE & INT'L PROCEDURE ACT, 13 U.L.A. 459 (1962). But see Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

4. See, e.g., Langan v. Valicopters, 88 Wash. 2d 855, 567 P.2d 218 (1977) (strict liability extended to action against cropduster and hiring farmer for spraying insecticides on organic crops of adjacent landowner); Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981) (department store employee forced to submit to strip search stated cause of action against manager and customer for tort of outrageous conduct); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 (1980) (plaintiff may recover for negligently inflicted psychic injuries without physical injury); Robak v. United States, 658 F.2d 471 (7th Cir. 1981)

this expansion, there remain many well-recognized injuries for which the law provides the injured party with no relief.[5] In a glaring example of this failure to provide a means of redress, no workable theories have been advanced to allow plaintiffs to assert claims against Satan and other netherworld entities, despite the historic and widespread recognition of the injurious activities in which they regularly engage.[6]

In the only reported decision of netherworld litigation, United States ex rel. Mayo v. Satan and His Staff,[7] a plaintiff was denied leave to proceed in forma pauperis on claims arising under 18 U.S.C. § 241 and 42 U.S.C. § 1983.[8] The court, without reaching

(doctors liable to parents for wrongful birth of child with pre-natally diagnosable defects); Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 351, 643 P.2d 954 (1982) (doctors liable to child for wrongful life).

5. For example, no claim for damages can be brought against a media defendant for an incorrect weather forecast despite the well-recognized and foreseeable injuries which may result from reliance upon an erroneous prediction. Nor does a cause of action lie for the injuries resulting from an erroneous decision by a sports offical. See Georgia High School Ass'n v. Waddell, 248 Ga. 542, 285 S.E.2d 7 (1981); Little, Sports Officiating Decisions and the Limits of Judicial Review, 2 J. ATTEN. SUBT. (1983) (forthcoming).

6. The ability of Satan, evil spirits, poltergeists, and other assorted netherworlders to work havoc on man has long been recounted. See, e.g., Genesis 3:1-15; Matthew 4:1-11; D.P. WALKER, UNCLEAN SPIRITS: POSSESSION AND EXORCISM IN FRANCE AND ENGLAND IN THE LATE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (1981); M. STARKEY, THE DEVIL IN MASSACHUSETTS (1949). See generally A. GAULD & A. CORNELL, POLTERGEISTS (1979); L. COULANGE, THE LIFE OF THE DEVIL (1930); J. ASHTON, THE DEVIL IN BRITAIN AND AMERICA (1896).

7. 54 F.R.D. 282 (E.D. Pa. 1971). By naming Satan and an unspecified "staff" in his complaint, plaintiff's pleadings were probably sufficient to subject any subordinate fallen angels to his claims, at least until discovery revealed the names of any subordinates. An alternative approach would have been to name as defendants "Satan and unknown devils." Another alternative would be an action against a class of defendants. See Note, Defendant Class Actions, 91 HARV. L. REV. 630 (1978).

8. Plaintiff's claims that defendants on "numerous occasions caused misery and unwarranted threats," had "placed deliberate obstacles" in plaintiff's path, and had "caused his downfall," were of little merit. 18 U.S.C. § 241 (1976) is a criminal statute and of no use to plaintiff in a civil action. See, e.g., Agnew v. Compton, 239 F.2d 226 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957). Similarly, plaintiff's claim under 42 U.S.C. § 1983 (1976) was insufficient as it did not allege that defendants acted under color of state law.

The court also noted, while not basing its decision on these factors, that it might be difficult to manage plaintiff's suit if it were later urged as a class action in favor of all those with similar claims against Satan, and that no instructions for service of process were included. In discussing a class action, the court was overreaching; no such action was

the merits of these claims, rested its decision upon the unlikelihood of establishing personal jurisdiction in the district. Such procedural problems, together with the limited jurisdiction of federal courts to hear non-federal causes of action,[9] make it unlikely that many civil claims could be asserted against Satan or similar defendants in a federal district court.[10] Since most injured plaintiffs must thus look to state courts for relief, this Article proposes an analysis under which a state court can hear claims against Satan.[11]

before it. Some writers have placed undue emphasis on the court's remarks regarding service of process. J. LANDERS & J. MARTIN, CIVIL PROCEDURE 176 (1981) (characterizing failure to include instructions for service as partial basis for dismissal).

9. Absent a statutory or constitutional cause of action, federal jusridiction over Satan would have to rest upon diversity. However, use of diversity presents several problems. First, it is unclear whether Satan is a citizen of any state or a "citizen or subject of a foreign state." 28 U.S.C. § 1332 (1976). If he does not fit one of these categories, diversity is not available; if he does fit either category, plaintiff has further problems, for he must specifically plead defendant's place of residence in a diversity action. FED. R. CIV. P. 8(a)(1); see Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829). Finally, an unusually large number of problems arise in trying to determine whether the amount in controversy satisfies the $10,000 requirement of 28 U.S.C. § 1332 (1976). This is particularly true in disputes arising out of contracts to sell a soul.

10. Because of the difficulty of obtaining federal jurisdiction for these actions, this Article is based on the assumption that actions against Satan will be brought in state courts. However, to the extent that federal subject matter jurisdiction can be obtained, similar questions of personal jurisdiction will arise.

11. The variety of possible claims which could be brought against such defendants is vast. Tort claims, similar to those pressed in Mayo, are obvious examples. A variety of contract claims could arise from attempts to enforce or to rescind a "sale-of-soul" contract. See, e.g., C. MARLOWE, THE TRAGICAL HISTORY OF THE LIFE AND DEATH OF DOCTOR FAUSTUS (1592) (contract between Lucifer and Faustus exchanging soul for unlimited knowledge and services of one Mephistophilis); Scratch v. Stone, described in S. BENET, The Devil and Daniel Webster, in 2 SELECTED WORKS OF STEPHEN VINCENT BENET 32 (1942) (alluded to in Mayo, 54 F.R.D. at 283); G. ABBOTT & D. WALLOP, DAMN YANKEES (1955) (contract between Devil and Washington Senators fan exchanging soul for American League pennant). Similarly, Satan might be subject to suit for property damage. See J. ANSON, THE AMITYVILLE HORROR (1977) (spirits in home damaged property and lowered property value). Finally, third-party complaints might be brought against netherworlders for contribution or indemnification, based upon the "the Devil made me do it" theory. See F. WILSON, THE DEVIL MADE ME BUY THIS DRESS (n.d.) (phonorecord).

There are, however, some Satanic contracts that would be unenforceable as contrary to public policy. One example is the wager for a soul. See, e.g., Daniels, The Devil Went Down to Georgia, in CHARLIE DANIELS BAND,

The primary obstacle to hearing such claims is the need of the forum state court to establish personal jurisdiction over the defendant.[12] The International Shoe decision[13] and its progeny,[14] governing the reach of a forum state's jurisdiction, mandate that the defendant have sufficient "minimum contacts" with the forum state so that "traditional notions of fair play and substantial justice" are not offended by requiring the defendant to defend a suit in that state.[15] Applying this test to Satan and similar defendants, a court should exercise jurisdiction if the plaintiff can show that the defendants maintained certain "minimum evil contacts" with that state.[16]

MILLION MILE REFLECTIONS 2, track 1 (1979) (phonorecord). While the courts will not enforce such gambling contracts, evidence of such activity could be offered to show that Satan had contacts in a given state. See infra notes 15 & 16 and accompanying text.

12. Prior to Shaffer v. Heitner, 433 U.S. 186 (1977), quasi-in-rem jurisdiction could be obtained over Satan by attaching souls owed to him under contracts of sale. See Harris v. Balk, 198 U.S. 215 (1905). However, Shaffer requires that "contacts" with the forum exist before any form of jurisdiction can be exercised; the presence of assets belonging to a potential defendant is not enough to subject him to jurisdiction to decide an unrelated cause of action. See Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1982 SUP. CT. REV. 77, 96-105; see generally R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 585-93 (1981).

13. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

14. See, e.g., Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

15. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In applying this test, the courts have held that sufficient "minimum contacts" exist where a non-resident executes a contract in the forum state, Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974), or where a plaintiff is injured in the forum state by a product produced by a non-resident, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (defendant could reasonably anticipate product's use in forum).

16. Cf. UNIF. INTERSTATE & INT'L PROCEDURE ACT § 1.03(b), 13 U.L.A. 459 (1962). Jurisdiction could be exercised over a claim arising from a contract between Satan and plaintiff if execution occurred in the forum, or if delivery of the soul was to occur there. For tort claims, plaintiff might show that defendant performed acts or caused results within the forum state, and that the injuries arose from these activities. The form of personal jurisdiction that would result in such cases is "specific" jurisdiction; the jurisdiction would extend only to causes of action which were related in some manner to the contacts which allow the exercise of personal jurisdiction. See Brilmayer, supra note 12.

To some extent, all states should be able to exercise jurisdiction over

Having established jurisdiction under the "minimum evil contacts" analysis, a plaintiff need only satisfy the forum state's requirements for service of process before proceeding. Personal service would of course present great difficulties; however, most jurisdictions authorize some alternatives,[17] such as substituted service[18] or service by publication.[19] In some cases, service may only require service upon the forum state's secretary of state;[20] however, states often require that service by publication or substituted service occur in the county or district in which the defendant resides or in which the action arose.[21] Plaintiffs bringing suit against Satan could satisfy these requirements by publishing notice in the county or district in which Satan maintains "maximum evil contacts."[22] For these

some claims against Satan and other netherworlders. It may be necessary for plaintiffs to rest jurisdiction on defendant's temptation centered activities rather than acts of a patently immoral character which can be attributed to defendants. Such acts--prostitution, gambling, drug abuse, political corruption--are potentially rare in some jurisdictions. For example, jurisdiction over Satan in Utah may be mainly based on temptation.

17. Personal service is not always constitutionally required. See Jacob v. Roberts, 223 U.S. 261 (1912) (when authorized by statute, substituted service constitutionally permissible when impractical or impossible to use actual personal service); 62 AM. JUR. 2D Process § 65. But cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (due process requires individual, mailed notice of action to settle accounting to known beneficiaries of trust).

18. See, e.g., S.D. COMP. LAWS ANN. § 15-6-4(e) (1967); see generally 62 AM. JUR. 2D Process § 66 (1972).

19. See, e.g., S.D. COMP. LAWS ANN. § 15-9-7 (1967) (authorizing service by publication in various circumstances in which defendant not within state); see generally 62 AM. JUR. 2D Process § 109 (1972).

20. This is often the case for actions against non-resident motorists and foreign corporations. See 8 AM. JUR. 2D Automobiles and Highway Traffic § 935 et seq. (1980); 26 AM. JUR. 2D Foreign Corporations § 516 et seq. (1968); cf. Burgess v. Ancillary Acceptance Corp., 543 S.W.2d 738 (Tex. Civ. App. 1976) (suit dismissed for failure to allege corporation non-resident).

21. Because service by publication is designed to provide actual notice, the requirement that publication occur in the locality in which defendant resides or has maximum contacts is sound. See, e.g., S.D. COMP. LAWS ANN. § 15-9-17 (1967) (publication in newspaper in county in which action pending).

22. It would be difficult to pinpoint the residence of Satan. This doubtless was part of relator's problem in Mayo. 54 F.R.D. at 283. However, one can replace the inquiry into "residence" with inquiry into where defendant has "maximum contacts" with the state. By providing for service in this location, defendants will be most likely to receive actual notice.

purposes, the courts should adopt a presumption that maximum evil contacts are maintained in the county or district that contains the forum state's capital city.[23]

The jurisdictional problems referred to in Mayo, then, are easily resolvable. Courts that use the approach suggested in this Article need not hide behind procedural technicalities; rather, they bravely can press on to reach the merits of claims against netherworlders.[24]

23. The county in which the state capital is located will often be the place of "maximum evil contacts." The potential for political corruption, graft, prostitution, bribery, and drug use in such areas and the corresponding temptation to engage in such activities is high. However, plaintiffs should be free to adduce evidence that other areas of the state are in fact the centers of "maximum evil contact." States in which such a showing is likely to be made include California (both San Francisco and Los Angeles are potentially more evil than Sacramento), New York (New York City clearly more evil than Albany), and New Jersey (almost any part of the state--Atlantic City, Newark, Jersey City, or Camden--more evil than Trenton).

24. This Article does not deal with the difficult problems of executing any judgment obtained against Satan. It is unlikely that any tangible assets can be found to have sold at an execution sale. However, it should be possible to garnishee ~~debts~~ souls owed to Satan, compelling payment to the judgment creditor instead of the contract creditor. Cf. supra note 12.

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Are Footnotes in Opinions Given Full Precedential Effect?

Robert A. James*

Indeed.[1]

* A.B., Stanford University, 1980; J.D. candidate, Yale Law School, 1983.

1. Approximately once a decade, a litigator who has run out of colorable arguments has asserted that particularly damning language in an opinion does not control the case at bar because the language appears in a footnote (this argument is herein referred to as the "Footnote Argument"). The federal and California courts have been the victims of such arguments five times since 1939, and have uniformly and vigorously defended a per se rule that the size of typeface does not bear in any way upon the weight accorded the ideas expressed therein. This Article seeks to sound the death knell of the Footnote Argument by providing a comprehensive review of the entire question and by demonstrating the futility of the argument in the face of the judicial declaration that note and text are of equal precedential value.

The earliest Footnote Argument was made in Gray v. Union Joint Stock Land Bank, 105 F.2d 275 (6th Cir.), rev'd on other grounds, 308 U.S. 523 (1939), in which counsel for farmers-appellants were dismayed by the Supreme Court's opinion in Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937). In Wright, the Court had noted that a court may halt proceedings at any time under the second Frazier-Lemke Act, a farmers' relief provision in the bankruptcy laws, if rehabilitation of the debtor appeared improbable. Id. at 462 n.6. The Circuit Court flatly rejected the contention of appellants that this footnote was not binding, holding that "while a footnote may sometimes make [an opinion] chaotic and bewildering, it is as much a part of it as that in the body." Gray, supra, 105 F.2d at 279. From the first appearance of the Footnote Argument, then, the courts have taken a per se approach that refuses to inquire into the level of chaos and bewilderment engendered by a footnote in an opinion.

The California District Court of Appeal took an identical stand in Melancon v. Walt Disney Productions, 127 Cal. App. 2d 213, 273 P.2d 560 (1954), a stockholder's derivative action. The California Supreme Court had ruled, in Melancon v. Superior Court, 42 Cal. 2d 698, 703 n.4, 268 P.2d 1050, 1053 n.4 (1954), that a third-party defendant may move to require the plaintiff to furnish security for costs. The lower court on remand dismissed the Footnote Argument with a footnote of its own, obliquely citing Gray; the note has been praised as a fine piece of judicial prose, D. MELLINKOFF, THE LANGUAGE OF THE LAW 443-44 (1963), and is reproduced in toto in the Appendix hereto. The Gray and Melancon cases have been cited approvingly by judges in both the federal and California court systems. See United States v. Egelak, 173 F. Supp. 206, 210 (D. Alaska 1959); People v. Jackson, 95 Cal. App. 3d 397, 402, 157 Cal. Rptr. 154, 157 (1979); see

generally 21 C.J.S. Courts § 221 at 407 & n.3 (1940); 20 AM. JUR. 2D Courts § 189 at 525 & n.20 (1965). But cf. Kirkland, Rethinking United States v. Detroit Timber & Lumber Co., 1 J. ATTEN. SUBT. 16 (1982) (per se rule may not apply where matter in footnote is not represented in the syllabus in jurisdictions adhering to the Ohio rule).

An independent and perhaps more satisfying defense of the per se rule, however, is found in Phillips v. Osborne, 444 F.2d 778 (9th Cir. 1971), in which the Court of Appeals held itself bound by the language of its own decision, Phillips v. Osborne, 403 F.2d 826, 828 n.2 (9th Cir. 1968), on the applicability of the abstention doctrine. The court rejected the Footnote Argument thus:

> The appellees would down-grade the significance of that language because it appears in a footnote. We think that the location, whether in the text or in a footnote, of something which the writer of an opinion thinks should be said, is a matter of style which must be left to the writer. A notable example of a footnote of great significance is footnote No. 4 in the opinion of Mr. Justice Stone (later Chief Justice Stone) in United States v. Carolene Products Co., 304 U.S. 144, [152 n.4 (1938)]. See, among the many comments which that footnote has excited, that of Judge [Billings] Learned Hand, "Chief Justice Stone's Concept of the Judicial Function" in "The Spirit of Liberty" (Dillard Ed. 1952) 201, 205.

Phillips v. Osborne, 444 F.2d 778, 782-83 (9th Cir. 1971). The per se rule is therefore founded upon considerations of the writer's individual autonomy, cf. I. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (1785) (L. Beck trans. 1969), and upon the possibility of greatness to which all footnotes, like all texts, may aspire.

APPENDIX

The full text of the relevant note in Melancon v. Walt Disney Productions, 127 Cal. App. 2d 213, 214 n.*, 273 P.2d 560, 561 n.* (1954), is as follows:

> There is no merit in plaintiff's contention made at the oral argument that the ruling of the Supreme Court was not binding since it appeared in the footnote in the opinion. A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect. See cases cited 21 C.J.S. (1940) p. 407, Courts, footnote 3.

The rhetorical flourish of identifying the "cases" cited in a Corpus Juris Secundum footnote as authority for the per se rule is appealing in its symmetry. Its luster is tarnished, however, by the fact that only one case is actually cited in 21 C.J.S. Courts § 221 at 407 n.3, or in the 1954 Supplement thereto--the Gray case, discussed supra. The logic and style of the note, of course, outweigh the slight inflation of supporting authority.

Journal of Law editors' note: For Bernard L. Diamond's article *On the Spelling of Daniel M'Naghten's Name* — which the *Journal of Attenuated Subtleties* had permission to reprint in its entirety back in 1982, but which we do not have permission to reprint today — please see pages 84 to 88 of volume 25 of THE *Ohio State Law Journal* (1964).

Special Project: A System of Citation for Phonograph Records*

Music has long exerted a powerful influence over Man's cognitive and emotive faculties, and many of the humanities and social sciences have been enriched by recognition of this influence. Scholars in fields such as religion, anthropology, art, and computer science have examined musical forms and expressions in attempts to gain deeper understanding of their respective disciplines.[1] Law, apart from its specialties concerning the public and private regulation of music,[2] has not followed suit. Although music is undoubtedly capable of lending support and giving insight in the examination of many legal doctrines and social problems, only one citation of a musical work on its modern embodiment, the phonograph record or phonorecord,[3] has been discovered.[4]

* The editors thank Douglas L. Baldwin for his assistance in preparing for print the examples used in this Article.

1. See, e.g., J. FRAZER, THE GOLDEN BOUGH (1890-1915) (religion); C. LEVI-STRAUSS, LE CRU ET LE CUIT (1964) (anthropology); K. CLARK, CIVILISATION (1969) (art); D. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1979) (computer science).

2. Writers in fields such as copyright have long found it necessary to refer to music. See, e.g., Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Bright Tunes Music Corp. v. Harrisongs Music Ltd., 420 F. Supp. 177 (S.D.N.Y. 1977); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924); see generally R. BROWN, KAPLAN AND BROWN'S CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 219-247 (3d ed. 1978).

3. The term "phonorecord" has been adopted by Congress in the Copyright Act of 1976. 17 U.S.C. § 101 (Supp. IV 1980). It is accordingly used in this system of citation.

4. Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1037 n.* (1980) ("Cf. B. SPRINGSTEEN, DARKNESS ON THE EDGE OF TOWN (Columbia Records, Inc. 1978)."). This citation form is mystifying. Why is the name of the publisher given, when this information is omitted from most other types of citations? For the citation under the system proposed by this Article, see infra.

The reason for this apparent absence of musical inspiration and explanation may be the absence in the otherwise comprehensive structure of law review citation[5] of any system of citation of phonograph records. The obsession in legal scholarship with proper form of citation[6] may well have inhibited such references in the past. This situation must not be allowed to continue, especially in the wake of the outburst in this half-century of music addressing social issues.[7] Accordingly, the editors of this Journal set forth a reasonably complete system of citation of musical material on phonograph records, together with related written material, for the consideration and use of the profession.

5. See A UNIFORM SYSTEM OF CITATION (13th ed. 1981).

6. See, e.g., 95 HARV. L. REV. (strict scrutiny standard). But cf. 91 YALE L.J. (harmless error standard); 49 U. CHI. L. REV. ("common sense dictates otherwise" standard).

7. Although music embodying theories of political philosophy has existed for some time, see, e.g., R. STRAUSS, ALSO SPRACH ZARATHUSTRA (H. von Karajan cond. 1974) (phonorecord) (first performed in 1896), and ancient folk music often has dealt with problems of social justice, see, e.g., Good King Wenceslas, in EDWARD BARRINGTON CHORALE, SPIRIT OF CHRISTMAS 1, track 3 (n.d.) (phonorecord), the emergence of rock and folk-rock music since the 1950's has represented a qualitative leap in the applicability of phonograph records to legal discourse.

17A Phonograph Records

Cite phonograph records according to rule 17A.1; cite liner and cover material according to rule 17A.2.

The citation forms for authors, titles, editions, and dates specified for books (rules 15.1, 15.2, 15.4, and 15.5), should be followed to the extent applicable when citing records.

17A.1 Phonograph Records

Cite phonograph albums by disc number, if more than one (cf. rule 3.2); performer or composer (either an individual, multiple individuals, who are cited similarly to joint authors, or a group); title of album or album set; side and track number, if only part of a disc is cited (rule 17A.3); a parenthetical identifying (i) the transcriber (transc.), conductor (cond.), performer (perf.), or soloist (solo.), if needed, and (ii) the date of the release; and the parenthetical "(phonorecord)".

Most "serious" music (e.g., works for orchestra, classical music) should be cited by composer, while most "popular" music should be cited by performer. When in doubt as to which name to use, refer to the record itself and its jacket and spine; follow the designation used by the publisher.

SIMON & GARFUNKEL, BOOKENDS (1968) (phonorecord).

But:

P. SIMON & A. GARFUNKEL, CONCERT IN CENTRAL PARK (1981) (phonorecord).

L. VAN BEETHOVEN, SYMPHONY NO. 3 (K. Böhm cond. 1962) ("Eroica") (phonorecord).

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M. MUSSOURGSKY, PICTURES AT AN EXHIBITION (M. Ravel transc., H. von Karajan cond. n.d.) (phonorecord).

Only the name performer need be cited, unless a reference to a backing performer is desired.

B. SPRINGSTEEN, DARKNESS ON THE EDGE OF TOWN (1978) (phonorecord).

N. YOUNG, RUST NEVER SLEEPS (1979) (phonorecord).

Or:

N. YOUNG & CRAZY HORSE, RUST NEVER SLEEPS (1979) (phonorecord).

Use the title given in J. OSBORNE, RECORD ALBUMS 1948-1978 (2d ed. 1978), the Schwann Record and Tape catalog, or a similar publication to cite an album that does not have a title provided by the publisher. If a popular name is commonly used, provide the name parenthetically:

THE BEATLES, THE BEATLES (1968) (phonorecord) ("White Album").

LED ZEPPELIN, LED ZEPPELIN IV (1971) (phonorecord).

If citing a particular work within an album, a rule analogous to rule 15.5.1 is used. If all the works in the album are by the same composer or performer, the name, including an initial, of the composer or performer is given, in large and small capitals. If the works are not all by the same composer or performer, or if it is relevant to cite the particular work to an individual or group that is not being cited as the composer or performer for the entire album, then only the last name of the composer or performer is given, in regular roman type. In this case, it is necessary to provide the performer or composer for the entire album before the album name. In either case,

the individual work title is printed in italics and the album title is printed in large and small capitals.

SIMON & GARFUNKEL, *I am a Rock,* in SOUNDS OF SILENCE 2, track 5 (1965) (phonorecord).

J.S. BACH, *Six-Part Ricercare,* in THE MUSICAL OFFERING 1, track 9 (Claves Bach Soloists perfs. 1970) (phonorecord).

Springsteen, *Talk to Me,* in SOUTHSIDE JOHNNY AND THE ASHBURY JUKES, HEARTS OF STONE 2, track 1 (1978) (phonorecord).

When referring to specific material within such a source, include both the side and track on which the source begins and the side and track on which the specific material appears, separated by a comma:

W. MOZART, *Symphony No. 41,* in SYMPHONIEN NR. 40 & NR. 41 (H. von Karajan cond. 1978) 2, track 1, 2, track 2 ("Jupiter" symphony) (2d movement, *Andante cantabile*) (phonorecord).

When possible, cite to omnibus collections by a composer or performer rather than to "greatest hits" collections. Thus:

J.S. BACH, MASS IN B MINOR (K. Münchinger cond. 1971) (phonorecord).

Not:

J.S. BACH, EXCERPTS FROM MASS IN B MINOR (H. Achenbach cond. 1970) (phonorecord).

Bach, *Mass in B Minor,* in BAROQUE TUNES THE WHOLE WORLD LIKES TO HUM 1, track 3 (Anon. cond. 1967) (phonorecord) (not available in stores).

17A.2 Liner and Jacket Material

Cite liner and jacket (cover) material according to the form for prefaces and forewords (rule 15.2).

Springsteen, *Jacket Notes* to SOUTHSIDE JOHNNY AND THE ASBURY JUKES, I DON'T WANT TO GO HOME (1976) (phonorecord).

Liner Notes to BLONDIE, PARALLEL LINES (1978) (phonorecord).

Ohlsson, *Jacket Notes* to F. CHOPIN, THE TWENTY-FOUR PRELUDES, OP. 28 (G. Ohlsson perf. 1974) (phonorecord).

17A.3 Subdivisions: Sides and Tracks

Give the side number after the album title, but before the parenthetical phrases, without any introductory abbreviation. Give the track number, if needed, after the side number, with the notation "track".

C. BOLLING, SUITE FOR FLUTE AND JAZZ PIANO 2, track 3 (J.-P. Rampal & C. Bolling perfs. 1975) (phonorecord).

L. VAN BEETHOVEN, *Sonata No. 21,* in VLADIMIR ASHKENAZY PLAYS BEETHOVEN SONATAS 1, track 4, 2, track 1 (1975) ("Waldstein") (2d movement, *Molto adagio*) (phonorecord).

Never use "side"; use "at", preceeded by a comma, if the side number may be confused with another part of the citation:

Fassert, *Barbara Ann,* in THE BEACH BOYS, BEACH BOYS '69, at 2, track 5 (1976) (phonorecord).

Do not give a disc number in a multi-disc set in which the sides of all discs are numbered in one sequence:

> Mendelssohn, *Trio No. 1,* in FOUR FAVORITE TRIOS 6 (Istomin-Rose-Stern Trio perfs. 1968) (phonorecord).
>
> Page, *Bron-Yr-Aur,* in LED ZEPPELIN, PHYSICAL GRAFFITI 3, track 2 (n.d.) (phonorecord).

But:

> Wonder & Wright, *If You Really Love Me,* in 3 THE GREATEST 64 MOTOWN ORIGINAL HITS 2, track 4 (n.d.) (phonorecord).

17A.4 The Hear Signal

In citing phonograph records, replace the signal "see" with "hear", "see also" with "hear also", "but see" with "but hear", and "see generally" with "hear generally" (rule 2.3). When more than one signal is used in a string citation, signals containing the word "hear" should appear immediately after the corresponding "see" signal. Thus:

> *See* T. WOLFE, YOU CAN'T GO HOME AGAIN (1940). *But hear* SIMON & GARFUNKEL, *Homeward Bound,* in PARSLEY, SAGE, ROSEMARY & THYME 1, track 4 (1966) (phonorecord); *hear generally* Ten Years After, *Goin' Home,* in WOODSTOCK (1971) (phonorecord).

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Case Note

American legal scholarship suffered a devastating blow in the mid-1930's with the abolition of the Case Notes from the major law reviews. These Notes distilled into two (or on rare occasions three) tightly packed paragraphs the facts and holding of a contemporary decision, together with a terse evaluation of its "correctness" as examined against the immutable fabric of the common law. The Note of the pre-Realist days is more like the comments of a professor on a court's examination blue-book than the lengthy rationalizations, predictions, and exhortations of the modern legal observer. The dogmatism and confidence of the Case Note, encountered in an age of relativism and nihilism, are nothing short of refreshing; wherefore we include as an occasional feature of the Journal specimens of these judicial report cards, these forgotten stanzas of the lost Langdellian idyll.

--The Editorial Board

PERSONALTY--LARCENY--TITLE--TWO JUSTICES INTIMATE THAT A THIEF BECOMES OWNER OF STOLEN CHATTEL.--Robert Rivera was indicted and convicted of receiving stolen property. Two weeks after his conviction, a second indictment was returned, charging Rivera with, inter alia, aggravated robbery; both indictments were "based upon the same theft" on August 13, 1980 of money and a motorcycle owned by Francis J. Kelly. Rivera moved to dismiss the second bill on the basis of the double jeopardy clause, U.S. CONST. amend. V, as applied to the states. The Ohio trial and appellate courts refused to dismiss the indictment, whereupon Rivera petitioned the United States Supreme Court for a writ of certiorari. Held, the petition is denied. Mr. Justice Brennan's dissent to the denial, which Mr. Justice Marshall joined, is nonetheless of great interest to students of the law of personal

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property. The bulk of the dissent concerns Justice Brennan's interpretation of the "same offense" requirement in double jeopardy jurisprudence, compare North Carolina v. Pearce, 395 U.S. 711, 717 (1969) with Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring), and is here irrelevant. The critical language occurs in Justice Brennan's statement of the facts: "Petitioner was arrested on August 13, 1980, after one Francis J. Kelly reported that petitioner had taken his motorcycle from him at knife point earlier that day, along with title to the motorcycle and some cash." Rivera v. Ohio, 103 S. Ct. 271, 272 (1982) (Brennan, J., dissenting from denial of certiorari) (emphasis supplied).

The interpretation of the consequences of theft upon title embodied in this statement of facts is clearly contrary to venerated and established principles of the law of personalty. Few tenets of the law are cherished more dearly than the proposition that a thief takes, and in general may pass, no title in the stolen property. See R.A. BROWN, LAW OF PERSONAL PROPERTY § 67 (2d ed. 1955); see also 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 354 (1923); 2 W. BLACKSTONE, COMMENTARIES *449 (English common law heritage). The state courts consistently so hold, see 63 AM. JUR. 2D Property § 46; cf. U.C.C. § 2-403; the federal courts honor this position, see, e.g., Dennis v. United States, 372 F. Supp. 563, 567 (E.D. Va. 1974) (construing Virginia law). Most important, the Supreme Court itself has expressly held that title may not be taken from the owner of personal property except voluntarily and according to law. See The Idaho, 93 U.S. 575, 583 (1876) (general common law) ("the title of the true owner of personalty cannot be impaired by the unauthorized acts of one not the owner"); cf. Stoddard v. Chambers, 43 U.S. (2 How.) 284, 318 (1844) (real property context) ("[n]o title can be held valid which has been acquired against law"). The revelation that two Justices of the Supreme Court apparently think otherwise may indicate a new and ugly trend in Anglo-American legal thought, a trend with unconscionable implications for the incentives for thievery and profound consequences for the future of private property.

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could be said about
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$2 the issue, $4 the volume.

1. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 632 (Johnson, J., dissenting) (1813).
2. In re Estate of Smith, 7 Utah 2d 405, 409, 326 P.2d 400, 402 (1958) (Crockett, J., dissenting).
3. Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904).
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8. Bailey v. Patterson, 369 U.S. 31, 33 (1962).
9. Ex parte Poresky, 290 U.S. 30, 32 (1933).
10. Rosado v. Wyman, 397 U.S. 397, 404 (1970).
11. Crump v. Hill, 104 F.2d 36, 38 (5th Cir. 1939), quoted in Griggs v. Provident Consumer Discount Co., 51 U.S.L.W. 3413, 3415 (U.S. Nov. 29, 1982) (Marshall, J., dissenting).
12. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 152 (S.D.N.Y. 1924) (B.L. Hand, J.) (quoting "Hough, J., dissentiente" in Jewelers' Circular Publihing Co. v. Keystone Publishing Co., 281 F. 83, 95 (2d Cir. 1922).


LIBRA

Almanac Excerpts

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AKA

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&

Reader

of Exemplary Legal Writing From the Year Just Passed

2019

edited by

Ross E. Davies & Cattleya M. Concepcion

Journal of Law editors' note: Page references in the text of works published here are to pages in the ink-on-paper "First sidereal edition" of the 2019 *Almanac & Reader*. Page references in the table of contents, credits, and footers here, however, are to pages in this, the "Ethereal Version" of the 2019 *Almanac & Reader*. And we've spelled Lucy Salyer's name correctly here, not as it was misspelled in the "First sidereal edition." *See* 22 Green Bag 2d 277.

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Ethereal Version.

There are two versions of the 2019 *Almanac & Reader*. One is this, the "Ethereal Version," in *The Journal of Law*. The other is the "First sidereal edition." Eligible *Green Bag* subscribers should receive one version or the other, but not both. Also, there is a supplement — our "Single Sheet Classic #9" — to this year's edition (intended for some of our extravagant subscribers) in the form of a large piece of paper mailed separately.

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Editorial Policy. We publish authors' ideas mostly in their own words. We fix mistakes and make minor changes to produce an attractive readable journal.

Author Notes. Gratitude to RAs is nice. Colleagues who make major contributions should share the byline. Recognize those who help in small ways with something printed by Hallmark, not the *Bag*.

Submissions. Please send them to editors@greenbag.org. We welcome anything interesting, law-related, well-written, and short (no more than 5,000 words, including no more than 50 footnotes).

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Preface

Almanacs of Law

This is the 14th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

I.

A Slightly Different Title for this Almanac & Reader

Q: Why the title change?
A: Some old almanacs.

The answer is a bit grim, but good, we think. This year, for the first time, the full title of our long-running annual begins "The Green Bag Almanac of Useful and *Interesting* Tidbits" rather than the customary "Green Bag Almanac of Useful and *Entertaining* Tidbits." That is because some of the more substantial tidbits in this year's edition include passages that do not qualify as entertaining by any reasonable measure.

This volume features complete (or very nearly complete) facsimiles of 11 old almanacs, each of which contains some material relating to law or lawyers. It should come as no surprise that some of that material is not pleasant. A life in the law involves at least some experience with the ugliness as well as the loveliness of humanity. Popular portrayals of the law and lawyers have always tended to highlight, and exaggerate, the extremes of that experience — and in days gone by almanacs of the sorts reproduced in this volume were very popular. (Indeed, pre-20th-century almanacs were, in some respects, analogous to both Google and Facebook today: they were the universally used go-to resources for useful information . . . and for confirmation of one's own prejudices.)

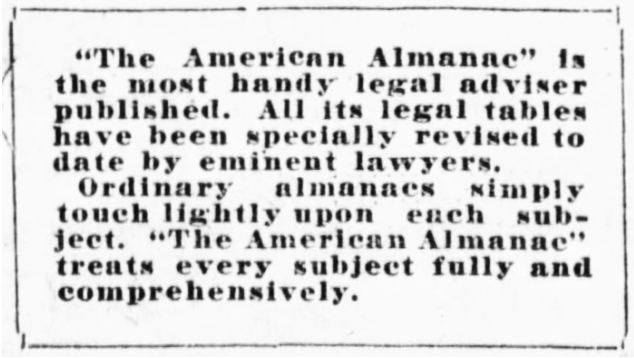
The most obvious example here of both the loveliness and the ugliness of humanity is the *American Anti-Slavery Almanac*. Its appealingly abolitionist themes are mixed with treatments of race and gender that would be considered unacceptable if they were expressed today. Most of the other almanacs here — and especially *Crockett* and *Rough and Ready* — also mix the appealing with the appalling.[1] And every one of them includes law and lawyers in the

[1] *See, e.g.*, Catherine Falzone, *Davy Crockett Almanacs*, in From the Stacks (New-York Historical Society June 19, 2012), blog.nyhistory.org/davy-crockett-almanacs/.

mix. All of this — the heartening, the disturbing, the intriguing, and so on, all spangled with shimmerings of law — makes these almanacs — each with its own hodge-podge characteristic of the cultural and chronological context in which it originally appeared — worthwhile reading for lawyers interested in our own history. Thus, "Interesting" seems like a better term than "Entertaining" this year.

Which is not to say that this volume lacks entertaining features. We expect, for example, that all readers — and especially librarians — will enjoy the manifold insights and timeless attributes of *The Old Librarian's Almanack or An Astronomical Diary of Coelestial Motions & Aspects For the Year of Our Lord Christ 1774*.[2] In addition, there is, as always, plenty in our superb set of years-in-review to prompt chuckles and eye-rolls. Moreover, the respectable authorities who have recommended the exemplary legal writing honored in this volume occasionally deliver pretty entertaining lines themselves. Finally, we do manage to have some fun with almanacs of various sorts throughout.

One aspect of the work on this volume that has turned out to be both a great disappointment and a great inspiration for us is the tremendous quantity of law-related content (some explicit, some between the lines) in old almanacs of all sorts, . . .


"The American Almanac" is the most handy legal adviser published. All its legal tables have been specially revised to date by eminent lawyers.

Ordinary almanacs simply touch lightly upon each subject. "The American Almanac" treats every subject fully and comprehensively.

Advertisement, San Francisco Examiner, December 24, 1902, at 5.

. . . most of which we did not have room for here. So, you should not be surprised if some year we issue another *Almanac & Reader* filled with "Interesting" old almanacs.

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[2] To learn more about that extraordinary booklet, read Wayne A. Wiegand's classic 1979 study published by Beta Phi Mu, the international honorary society for library and information studies.

II.
A Slightly Tardy Almanac & Reader

Q: Why did this almanac take so long to print?
A: One modern publisher.

The answer is easy and educational, though it takes some telling. Read Cattleya Concepcion's description (starting on page 526 below) of her dealings with HarperCollins.

III.
A Slightly Revised List of Exemplary Legal Writing

Q: Why another round of changes?
A: One likeable but tiresome system abandoned.

We still like the system we had planned to use to select exemplary legal writing for this year's *Almanac & Reader*. As we said last year,

> To us, [that system] does not yet feel corrupt or unfair. But then, we still feel that we are honest and diligent and fair-minded, and that the voters on our secret panel are too. We might be wrong about some of that. You will, of course, judge for yourself, and we will carry on as best we can.

Since then, however, experience has taught that while we were and are correct about the integrity and fairness of the system, it has become too darned tiresome to administer.

For example, in last year's *Almanac & Reader* we also said,

> The ballot [for 2017 legal writing honorees] lacked nominees in the "briefs filed in a state or federal appellate court" . . . . In [the previous] year's *Almanac & Reader* we gently jawboned against self-promotion. Maybe that gentleness was why every brief nominated for this year's *Almanac & Reader* was submitted by a lawyer whose name was on the brief or who worked for a lawyer whose name was on the brief. So, now we are being less gentle about the jawboning: If the *Green Bag* ever goes into the business of knowingly facilitating self-promotion by writers or publishers, we will retain our high-toned professionalism (of course), but we will also charge for the service.[3]

[3] *See, e.g., Welcome to the entry site for The Pulitzer Prizes in Journalism!*, entrysite.pulitzer.org ("Entry fee: $50 per entry - paid by credit card only (MasterCard, Visa, American Express and Discover).").

The result? Almost every brief nominated for this year's *Almanac & Reader* was submitted by a lawyer whose name was *not* on the brief and who was *not* an employee of a lawyer whose name was on the brief, but who was a close co-worker or close relative or former co-clerk of a lawyer whose name was on the brief. (No, figuring all that out was not difficult, though it did take a lot of time. And yes, figuring all that out was not heartening.) So much for the spirit of the rule. And the few nominations that were not of this sort were of the types we'd seen in quantity the year before: self-nominations and nominations by subordinates.

Variations on this story (some involving more obviously unethical or antisocial behavior) could be told about other categories in which we had planned to honor exemplary legal writing. But why waste your time with more editorial whining? The bottom line is that we aspire to employ a system that both (a) has an integrity enabling us to honor with confidence some of the best of legal writing each year, and (b) has a simplicity enabling us to do that work efficiently (and happily). In 2017 and 2018, policing the integrity of the nominating process and protecting the confidentiality of the balloting process — both of which we are proud to have preserved — became too complicated and generally burdensome and unpleasant. So, we ended up tinkering again.

IV.
A Slightly Longer List of Respectable Authorities

Q: What is the new system this time?

A: One likeable and promising system extended.

Fortunately, we had an excellent alternative model at hand. Since 2015, we've been using a special system to select books worthy of recognition for the exemplary legal writing between their covers. As we explained in the 2016 *Almanac & Reader*,

> *Who could nominate?* We enlisted a few respectable authorities to give us lists of their five favorite new law books — with short explanations, which we have published, with the listers' bylines, in this *Almanac*. *What could they nominate?* This time around, any books about law with 2015 publication dates. We will treat other types of writing this way in the future — news reporting, scripts, and poetry seem like good candidates — but for this year we started simple.

And that system has worked smoothly — with, as best we can tell, integrity and simplicity — ever since.

At the time, we had no idea that judicial opinions would be the second type of writing to which we would extend this system. But that's how things turned out.

During 2018, we enlisted six judges and former judges — respectable authorities on both the reading and the writing of judicial opinions — to recommend a handful of exemplary judicial opinions written by other judges and published in 2018. A gratifyingly high two-thirds of that group did in fact deliver their recommendations, accompanied in all cases by thoughtful commentary. You will find their recommendations in the January, April, July, and November sections of this *Almanac & Reader*. Each set of recommendations is accompanied by the complete text of one of the recommended works.

We were also fortunate to retain all four of our excellent original recommenders of books. Femi Cadmus, Lee Epstein, and Cedric Powell returned to recommend books again, and Susan Phillips Read became one of our inaugural recommenders of judicial opinions. We also enlarged our roster of respectable authorities on books by enlisting nine more senior scholars to recommend books published in 2018. Each new recommender committed to collaborate with a junior (in years toiling in the fields of legal writing, not necessarily in years on this earth) respectable authority of their own choosing. A disappointingly low one-third of that new group delivered recommendations. But the recommendations and associated commentary of the three sets of collaborators who did deliver was most gratifying. You will find their good work, and the work of our veterans, in the February, March, May, June, August, and September sections of this *Almanac & Reader*.

Assuming all goes well this year, you should expect to see more of the same sort of treatment of books and of judicial opinions (with perhaps a few more recommenders) in next year's *Almanac & Reader*. And perhaps similar treatment of another category or two.

Working with these respectable authorities and putting their good work in print has been a great pleasure for us and, we believe, will be a great service to our community. Please do not hesitate to let us know what you think.

IV.
Other Business

Our Goals

Our goals remain the same, year after year: to present a fine, even inspiring, year's worth of exemplary legal writing — and to accompany that fine

work with a useful and interesting (and sometimes entertaining) potpourri of distracting, thought-provoking oddments. Like the law itself, the 2018 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

Our Thanks

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by thanking and apologizing to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to O'Melveny & Myers LLP (especially Nadine Bynum and Greg Jacob); to Paul Kiernan for helpful tips; to Amanda Zimmerman of the Library of Congress for kindly and generous advice and assistance with the *The Rhode-Island Almanack For the Year, 1741*; and to the extraordinary Ira Brad Matetsky, who never fails to make any work he touches better.

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

Ross E. Davies
June 2, 2019

Gregory Jacob, Rakesh Kilaru,
Kristi Gallegos & Brian Quinn[†]

THE YEAR IN LAW

2017-2018

NOVEMBER 2017

November 1: President Donald Trump calls on Congress to abolish the Diversity Visa Lottery Program, through which Sayfullo Saipov — who the day before killed eight people in a New York City terrorist attack by driving a truck onto a bicycle path — gained admission to the U.S. from Uzbekistan in 2010. • Harvey Weinstein files a lawsuit in Delaware Chancery Court against the Weinstein Company, seeking documents to help defend himself against rape and sexual harassment claims. The Weinstein Co. responds that

[†] Greg Jacob and Brian Quinn practice law in the Washington, DC office of O'Melveny & Myers LLP, Kristi Gallegos is Senior Legal Counsel with Western Digital Corporation, and Rakesh Kilaru practices in the Washington, DC office of Wilkinson Walsh + Eskovitz.

Weinstein is actually seeking to gain an improper advantage in an ongoing arbitration in which Weinstein is contesting his ouster from the company. • The U.S. Senate confirms Michigan Supreme Court Justice Joan Larsen, who is on President Trump's "List of 20" from which he has pledged to pick any Supreme Court nominees, to the Sixth Circuit Court of Appeals. • The Louisiana Court of Appeal strikes down Governor John Edwards's executive order purporting to require all state agencies to include in their contracts with service providers provisions prohibiting discrimination against LGBT workers, saying that the Governor could not go beyond ensuring the faithful execution of existing Louisiana anti-discrimination law.

November 2: Former Akin Gump partner and former U.S. Department of Justice attorney Jeffrey Wertkin announces he will plead guilty to charges after he attempted to sell two companies sealed False Claims Act complaints he had taken with him when he left the government the year before.

November 3: A federal district court in Texas applies the attorney immunity doctrine to dismiss a $5 billion lawsuit against law firm Proskauer Rose LLP for its alleged role in abetting the $7 billion Ponzi scheme of Robert Stanford.

November 6: *Law360* reports that there has been a significant uptick in BigLaw pro bono challenges to government policies since the election of President Trump, particularly in the areas of immigration and legal protections for LGBT individuals.

November 7: The *New York Times* fires Boies Schiller Flexner LLP, alleging that while representing the *Times* on another matter, litigator David Boies waged a "reprehensible" secret campaign on behalf of Harvey Weinstein that included the use of former Mossad agents employing fake identities to try to kill a *Times* story about Weinstein's sexual misconduct. Boies asserts that an "advance conflict waiver" signed by the *Times* resolved any potential ethical concerns.

November 8: The U.S. Supreme Court releases its unanimous decision in *Hamer v. Neighborhood Housing et al.*, holding that Federal Rule of Civil Procedure 4(a)(5)(C)'s one-month time limit for extensions on notice-of-appeal filings is not jurisdictional and may in certain circumstances be further extended.

November 9: The U.S. Court of Appeals for the Second Circuit allows Dallas Cowboy star Ezekiel Elliot's suspension by the NFL for allegedly abusing a former female acquaintance to go into effect pending appeal.

November 10: U.S. Supreme Court Justice Elena Kagan recuses herself from further participation in *Jennings v. Rodriguez* after her chambers belatedly

discovers that she had greenlighted a filing in the case while serving as U.S. Solicitor General. The case, which concerns whether the Due Process Clause requires that immigrants who have been detained for six months pending removal proceedings be given bond hearings, had been held over from the previous term and reargued in October.

November 13: The U.S. Court of Appeals for the Ninth Circuit reverses most of an October 17 injunction entered by the U.S. District Court for the District of Hawaii against the Trump Administration's third "travel ban," leaving in place only provisions related to people with a "bona fide relationship" to U.S. persons or entities.

November 16: U.S. Senate Judiciary Committee Chairman Chuck Grassley announces he will no longer strictly enforce informal Senate "blue slip" rules allowing Senators to indefinitely block judicial nominees from their home state. • The U.S. Court of Appeals for the Ninth Circuit rules that Fox's hit show "Empire" does not infringe the trademark of hip-hop record label Empire Distribution, Inc., noting that the title choice was protected by the First Amendment because it was made for "artistically relevant reasons."

November 17: U.S. Attorney General Jeff Sessions issues a policy banning the Justice Department from issuing "guidance documents that purport to create rights or obligations on persons or entities outside the Executive Branch." • President Trump adds five names to his list of potential Supreme Court nominees, including D.C. Circuit Judge Brett Kavanaugh.

November 20: 21st Century Fox enters into a $90 million settlement over numerous workplace harassment complaints relating to Fox News, which includes a commitment to create a new advisory council on workplace culture. • San Francisco-based Sedgwick LLP shutters its doors after a series of office closures and defections.

November 21: The U.S. Court of Appeals for the Second Circuit rules that $1.68 billion of the Iran Central Bank's money held in an account in Luxembourg and sought by families of the victims of the 1983 Beirut Marine Corps Barracks bombing is not beyond the jurisdiction of U.S. courts because a district court could order the assets in question to be brought to New York State. • President Trump issues his second and third pardons (following the first in August 2017 to Sherriff Joe Arpaio) to turkeys Drumstick and Wishbone. He notes that the White House Counsel's office has informed him that President Obama's Thanksgiving 2016 pardons of turkeys Tater and Tot cannot be revoked, so "Tater and Tot, you can rest easy."

November 25: U.S. Court of Appeals for the Ninth Circuit Senior Judge Harry Pregerson dies at age 94.

November 27: Cravath, Swaine & Moore announces its market-leading bonus structure, unchanged from the previous two years. With a $15,000 bonus, first-year associates will make $195,000. • The U.S. Supreme Court lifts its suspension from its bar of New York attorney James A. Robbins after realizing that it was a different James A. Robbins who had been convicted in New York State of forging documents to cover up the misplacing of a decedent's will.

November 28: The U.S. Court of Appeals for the Sixth Circuit holds that anonymous internet users who are adjudicated copyright infringers presumptively should be unmasked because their First Amendment right to anonymity will typically be offset by public interest in the adjudicated decision.

November 29: The U.S. House of Representatives passes a resolution requiring all members and their staffs to receive sexual harassment training in each session of Congress. • NBC fires Matt Lauer after receiving a sexual misconduct complaint. • Minnesota Public Radio fires Garrison Keillor following its receipt of harassment allegations, and ends broadcast of his "The Writer's Almanac" and rebroadcasts of his "A Prairie Home Companion."

December 2017

December 3: CVS Health Corp. announces it will purchase Aetna in a $69 billion cash and stock deal. Antitrust concerns are immediately raised, but the government ultimately signs off on the merger, leaving one remaining hurdle for the deal to clear: approval by Judge Richard Leon of the U.S. District Court for the District of Columbia.

December 5: President Trump announces that he will recognize Jerusalem as the capital of Israel, reversing nearly 70 years of U.S. foreign policy. • The Department of Homeland Security releases a report stating that the number of people caught crossing illegally from Mexico into the U.S. has dropped to the lowest level in 46 years, and that arrests by Immigration and Customs Enforcement of people living in the U.S. illegally increased by 42% over the same period in the prior year.

December 7: U.S. Senator Al Franken announces he will resign following sexual misconduct allegations from multiple women. • Former U.S. gymnastics doctor Larry Nassar is sentenced to 60 years in prison in connection with 37,000 child pornography images investigators found on his electronic devices. Nassar also faces separate sentencing in January following his guilty plea to three charges of first degree criminal sexual conduct with children under the age of 16.

December 8: The European Union and the United Kingdom announce agreement on the general terms of their "Brexit" split. • Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit is accused of sexual harassment by six women who allege he made inappropriate sexual comments and showed them pornographic material.

December 12: Voters head to the polls in Alabama's special election between Roy Moore and Doug Jones to fill the Senate seat vacated by Jeff Sessions following his appointment by President Trump as U.S. Attorney General. Jones wins, reducing the GOP's edge in the Senate to a 51-49 margin.

December 14: Walt Disney Co. and 21st Century Fox announce a deal in which Disney will purchase certain of Fox's assets, including the 20th Century Fox television and movie studio and cable networks, in an all-stock deal valued at over $75 billion. • The Federal Communications Commission repeals net neutrality rules that were enacted by the Obama Administration. The change removes rules that barred service providers from blocking or slowing access to certain content online.

December 15: Federal Judge Wendy Beetlestone grants a preliminary injunction sought by the Commonwealth of Pennsylvania to block new Trump Administration rules that expand the exceptions to the Affordable Care Act's requirement that employer health care plans provide free FDA-approved contraception. • Republicans introduce the Tax Cuts and Jobs Act, which includes $1.5 trillion in tax cuts and lowers the corporate tax rate from 35% to 21%.

December 18: The City of Detroit files a complaint in the U.S. District Court for the Eastern District of Michigan, charging opioid manufacturers with "aggressively over-promot[ing] highly addictive, dangerous opioid products," and seeking damages under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, among other causes of action. • Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia issues a temporary restraining order preventing the federal government from interfering with or obstructing two undocumented immigrants from accessing abortion care. • Russian cybersecurity firm Kaspersky Labs files suit in the U.S. District Court for the District of Columbia, alleging that the federal government violated the Administrative Procedure Act when it banned federal government agencies from using Kaspersky products, and seeking an order invalidating the Department of Homeland Security's directive implementing the ban. • Pennsylvania Governor Tom Wolff vetoes a bill that would have banned abortions after the 20th week of pregnancy, criminalized certain medical techniques for performing abortions, and omitted any exceptions in cases of rape or incest.

December 19: The Connecticut Supreme Court hears argument in *Burke v. Mesniaeff*, which raises the question whether a husband who purchases a home during a marriage but titles it solely in his name can thereafter treat his wife as a criminal trespasser and forcibly expel her if she refuses his command to leave the premises. • With 227 in favor and 203 opposed, split largely along party lines, the U.S. House of Representatives approves the conference committee version of the Tax Cuts and Jobs Act. • The U.S. Department of Justice voluntarily dismisses its appeal from the U.S. District Court for the District of Columbia's entry of a temporary restraining order requiring the government to cease its efforts to obstruct or interfere with an undocumented immigrant's attempts to obtain an abortion.

December 20: The U.S. Senate votes along party lines to approve a revised version of the Tax Cuts and Jobs Act after the Senate Parliamentarian strikes three provisions of the House version of the bill because they violate the Senate's "Byrd Rule." • In a largely party-lines vote, the U.S. House of Representatives votes 224-201 in favor of the Senate version of the Tax Cuts and Jobs Act, sending the legislation to President Trump for his signature.

December 21: Judge Haywood S. Gilliam Jr. of the U.S. District Court for the Northern District of California enters an order preliminarily enjoining a Trump Administration rule permitting employers who cite religious or moral objections to avoid the contraceptive mandate of the Affordable Care Act. • Judge George B. Daniels of the U.S. District Court for the Southern District of New York dismisses a lawsuit accusing President Trump of violating the Emoluments Clause of the Constitution. • The U.S. Court of Appeals for the Fourth Circuit denies the Trump Administration's motion for an emergency stay of a district court order preventing the federal government from excluding transgender individuals from consideration for service in the armed forces.

December 22: The U.S. Court of Appeals for the Ninth Circuit affirms an order of the U.S. District Court for the District of Hawaii enjoining President Trump's travel ban, finding that the President failed to "make a legally sufficient finding that the entry of the specified individuals would be 'detrimental to the interests of the United States.'" • New York, Philadelphia, and San Francisco file a complaint against the Department of Defense ("DOD") in the U.S. District Court for the Eastern District of Virginia, in connection with the DOD's alleged failure adequately to report data to the national gun background-check database concerning criminal convictions before military tribunals.

December 27: Judge A. Wallace Tashima of the U.S. Court of Appeals for the Ninth Circuit, sitting by designation in the U.S. District Court for the

District of Arizona, permanently enjoins Arizona from enforcing a ban on ethnic studies in public schools.

December 28: Alabama certifies Democrat Doug Jones's victory over Republican Roy Moore in an election for U.S. Senate, mooting Moore's eleventh-hour lawsuit seeking to forestall certification.

JANUARY 2018

January 3: Paul Manafort sues the U.S. Justice Department in the U.S. District Court for the District of Columbia, alleging that Special Counsel Robert Mueller has strayed from his mandate by filing charges against Manafort for lobbying work.

January 4: Attorney General Sessions issues a memorandum to all U.S. Attorneys rescinding prior guidance on marijuana prosecutions and stating that marijuana crimes should be investigated and prosecuted like all other crimes.

January 9: Judge Daniel Polster of the U.S. District Court for the Northern District of Ohio orders lawyers in the multidistrict National Prescription Opiate Litigation to begin private settlement talks.

January 10: Judge Timothy Kelly of the U.S. District Court for the District of Columbia declines to invalidate the temporary appointment of Mick Mulvaney as acting Director of the Consumer Financial Protection Bureau, rejecting a challenge by Leandra English, the Deputy Director that former CFPB director Richard Cordray attempted to install as his successor.

January 11: A Los Angeles jury issues a $3.5 million verdict against an apartment complex in a lawsuit based on a bed bug infestation.

January 12: James Duff, the director of the Administrative Office of the U.S. Courts, announces the composition of a working group formed, at the direction of Chief Justice John Roberts, to evaluate the judiciary's codes of conduct and procedures for addressing inappropriate workplace behavior.

January 18: The CFPB announces the dismissal of *CFPB v. Golden Valley Lending*, a lawsuit against four economic development arms of the Habematolel Pomo of Upper Lake, a sovereign Indian Nation based in California. The CFPB had filed the lawsuit during the tenure of former Director Richard Cordray as part of a campaign against tribal online lending. The dismissal marks the first lawsuit filed during Cordray's tenure that is dropped during the tenure of Acting Director Mick Mulvaney.

January 19: The U.S. Supreme Court appoints O'Melveny & Myers partner Anton Metlitsky to argue, in *Lucia v. SEC*, in defense of the constitutionality of the Securities and Exchange Commission's appointment process for ad-

ministrative law judges. The SEC (represented by the Office of the Solicitor General) and Lucia agree that the appointment process is unconstitutional. • The Supreme Court grants review in *Trump v. Hawaii*, a lawsuit over President Trump's third "travel ban" on foreign nationals primarily from countries with a predominantly Muslim population.

January 22: Same-sex couples file lawsuits in federal court challenging the State Department's classification of their children as "born out of wedlock," a classification that results in the denial of U.S. citizenship to some of the children. • The U.S. Department of Labor ratifies the appointments of many of its administrative law judges in preparation for the Supreme Court's resolution of *Lucia v. SEC*, a challenge to the appointment process for SEC administrative law judges (see January 19 entry).

January 24: Singer Enrique Iglesias files a lawsuit against Universal International Music B.V. in the U.S. District Court for the Southern District of Florida, claiming the improper denial of royalties based on streams of his music.

January 25: Judge Gregg Costa of the U.S. Court of Appeals for the Fifth Circuit writes a post on the *Harvard Law Review Blog* suggesting that cases seeking nationwide injunctions should be presented to three-judge panels rather than individual district judges.

January 29: In a public address hosted by the Bronx Defenders, U.S. Supreme Court Justice Sonia Sotomayor calls for experienced Supreme Court advocates to present argument in criminal defense cases at the Court, stating that she "want[s] to kill" inexperienced advocates who do an ineffective job at argument. • Thomas Perrelli and Ian Gershengorn of Jenner & Block sign on to represent Kentucky residents seeking to file a class action lawsuit challenging the state's new Medicaid work requirements.

January 31: The *en banc* U.S. Court of Appeals for the D.C. Circuit issues its opinion in *PHH Corp. v. CFPB*, holding that Article II of the U.S. Constitution does not require invalidation of the provisions of the Consumer Financial Protection Act providing that the CFPB director shall be appointed for a five-year term in which they can be removed only for cause. The court nevertheless provides PHH Corporation with another opportunity to challenge the $109 million penalty levied against it by the agency. • The U.S. Department of Justice announces that it will not attempt to re-try U.S. Senator Bob Menendez on corruption charges after the first trial ends with a hung jury. • Days before the Super Bowl, US Foods and Sysco sue chicken wing producers, claiming that they have conspired to fix poultry prices.

FEBRUARY 2018

February 1: Shanlon Wu, Walter Mack, and Annemarie McAvoy, lawyers for ex-Trump campaign aide Rick Gates, file a sealed motion to withdraw as his counsel in a criminal prosecution for money laundering and other charges brought by Special Counsel Robert Mueller.

February 2: An article in the *National Law Journal* notes that Arnold & Porter Kaye Scholer — a merged entity created from law firms Arnold & Porter and Kaye Scholer — has rebranded itself as just Arnold & Porter.

February 5: The Judicial Council of the U.S. Court of Appeals for the Second Circuit announces that it will take no further action on a sexual misconduct claim against former Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, observing that Kozinski's retirement deprives the panel of authority to take any further action.

February 6: Eleven states file a lawsuit in the U.S. District Court for the Southern District of New York, challenging that the EPA's suspension of the 2015 Clean Water Rule (which defined the waters of the United States).

February 9: Waymo and Uber reach a $244.8 million settlement that resolves their trial over whether Uber stole trade secrets from Waymo by acquiring a startup created by a former Google engineer who specializes in self-driving vehicles. The settlement occurs less than a week into the trial. • Associate Attorney General Rachel Brand announces that she is leaving the Justice Department to become the head of global corporate governance at Walmart Inc.

February 13: Judge Richard Young of the U.S. District Court for the Southern District of Indiana issues an injunction barring Wildlife in Need, an Indiana roadside zoo, from declawing tigers and lions, and from displaying cubs under 18 months old. PETA filed a lawsuit challenging those practices.

February 15: The *en banc* U.S. Court of Appeals for the Fourth Circuit strikes down President Trump's third "travel ban" on foreign nationals primarily from countries with a predominantly Muslim population. Chief Judge Roger Gregory writes the majority opinion, which is joined by eight other judges. • Judge William Alsup of the U.S. District Court for the Northern District of California certifies a class action brought by Uber drivers claiming that the ride-sharing company collects too big of a portion of fees paid by passengers. Alsup was also the judge in the Uber-Waymo lawsuit (see February 9, 2018 entry).

February 20: The U.S. Supreme Court denies review in *Silvester v. Becerra*, a case involving the constitutionality of California's 10-day waiting period for the purchase of firearms. Justice Clarence Thomas dissents, writing that the

"Second Amendment is a disfavored right in this Court." • Judge Richard Leon of the U.S. District Court for the District of Columbia denies AT&T's request for internal White House communications regarding the company's acquisition of Time Warner. AT&T had suggested that the Department of Justice's opposition to the merger was directed by President Trump. • The U.S. Supreme Court hears oral argument in *City of Hays v. Vogt*, which presents the question whether the Fifth Amendment applies to the use of statements at a probable cause hearing. All three advocates in the case — Toby Heytens, Elizabeth Prelogar, and Kelsi Brown Corkran — clerked for Justice Ruth Bader Ginsburg.

February 21: A coalition of law firms and The League of United Latin American Citizens files a lawsuit challenging the "winner-take-all" method of selecting electors in Presidential elections.

February 23: Special Counsel Mueller issues a 32-count superseding indictment of Paul Manafort and Rick Gates, which adds tax fraud and bank fraud charges, and expands on allegations of money laundering. • Kentucky Governor Matt Bevin files a countersuit against residents of his state who are challenging new Medicaid work requirements.

February 26: The *en banc* U.S. Court of Appeals for the Second Circuit issues its decision in *Zarda v. Altitude Express*, holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation. The court's decision is 10-3, with Chief Judge Robert Katzmann writing the majority opinion. • The U.S. Supreme Court hears argument in *Janus v. AFSCME*, a case challenging the constitutionality of union "fair share" fees. The Court heard oral argument in a similar case during the October 2016 Term but split 4-4 after the death of Justice Scalia. At the oral argument in *Janus*, Justice Neil Gorsuch asks no questions despite the perception that he will be the deciding vote. • Judge Randolph Moss of the U.S. District Court for the District of Columbia dismisses a lawsuit challenging President Trump's Executive Order requiring two deregulatory actions for every new regulation, finding the plaintiffs lack standing.

February 27: The U.S. Supreme Court issues its 5-3 decision in *Jennings v. Rodriguez*, reversing a Ninth Circuit decision holding that federal law gives detained aliens the right to periodic bond hearings during the course of their detention. Justice Stephen Breyer dissents, joined by Justices Ginsburg and Sotomayor — and reads portions of his opinion from the bench during the decision announcement. • Judge Gonzalo Curiel of the U.S. District Court for the Southern District of California issues a decision holding that the Trump Administration can waive environmental laws that might stand in the

way of building a border wall. President Trump had previously contended that Curiel should recuse himself from presiding over a separate lawsuit involving Trump University because the judge is "Mexican."

February 28: Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia sets a September 14 date for Paul Manafort's trial on several criminal charges, including conspiracy to defraud the United States. This trial is one of two involving Manafort.

MARCH 2018

March 1: The federal judiciary announces a new, two-year pilot project for hiring law clerks. Judges who participate will agree not to make any job offers for 2020 law school graduates before June 17, 2019, and for 2021 law school graduates before June 15, 2020. Participating judges also agree to leave offers open for at least 48 hours, rather than making on-the-spot or "exploding" offers.

March 6: The office of Special Counsel Mueller issues a report to the White House stating that Kellyanne Conway, a senior advisor to President Trump, should be disciplined for violating the Hatch Act based on comments she made in television interviews about the 2017 Alabama Senate election. • The United States sues California in the U.S. District Court for the Eastern District of California, seeking to invalidate provisions of California law that allegedly (1) prohibit private employers from cooperating with federal officials seeking information relevant to immigration enforcement, (2) create an inspection and review scheme in which the California Attorney General investigates federal law enforcement agents, and (3) limit cooperation of state and local law enforcement officers with the federal government regarding enforcement of the immigration laws. • A study by Tonja Jacobi and Matthew Sag contends that the Justices of the U.S. Supreme Court are asking more questions, and are advocating to each other rather than seeking information from the advocates.

March 8: Judge Thomas Ellis of the U.S. District Court for the Eastern District of Virginia schedules another criminal trial for Paul Manafort to start July 10, 2018 (see February 28 entry).

March 9: "Pharma Bro" Martin Shkreli receives a seven-year prison sentence for three federal securities law violations.

March 12: The U.S. Department of Education announces that it will extend the period in which students from the now-defunct Charlotte School of Law can seek to have their federal loans discharged.

March 13: The Federal Judiciary Workplace Conduct Working Group, led by James C. Duff, announces that it is either implementing or developing 20 measures to address workplace harassment. The Working Group solicited input from current and former law clerks and current judiciary employees, and also created a mailbox at uscourts.gov for the same purpose.

March 14: Chadbourne & Parke, and its successor firm, Norton Rose Fulbright, agree to a settlement with three former women partners that resolves their gender discrimination claims. • The SEC announces securities fraud charges against Elizabeth Holmes, founder and CEO of Theranos Inc., and Ramesh Balwani, former president of the company. The complaints allege that Theranos, Holmes, and Balwani perpetrated an extensive fraud in which they raised over $700 million based on false claims about the company's products and performance. The SEC simultaneously announces a settlement with Theranos and Holmes in which the latter pays $500,000 and agrees to return 18.9 million shares of Theranos and relinquish voting control of the company. Holmes also agrees to a bar on serving as an officer or director of a public company for 10 years. • Dean Ted Ruger of the University of Pennsylvania Law School announces that Professor Amy Wax will no longer teach required first-year law school courses after a video surfaces of her claiming that African-American law students underperform academically.

March 15: The judge presiding over the retrial of sexual assault charges against Bill Cosby announces that five former accusers will be permitted to testify, in addition to the woman whose claims gave rise to the prosecution. The first trial ended in a hung jury and thus a mistrial. • The U.S. Court of Appeals for the Fifth Circuit issues a 2-1 decision striking down the U.S. Labor Department's "Fiduciary Rule," which was promulgated and finalized during the Obama Administration. The rule purported to target conflicts of interest in the retirement-savings industry by broadening the definition of a fiduciary.

March 19: The widely-anticipated trial over the AT&T-Time Warner merger begins before Judge Richard Leon of the U.S. District Court for the District of Columbia. • Dr. Stephen Ungerleider, a sports psychologist, files a lawsuit in the U.S. District Court for the District of Massachusetts, claiming that the U.S. Olympic Committee and a member of its board spread lies about him to thwart his efforts to expose sexual abuse of Olympic athletes. • The U.S. Supreme Court denies review in *Hidalgo v. Arizona*, a case that presented a challenge to the constitutionality of the death penalty. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, issues a statement respecting the denial of certiorari suggesting a willingness to hear the issue in a case that more properly presents it. • The Court also denies certio-

rari in *Garco Construction, Inc. v. Speer*; Justice Thomas, joined by Justice Gorsuch, dissents from the denial, stating that the Court should have granted review to overrule precedents, including *Auer v. Robbins*, that grant significant deference to an agency's interpretation of its own regulations.

March 20: William Voge, the chairman of Latham & Watkins, steps down as chair and retires from the firm over inappropriate "communication of a sexual nature" with a woman with no ties to the firm. • A California jury awards former Major League Baseball pitcher Greg Reynolds $2.3 million for hand injuries he suffered when fighting a man who was high on LSD. Reynolds claimed that the injuries were career-ending.

March 21: The U.S. Court of Appeals for the Ninth Circuit upholds a $5 million copyright infringement jury verdict against Pharrell Williams and Robin Thicke. In the lawsuit, the family of Marvin Gaye claimed that the song "Blurred Lines" unlawfully drew from Gaye's 1977 song, "Got to Give It Up." • President Trump tweets criticism of the Department of Justice's decision not to seek Supreme Court review of a Ninth Circuit ruling stopping Arizona from denying driver's licenses to DACA recipients.

March 23: Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia hears oral argument on a motion for summary judgment in *National Veterans Legal Services Program v. United States*, a case about whether the federal judiciary's PACER system overcharges the public for access to court records.

March 25: The New York Attorney General's office announces a $30,000 settlement with three health app developers based on allegedly misleading claims. The three apps are Cardiio, which measures heart rate; Runtastic, which measures both heart rate and cardiovascular performance under stress; and Matis, which purportedly turns any smart phone into a fetal heart monitor.

March 26: Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit issues a concurring opinion in *Christiansen v. Omnicom Group*, urging the court to go *en banc* to determine whether Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation.

March 27: Uber agrees to pay $10 million to settle a class action lawsuit brought by over 400 women and minority software engineers raising workplace harassment claims. • Michael J. Gottlieb, a partner at Boies Schiller Flexner, announces that the firm has filed a defamation lawsuit on behalf of Aaron Rich, the brother of Seth Rich, a Democratic National Committee staffer whose 2016 murder has given rise to various conspiracy theories. The

defendants in the lawsuit are several conspiracy theorists, including Ed Butowsky, Matt Couch, America First Media, and the *Washington Examiner*. • The U.S. Supreme Court hears oral argument in *Hughes v. United States*, a case about how lower courts should interpret Supreme Court decisions that do not involve a clear majority opinion. • Judge Mary E. Wiss of the Superior Court of California issues an order permitting a pay equity class action to proceed against Google. The lawsuit claims that Google violated pay discrimination laws by using prior salary data to set salaries for new hires. • The Tennessee Attorney General issues a legal opinion stating that a law requiring all license plates in the state to say "In God We Trust" would be constitutionally suspect. The opinion also states that there would be fewer concerns with a law that permitted citizens to obtain such plates, but did not require them to do so. • The American Bar Association puts Arizona Summit Law School on probation, after its bar passage rate drops to 25% for first-time test takers. (The Law School previously had featured bar passage rates as high as 97%.)

March 28: Judge Peter Messitte of the U.S. District Court for the District of Maryland denies a motion to dismiss a lawsuit, filed by the attorneys general of Maryland and the District of Columbia, claiming that President Trump is violating the U.S. Constitution's Emoluments Clause based on the earnings of the Trump International Hotel in Washington, DC. • Several anti-smoking groups and doctors file a lawsuit in the U.S. District Court for the District of Maryland, challenging the FDA's decision to delay its review of e-cigarettes. • The U.S. Supreme Court announces that Justice Alito is no longer recused in *Rimini Street v. Oracle USA*. • General counsel from 185 companies send a letter to Congress urging it to continue funding the Legal Services Corporation, a major provider of civil legal aid to individuals who cannot afford legal assistance.

March 29: Uber reaches a confidential settlement with the family of Elaine Herzberg, who died in a car crash involving one of Uber's self-driving vehicles. • Judge Claudia Wilken of the U.S. District Court for the Northern District of California denies a summary judgment motion by the NCAA in a class action lawsuit seeking to end all restrictions on the compensation and benefits that Division I basketball players and Football Bowl Subdivision players can receive. • Guilford County, North Carolina District Judge Mark Cummings orders a man to stand in front of the Guilford County courthouse with a sign saying, "This is the face of domestic abuse." The man pleaded guilty to assaulting women a week earlier.

March 30: *Bloomberg* reports that 3,700 former students at Trump University — out of around 6,000 potential claimants — have submitted claims on the

$25-million-dollar settlement of their class action fraud lawsuit. • The *Huffington Post* reports that the University of Pittsburgh Law School has created a class titled "Crime, Law and Society in 'The Wire,'" which will explore contemporary issues in the criminal justice system by discussing episodes of the critically-acclaimed HBO show. • Judge Derrick Watson of the U.S. District Court for the District of Hawaii converts his temporary restraining order into a preliminary injunction against President Trump's second "travel ban."

March 31: Judge Ellen Segal Huvelle denies plaintiffs' motion for summary judgment in *National Veterans Legal Services Program v. United States*, but rules that certain government expenses are not permissible uses of fees collected via PACER (see March 23 entry). • The U.S. Court of Appeals for the Second Circuit upholds New York's ban on non-lawyer investment in law firms, concluding that the ban is consistent with the First Amendment.

APRIL 2018

April 1: President Trump announces, via Twitter, that he has reached a plea deal with Special Counsel Mueller that clears him of any and all wrongdoing in exchange for his agreement to livestream, also via Twitter, all "Executive Time" on the President's calendar.[*]

April 3: Attorney Debra Katz announces the filing of a sexual harassment lawsuit against celebrity chef Mike Isabella and his businesses that (among other things) challenges the validity of a lifetime nondisclosure agreement that employees were required to sign. • Alexander van der Zwaan, formerly an associate at Skadden, Arps, Slate, Meagher & Flom, receives a 30-day jail sentence for lying to Special Counsel Mueller during his investigation into Russian interference in the 2016 presidential election.

April 5: Judge Anita Brody of the U.S. District Court for the Eastern District of Pennsylvania announces that she will award $112.5 million in attorney fees in concussion litigation brought by former football players against the NFL. The lawsuit had previously settled for $1 billion.

April 9: The FBI raids the offices of President Trump's personal attorney, Michael Cohen.

April 11: A jury in New Jersey awards $80 million in punitive damages in a lawsuit against Johnson & Johnson and Imerys Talc America by a man who claimed that he developed mesothelioma from baby powder. The award brings the total damages in the case to $117 million — which is on top of billions of dollars of verdicts issued elsewhere.

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[*] April Fools!

April 12: Judge Daniel Polster of the U.S. District Court for the Northern District of Ohio announces an aggressive discovery schedule, including a potential trial date in March 2019, for the sprawling federal opioids MDL. • George Garofano pleads guilty to a hacking scheme that targeted over 200 people, including actresses Jennifer Lawrence, Kate Upton, and Kirsten Dunst.

April 14: In a statement provided to various media outlets, Tobi Young, a citizen of the Chickasaw Nation, announces that she has been hired by Justice Gorsuch. Young is likely the first-ever Native American Supreme Court law clerk.

April 16: Yale Law Professor James Forman, Jr. wins the Pulitzer Prize for *Locking Up Our Own: Crime and Punishment in Black America*, a book about racial disparities in the American criminal justice system.

April 17: The U.S. Supreme Court hears arguments in *South Dakota v. Wayfair*, a case about whether states may require online retailers to collect sales taxes in states where they do business, but do not have a physical presence. • Nine former security representatives for the NFL file a lawsuit against the league, claiming that their dismissals violated federal age discrimination laws. • The Supreme Court dismisses, as moot, *United States v. Microsoft* — a case about whether law enforcement agencies can access emails stored outside the United States — based on the passage of the federal CLOUD Act. • Justice Sotomayor participates in oral arguments at the Supreme Court despite breaking her left shoulder at home.

April 19: Former New York Mayor Rudy Giuliani announces that he is leaving his law firm to join President Trump's legal team in the investigation by Special Counsel Mueller.

April 23: The SEC sanctions "Pharma Bro" Martin Shkreli by preventing him from associating with brokers and ratings agencies. Shkreli had previously been convicted of several federal securities fraud offenses and sentenced to seven years' imprisonment (see March 9, 2018 entry). • Deputy Attorney General Rod Rosenstein presents oral argument at the U.S. Supreme Court in *Chavez-Meza v. United States*, a case about the amount of explanation federal district judges must give in certain sentencing proceedings. • O'Melveny & Myers LLP announces that Jeffrey Fisher, a prominent Supreme Court advocate and a professor at Stanford Law School, has joined the firm as a special counsel.

April 24: The U.S. Supreme Court issues its decision in *Jesner v. Arab Bank*, holding that foreign corporations cannot be held liable in U.S. courts, under the Alien Tort Statute, for torts committed overseas. The decision is 5-4;

Justice Kennedy writes the majority opinion, but parts of his opinion are joined only by the Chief Justice and Justice Thomas. Justice Sotomayor pens the dissent. The Court had issued several decisions in recent years over the scope of the Alien Tort Statute, including its 2013 decision in *Kiobel v. Royal Dutch Petroleum*, a case that presented the same question as in *Jesner*, and featured two rounds of oral argument at the Court.

April 25: Lucasfilm survives a motion to dismiss in its lawsuit against app maker Ren Ventures over the developer's attempt to create an app that would allow users to play Sabacc, a fictional game famously played by characters in the Star Wars franchise (the most famous instance of the game being when Han Solo won the Millennium Falcon from Lando Calrissian). • The U.S. Supreme Court hears oral argument in *Trump v. Hawaii*, a lawsuit over President Trump's third "travel ban" on foreign nationals primarily from countries with a predominantly Muslim population. Much of the argument focuses on statements made by President Trump during his campaign and after becoming President (see Jan. 19, 2018 entry).

April 26: Lawyers for Connie Bertram, the head of Proskauer Rose's Washington, DC labor and employment practice, announce that she is the plaintiff in a $50 million gender bias suit against the law firm. The plaintiff's identity had previously been unknown.

April 27: Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia dismisses Paul Manafort's lawsuit challenging the appointment of Special Counsel Muller, stating that the lawsuit is not an "appropriate vehicle" for raising concerns with a prosecutor's investigation (see Jan. 3, 2018 entry). • Fish & Richardson opens its Washington, DC office in the new waterfront "Wharf" development, making it the first law firm to join the development.

April 29: T-Mobile and Sprint, the third- and fourth-largest wireless carriers, announce a nearly $27 billion merger. The proposed merged company would be named T-Mobile. The two companies had discussed mergers on and off for several years.

April 30: The U.S. Supreme Court grants review in *Frank v. Gaos*, which presents the question whether a *cy pres* award of proceeds to third-party organizations, as part of a settlement of a class action, comports with Federal Rule of Civil Procedure 23. • The Supreme Court announces that Justice Sotomayor will undergo a "reverse shoulder replacement surgery" in connection with her fall earlier in the month (see April 17, 2018 entry). • Three associates at Morrison & Foerster file a class action lawsuit against the firm, claiming that it has routinely discriminated against mothers and pregnant women.

May 2018

May 3: California detectives hope to find the identity of the Zodiac Killer by comparing DNA obtained from saliva samples on stamps and envelopes that the killer sent to news outlets during his crime spree to information available on open-source DNA databases.

May 4: The NSA releases a report indicating it collected 534 million call records and messages of Americans in 2017, which was more than three times greater than the 151 million American records the agency collected in 2016. The records include the numbers and time of a call or message, but not its content.

May 8: Former CIA officer Jerry Chun Shing Lee is indicted by a federal grand jury for allegedly collecting classified information for the Chinese government, after the FBI discovered handwritten notes including the true names of informants in China in Lee's hotel room in 2012. The FBI's investigation began after more than a dozen informants in China were killed or imprisoned.

May 9: Andre Young, aka Dr. Dre, loses a trademark dispute against Pennsylvania gynecologist Draion M. Burch, who had begun proceedings in 2015 to trademark the name "Dr. Drai" to be used in connection with the sale of audiobooks and webinars on sex education and other health-related topics. • Wu Xiaohui, former chairman of Anbang Insurance Group, is sentenced to 18 years in prison after being convicted on fraud and embezzlement charges in Shanghai for his involvement in a fundraising scheme that inflated the company's capital through the unauthorized sales of high-yield investment insurance products and diverted $10.4 billion of the company's funds.

May 11: Oklahoma Governor Mary Fallin vetoes a bill that would have allowed anyone 21 years old or older who had not been convicted of certain crimes to carry a loaded firearm in public without a permit or training.

May 15: 21st Century Fox settles lawsuits filed by 18 current and former employees (including former Fox News anchor Kelly Wright) alleging race, gender, and pregnancy discrimination for approximately $10 million. The settlement requires employees to drop their claims, leave the company, abstain from seeking future employment with it, and keep secret their individual settlement amounts, but permits them to publicly discuss their allegations. • Judge Jackson of the U.S. District Court for the District of Columbia allows the criminal case against Paul Manafort for tax and bank fraud to proceed after Manafort's lawyers fail to convince the court that the alleged crimes fall outside the scope of Special Counsel Mueller's mandate to investigate links

between the Russian government and individuals associated with the Trump presidential campaign.

May 18: Seventeen-year-old Dimitrios Pagourtzis is arrested for killing 10 people and injuring at least 10 others after opening fire in a Santa Fe, Texas high school.

May 21: Chief Judge K. Michael Moore of the U.S. District Court for the Southern District of Florida sentences Sergio Neftalí Mejía-Duarte, a Honduran drug trafficker, to life in prison for leading a criminal organization that conspired to traffic cocaine to Mexico's Sinaloa Cartel for distribution in the United States. • Justice Gorsuch authors the U.S. Supreme Court's 5-4 decision in *Epic Systems Corp. v. Lewis*, ruling that arbitration agreements between employers and employees that require individualized arbitration to resolve disputes preclude employees from resolving such disputes via class action lawsuits.

May 22: Gary Tanner, a former Valeant executive, and Andrew Davenport, former CEO of Philidor Rx Services, are convicted in federal court on charges including wire fraud and conspiracy to commit money laundering based on allegations that Tanner passed inside information to Philidor and that Davenport paid a $10 million kickback to Tanner when Valeant exercised an option to buy Philidor. • Judge Arenda L. Wright Allen of the U.S. District Court for the Eastern District of Virginia denies the Gloucester County School Board's motion to dismiss a civil rights suit brought by Gavin Grimm, a transgender student who sued to win the right to use a boys' high-school restroom. The case had previously been set to be argued before the U.S. Supreme Court in 2017, but was remanded after President Trump rolled back guidance issued by the Obama Administration that had allowed transgender students to use the bathroom that corresponds with their personal gender identity.

May 23: Eighty-three Mexican Mafia leaders and associates are charged with racketeering conspiracies in connection with allegations they controlled drug sales and arranged stabbings, kidnappings, and murders from inside Los Angeles County jails. Attorney Gabriel Zendejas-Chavez is also arrested for allegedly carrying messages to the gang members inside the prison and attempting to shield the criminal messages with attorney-client privilege.

May 25: Former Hollywood producer Harvey Weinstein turns himself in to the New York Police Department to face charges of rape and sexual misconduct.

May 28: Mali migrant Mamoudou Gassama scales a Paris building to save a four-year-old boy who was dangling from a fourth story balcony after the

boy's father left him home alone while grocery shopping and playing Pokémon Go. The boy's father faces two years in prison while Gassama receives for his heroism a fast track to citizenship from French President Emmanuel Macron and a job offer from the fire department.

May 29: After Epic Games adds a battle-royale feature to its "Fortnite" game, Bluehole (creator of the "PlayerUnknown's Battlegrounds" game) files suit in South Korea, alleging copyright infringement.

May 30: A Florida man pleads guilty to impersonating a Saudi prince for decades and defrauding investors of millions of dollars that he used to purchase Ferraris, expensive jewelry, and a condo in Miami.

May 31: Prosecutors in South Korea raid the headquarters of Korean Air Lines over suspected embezzlement, tax evasion, and breach of trust by Chairman Cho Yang-ho and members of his family.

June 2018

June 1: Commercial litigation documents filed in Dallas, Texas allege that Chinese telecommunications company ZTE was created as a front for military intelligence and has engaged in corruption in 18 countries. Heads of the CIA, FBI, and NSA testified in February that they do not use, nor would they recommend that private citizens use, products created by ZTE or smartphone maker Huawei. • Woojae "Steve" Jung, a vice president at Goldman Sachs, is charged with insider trading for trading on non-public information of several clients of the firm. Jung used an account in the name of a friend who lived in South Korea and is alleged to have made more than $130,000 through the trades. • *Above the Law*'s employment-based list of the top 50 law schools sees changes at the top this year, due in part to an increase in the federal clerkship rates at the top three schools: University of Chicago Law School, University of Virginia School of Law, and Duke Law.

June 4: The U.S. Supreme Court rules in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* that the Commission violated the First Amendment's Free Exercise Clause when it ordered a Christian baker to cease and desist from discriminating against same-sex couples by refusing, based on his religious beliefs, to bake cakes for their wedding ceremonies. • U.S. Army veteran and former U.S. Defense Intelligence Agency officer Ron Rockwell Hansen is charged with acting as an unregistered foreign agent for China and transmitting national defense information to aid a foreign government. Hansen, who had top-secret security clearance while working for the DIA, is accused of providing information gathered from military and other intelli-

gence conferences to contacts in China and is alleged to have received at least $800,000 in payments originating from China since 2013.

June 5: A judge in Argentina charges famed Columbian drug trafficker Pablo Escobar's widow and son with laundering drug trafficking money through real estate transactions in Buenos Aires. Authorities previously investigated the two for similar allegations, but the case was closed in 2005.

June 11: The U.S. Supreme Court rules 5-4 in *Husted v. A. Philip Randolph Institute* that the process Ohio uses to identify and remove from the voting rolls voters who have lost their residency qualification does not violate the Failure-to-Vote Clause of the National Voter Registration Act because the procedure does not use registered voters' failure to vote as the "sole criterion" for removing them from the state's voting rolls.

June 12: In a nearly 200-page opinion, Judge Richard Leon of the U.S. District Court for the District of Columbia rules that the government has failed to establish that the $81 billion megamerger between AT&T and Time Warner would decrease competition.

June 15: U.S. Senator Rand Paul's neighbor, Rene Boucher, is sentenced to 30 days in prison for attacking Paul while he was doing yard work, causing the Senator to suffer multiple fractured ribs.

June 19: Security researcher Symantec reports that hackers in China breached the computer systems of satellite operators, defense contractors, and telecommunications companies in the U.S. and appeared to be driven by "national espionage goals."

June 20: Blake Leibel, an author and the son of a wealthy real estate tycoon in Canada, is convicted of torturing and murdering the mother of his newborn daughter, mirroring the gruesome death of characters in his novel *Syndrome*, which follows the mind of a convicted serial killer.

June 21: The U.S. Supreme Court rules in *South Dakota v. Wayfair* that a South Dakota law requiring online retailers who meet certain sales thresholds to collect and remit state sales tax should not be precluded based on prior Court decisions that required an out-of-state seller to have a physical presence in the state. The prior cases are overruled because "[m]odern e-commerce does not align analytically" with the physical presence rule in the earlier cases.

June 22: The U.S. Supreme Court rules in *Carpenter v. United States* that the government's use of cell phone location records to track an individual's location over time without a warrant violates the individual's legitimate expec-

tation of privacy in their physical location and movements under the Fourth Amendment. • Over 100 Amazon employees demand that Jeff Bezos, Amazon's CEO, stop selling its Rekognition facial recognition software to law enforcement after the American Civil Liberties Union revealed in May that Amazon heavily marketed the program to police departments and other government agencies. This follows similar employee activism earlier in the month at Microsoft regarding a cloud computing contract with Immigration and Customs Enforcement and at Google regarding a pilot program with the Defense Department that uses artificial intelligence to analyze drone footage.

June 25: The U.S. Supreme Court declines to hear the appeal of Brendan Dassey, whose conviction for the 2005 murder of Teresa Halbach was the subject of the Netflix series "Making a Murderer," leaving in place the U.S. Court of Appeals for the Seventh Circuit's 2017 decision that Dassey's confession had not been coerced. • A 77-year-old man is arrested in Long Beach, California and charged with murder, attempted murder, and arson after he allegedly set fire to the high-rise apartment building where he lived and shot at the firefighters who responded to the blaze, killing one firefighter and wounding another.

June 26: The U.S. Supreme Court rules in *Trump v. Hawaii* that President Trump's proclamation under the Immigration and Nationality Act, which imposed entry restrictions on nationals from certain countries that the President determined did not share enough information to permit adequate vetting of individuals to determine whether they present "public safety threats," did not exceed his authority. • The Court rules in *National Institute of Family and Life Advocates v. Becerra* that a California law requiring anti-abortion pregnancy centers to post notices about free or low-cost abortions likely violates the centers' First Amendment rights, by altering the content of their speech.

June 27: Apple and Samsung Electronics settle a dispute over alleged patent violations by Samsung. The settlement, the terms of which are not available, ends a seven-year dispute between the world's top smartphone makers. • Justice Kennedy announces he will retire from the U.S. Supreme Court, effective July 31.

June 28: Singer and songwriter Ed Sheeran, Sony/ATV Music Publishing, and Atlantic are sued for $100 million in an infringement suit alleging that Sheeran's "Thinking Out Loud" copies portions of Marvin Gaye's 1973 hit, "Let's Get It On."

JULY 2018

July 2: Former movie producer Harvey Weinstein is charged by the Manhattan District Attorney with three additional sex crimes, which carry a maximum sentence of life in prison (see May 25 entry). • Judge James E. Boasberg of the U.S. District Court for the District of Columbia issues a preliminary injunction requiring the Department of Homeland Security to follow its own 2009 directive that requires asylum seekers' cases be reviewed individually, rather than by making blanket detention decisions. • Prosecutors appeal the 30-day sentence given to Rene Boucher stemming from his attack on U.S. Senator Rand Paul (see June 15 entry).

July 3: TV's "Dog Whisperer" Cesar Millan reveals that he crossed the U.S. border with Mexico illegally before becoming a U.S. citizen in 2009.

July 4: Three suspects are charged with kidnapping and assault with a firearm after they allegedly kidnapped actors Daisy McCrackin and Joseph Capone and then forced Capone to remove his clothing and wait in a bathtub for 30 hours while McCrackin was driven around to multiple banks to withdraw $10,000 to secure Capone's release. McCrackin escaped the following day and called police.

July 5: Singer Chris Brown is arrested following a performance in Florida based on a warrant for a 2017 incident at a nightclub in which Brown is alleged to have punched a photographer who had been hired to take pictures.

July 9: President Trump nominates Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit to replace Justice Kennedy on the U.S. Supreme Court (see June 27 entry). Kavanaugh clerked for Kennedy at the Court in 1993-1994.

July 10: Former Apple employee Xiaolang Zhang is charged with stealing autonomous driving trade secrets for Chinese competitors, a violation of the 1996 Economic Espionage Act, and faces up to ten years in federal prison and a $250,000 fine.

July 12: The Department of Justice appeals the approval of AT&T's merger with Time Warner (see June 12 entry).

July 15: A Greenpeace protester is arrested in Scotland and charged with breaching a no-fly zone at the Turnberry resort after the man paraglided over the property while displaying a banner that read "Trump: Well Below Par #RESIST" while President Trump was staying there.

July 16: China files a complaint with the World Trade Organization over President Trump's plan to levy tariffs on $200 billion of Chinese goods.

July 17: New York, Connecticut, Maryland, and New Jersey sue the federal government to void the $10,000 cap on federal deductions for state and local taxes under President Trump's tax plan.

July 18: The California Supreme Court removes a proposed measure from the November ballot that aimed to divide the state into three separate states after a challenge is filed questioning the measure's validity. Venture capitalist Tim Draper spent $1.2 million promoting the measure. • The European Union fines Google €4.3 billion ($5.1 billion) for violating antitrust laws by requiring that Android smartphones be equipped with Google programs as the default software. This is the largest fine ever levied by the EU and follows a €2.4 billion ($2.7 billion) fine it levied against Google in 2017 for unfairly promoting its own shopping comparison services by including them at the top of search results.

July 25: Apple's latest iOS update includes an option to block USB devices, including those used by law enforcement to crack passcodes. Once the phone has been locked for an hour, accessories will no longer be able to connect through the USB port of the device.

July 27: CBS chief executive Leslie Moonves faces an investigation after six women accuse him of sexual harassment in an article published by *The New Yorker*. • Special Counsel Mueller submits a list of 35 potential witnesses in the bank and tax fraud trial of former Trump campaign chairman Paul Manafort.

July 29: President Trump tweets a threat to shut down the federal government if Democrats in Congress do not pass changes to immigration laws, including the funding of a border wall with Mexico.

July 31: A federal judge issues a temporary restraining order halting the online publication of instructions for the 3D-printing of plastic guns after several states sue to block an earlier settlement that permitted the plans to remain online.

AUGUST 2018

August 1: The U.S. Court of Appeals for the Ninth Circuit affirms a district court's grant of summary judgment in favor of the City and County of San Francisco and the County of Santa Clara in an action challenging Executive Order 13,768, in which President Trump directed the withholding of federal grants to so-called "sanctuary cities." The Ninth Circuit vacates the district court's nationwide injunction, however. • The National Association for Law Placement (NALP) reports that law school graduate employment for the class of 2017 increased by one percent to 88.6%, and that the percentage of

law students who secured jobs that require bar passage within ten months of graduation rose more than four percent to 71.8%. • CBS announces that it has hired Covington & Burling and Debevoise & Plimpton to investigate claims that CEO Leslie Moonves sexually harassed employees. • Law firms Nelson Mullins Riley & Scarborough and Broad & Cassel finalize their merger, which the firms announced in June 2018.

August 2: Baltimore, Chicago, Cincinnati, and Columbus file suit against President Trump and various officials at the U.S. Department of Health and Human Services in the U.S. District Court for the District of Maryland, seeking declaratory and injunctive relief to prevent the Trump Administration from allegedly sabotaging the Affordable Care Act by discouraging enrollment and reducing health plan choices, thereby destabilizing the health insurance exchanges that the law established. • The EPA and the National Highway Traffic Safety Administration lay out plans to roll back Obama-era fuel economy standards and freeze mileage targets at 2020 levels, eliciting a joint statement from 19 attorneys general promising to contest the new rules in federal court.

August 3: For the second time, Judge John Bates of the U.S. District Court for the District of Columbia holds that the Department of Homeland Security's rescission of the DACA program was arbitrary and capricious, and therefore unlawful. • Judge Dana Sabraw of the U.S. District Court for the Southern District of California rejects the Trump Administration's request to vest the ACLU with responsibility for locating parents who were deported after being separated from their children pursuant to President Trump's "zero tolerance" immigration enforcement policy.

August 5: President Trump concedes that his son Donald Trump Jr. and top campaign aides met with individuals linked to Russia for the purpose of "get[ting] information on an opponent." In a TV interview, President Trump's lawyer Jay Sekulow recants his earlier claim that the President was not involved in the drafting of a statement describing that meeting.

August 6: HSBC Holdings reveals its agreement to settle with the Department of Justice for $765 million following an investigation into its sales practices with respect to residential mortgage-backed securities in 2005 to 2007. • The ABA House of Delegates votes to reduce fees and simplify its fee structure in a bid to attract new members.

August 7: The West Virginia House Judiciary Committee approves 14 articles of impeachment charging all four remaining justices on the West Virginia Supreme Court with breaching their duty to "carry out the administrative duties of the court" and engaging in wasteful spending.

August 8: President Trump's legal team rejects Special Counsel Mueller's proposal for an on-the-record interview with the President (see September 4 entry). • The FBI arrests U.S. Representative Christopher Collins on suspicion of securities fraud, wire fraud, and lying to investigators stemming from Collins's alleged use of inside information pertaining to clinical drug trial data. Collins indicates that he will not suspend his reelection campaign.

August 9: The U.S. Court of Appeals for the Ninth Circuit grants a petition for review of the EPA's decision to allow farmers to apply the pesticide chlorpyrifos to crops, vacates the EPA's order, and remands to the EPA with directions to "revoke all tolerances and cancel all registrations for chlorpyrifos within 60 days."

August 10: Proskauer Rose and labor and employment partner Connie Bertram settle Bertram's multi-million-dollar gender discrimination lawsuit, in which Bertram alleged that the firm "consistently underpays its top female talent." • The U.S. Senate Committee on the Judiciary announces that a hearing on Judge Brett Kavanaugh's nomination to the Supreme Court will begin on September 4.

August 13: Hawaii voluntarily dismisses its challenge to the Trump Administration's travel ban on individuals from predominately Muslim countries in the wake of the Administration's victory in the U.S. Supreme Court. • Federal prosecutors rest their case against former Trump campaign chairman Paul Manafort after putting on more than 20 witnesses over the course of 10 days of trial.

August 14: Attorneys for former Trump campaign chairman Paul Manafort rest their case without calling Manafort or any other witness in his defense.

August 15: Illinois prosecutors filed charges against John Gately III in connection with the shooting death of his brother-in-law, Mayer Brown appellate partner Stephen Shapiro.

August 16: Intellectual property boutique Senniger Powers announces its merger with Stinson Leonard Street, to close in October 2018.

August 17: Special master, former federal judge, and current Bracewell partner Barbara Jones completes her privilege review of materials that federal prosecutors seized from the offices of Michael Cohen, President Trump's personal attorney. Jones determines that slightly over 7,000 of the pool of 3.2 million documents qualify for protection under applicable legal privileges.

August 20: Judge Kiyo Matsumoto of the U.S. District Court for the Eastern District of New York sentences former Katten Muchin Rosenman attorney

Evan Greebel to 18 months in prison for his role in helping "Pharma Bro" Martin Shkreli to control the price and trading of Retrophin stock.

August 21: A federal grand jury indicts U.S. Representative Duncan Hunter and his wife Margaret Hunter for campaign finance violations stemming from their alleged use of campaign funds for personal expenses. • Venable and intellectual property law boutique Fitzpatrick, Cella, Harper & Scinto announce their intention to merge in November 2018.

August 22: The U.S. Court of Appeals for the Eleventh Circuit affirms a decision from the U.S. District Court for the Middle District of Alabama invalidating an Alabama statute that prohibited dilation and evacuation abortions, referring to the Supreme Court's abortion jurisprudence as "an aberration of constitutional law."

August 23: After President Trump repeatedly questions the decision-making of Attorney General Jeff Sessions on Twitter, Sessions announces that "the actions of the Department of Justice will not be improperly influenced by political considerations."

August 24: Proskauer Rose settles claims in connection with its work for R. Allen Stanford — the architect of a billion-dollar Ponzi scheme — for $63 million.

August 27: A three-judge panel of the U.S. District Court for the Middle District of North Carolina holds, for the second time, that North Carolina Republicans impermissibly drew congressional districts in a way that insulated Republicans from electoral defeat, and questions whether the North Carolina legislature should be accorded another opportunity to redraw the map.

August 28: California becomes the first state to abolish cash bail after Governor Jerry Brown signs SB-10, which provides discretion to judges to tailor release decisions on a suspect's threat to public safety and likelihood of appearing in court. • A Texas jury convicts former police officer Roy Oliver of murder for the shooting of unarmed teenager Jordan Edwards.

August 29: President Trump announces via tweet that White House Counsel Don McGahn will leave his post "shortly after the confirmation (hopefully)" of D.C. Circuit Judge Brett Kavanaugh to the Supreme Court. • Clifford Chance agrees to pay a $132,000 civil fine and lost wages to resolve claims that it discriminated against dual citizens and non-U.S. citizens in making staffing decisions on a document review project. • The U.S. Court of Appeals for the Eighth Circuit holds that Wells Fargo did not discriminate against minorities by enforcing a policy to fire or not hire individuals with disqualifying criminal records.

August 30: Microsoft vice president and general counsel Dev Stahlkopf announces that the company will require its legal service providers to offer paid parental leave to employees working on Microsoft matters. • Investors in Papa John's Pizza file a securities class action in the U.S. District Court for the Southern District of New York, alleging that the company breached its own policies by, among other things, failing to address the misconduct of ex-chairman and CEO John Schnatter. • Plaintiffs file two privacy law class actions against Facebook in the U.S. District Court for the Northern District of California, alleging that the company impermissibly shared user data without permission.

August 31: Former Dewey & LeBoeuf chairman Steven Davis, finance director Francis Canellas, and controller Thomas Mullikin settle with the SEC by agreeing to pay roughly $216,000 in combined civil penalties to resolve the Commission's claims that they facilitated a $150 million fraudulent bond offering by the firm.

SEPTEMBER 2018

September 4: Special Counsel Mueller agrees to allow President Trump and his legal team to provide some written answers in lieu of oral answers in an interview setting (see August 8 entry). • State Farm coughs up $250 million in settling a lawsuit alleging that it worked to secure the election of an Illinois Supreme Court justice through improper means in 2004 for the improper purpose of overturning a billion-dollar judgment against it. • Confirmation hearings begin for U.S. Supreme Court nominee Judge Brett Kavanaugh, and are punctuated by interruptions by protesters and complaints by Democrats that they have not had sufficient time to review over 40,000 pages in documents that lawyers for former President Bush released to them the night before. • Trial begins before Judge Claudia Wilken in the U.S. District Court for the Northern District of California in class action antitrust litigation testing the legality of the NCAA's restrictions on compensating student athletes. • Schnader Harrison Segal & Lewis sues former client Bill Cosby for more than $50,000 in legal fees in connection with its representation of Cosby in civil and criminal litigation.

September 5: The SEC alerts investors to the risks of investing in marijuana-related companies, which the Commission notes may be at risk of criminal prosecution given the Trump Administration's rescission of the Obama Administration's policy on the prosecution of marijuana-related offenses. • Wells Fargo's law firms specialty group issues a report finding that law firms' financial performance during the first half of 2018 improved markedly. •

Former U.S. Senate candidate and Alabama Chief Justice Roy Moore files a complaint in the U.S. District Court for the District of Columbia alleging that actor Sacha Baron Cohen "falsely painted, portrayed, mocked and with malice defamed Judge Moore as a sex offender" after Cohen — posing as a former Mossad agent — invited Moore to be interviewed on a fictional Israeli television network.

September 7: Judge Randolph Moss of the U.S. District Court for the District of Columbia sentences former Trump campaign adviser George Papadopoulos to 14 days in prison after Papadopoulos pleads guilty to lying to FBI investigators about his connections to Russian affiliates.

September 10: The ABA announces a seven-point plan to address substance abuse and mental health issues in the legal profession, an effort to address chronic stress and high rates of depression and substance use in the profession. • Judge Lucy Koh of the U.S. District Court for the Northern District of California signs off on Yahoo's $80 million settlement with investors who alleged that the company misled them about four data breaches that jeopardized the personal information of as many as 3 billion users. • CBS CEO Leslie Moonves resigns amid calls for an investigation into allegations that he sexually harassed multiple women during his tenure at the network. • The U.S. Court of Appeals for the Federal Circuit affirms a Patent Trial and Appeal Board decision upholding the validity of Harvard and MIT's CRISPR gene editing patents in the face of a challenge from the University of California and the University of Vienna.

September 11: In an interlocutory appeal from the U.S. District Court for the Western District of Kentucky, the U.S. Court of Appeals for the Sixth Circuit reverses and remands an order declining to dismiss incitement-to-riot claims against President Trump stemming from his comments at a Kentucky campaign rally in which he directed his supporters to eject protesters from the venue.

September 12: Former law students at the shuttered Charlotte School of Law settle their class-action claims against the school — which allegedly misled students about the depth of its ABA accreditation problems — for $2.7 million

September 13: The U.S. Court of Appeals for the D.C. Circuit hears argument in a case brought by the Electronic Privacy Information Center, which seeks to use the Freedom of Information Act to obtain President Trump's tax returns from the IRS. • The Committee on the Judiciary of the U.S. House of Representatives votes 16-5 to approve a proposal to divide the U.S. Court of Appeals for the Ninth Circuit into three regions.

September 14: Former Trump campaign chairman Paul Manafort strikes a deal to cooperate with Special Counsel Mueller's probe into Russian influence on the 2016 elections in exchange for a lighter criminal sentence. • *The New Yorker* reports on allegations the Supreme Court nominee Judge Brett Kavanaugh engaged in sexual misconduct while a high-school student at Georgetown Preparatory School; Kavanaugh quickly releases a statement "categorically and unequivocally" denying the allegations.

September 16: The *Washington Post* publishes an interview with Dr. Christine Blasey Ford, who alleges that Supreme Court nominee Judge Brett Kavanaugh sexually assaulted her while at a high-school house party.

September 17: U.S. Senator and Chairman of the Senate Judiciary Committee Charles Grassley postpones a September 21 vote on Judge Brett Kavanaugh's nomination to the Supreme Court, and announces a supplemental hearing on September 24 to hear testimony from Kavanaugh and Dr. Christine Blasey Ford as to Ford's allegation that Kavanaugh sexually assaulted her.

September 18: After 13 years of litigation, MasterCard, Visa, and a group of banks agree to settle antitrust claims stemming from "swipe" fees and anti-steering rules for $6.2 billion.

September 19: Judge Steven T. O'Neill of the Montgomery County (Maryland) Court of Common Pleas denies Bill Cosby's motion seeking his recusal days prior to Cosby's criminal sentencing for sexual assault crimes. • Judge R. Brooke Jackson of the U.S. District Court for the District of Colorado holds that the federal government may not deny a passport application on the basis of an individual's refusal to specify a male or female gender in an application.

September 20: Cardinal Timothy Dolan of New York announces that former federal judge Barbara Jones will serve as a special counsel and independent reviewer of child sex abuse cases to determine whether the New York Diocese of the Catholic church followed proper protocols.

September 21: The *New York Times* reports that Deputy Attorney General Rod Rosenstein suggested in the spring of 2017 that he secretly record President Trump shortly after assuming responsibility for overseeing the Department of Justice's Russia investigation and writing a memo that President Trump pointed to as a justification for firing then-FBI Director James Comey.

September 23: Dr. Christine Blasey Ford agrees to testify before the Senate Committee on the Judiciary about her allegation that Supreme Court nominee Judge Brett Kavanaugh sexually assaulted her at a high-school house party. •

The New Yorker reports that a second woman, Deborah Ramirez, has accused Kavanaugh of sexually assaulting her at a Yale dorm party.

September 24: Supreme Court nominee Judge Brett Kavanaugh sends a letter to Senators Charles Grassley and Diane Feinstein stating that he "will not be intimidated into withdrawing from this [nomination] process," nor will he succumb to a "last-minute character assassination." • The U.S. Court of Appeals for the Eighth Circuit stays an order from the U.S. District Court for the District of North Dakota preliminarily enjoining the enforcement of a voter identification law requiring prospective voters to present poll workers with a form of identification listing a current residential street address. • Judge Dana Christensen of the U.S. District Court for the District of Montana invalidates as arbitrary and capricious the U.S. Fish and Wildlife Service's 2017 decision to remove protections for grizzly bears in the greater Yellowstone area under the Endangered Species Act.

September 25: The U.S. Court of Appeals for the Second Circuit denies the Department of Justice's petition for a writ of mandamus seeking to halt the deposition of Acting Assistant Attorney General John Gore, concerning his involvement in adding a citizenship question to the U.S. Census. • The U.S. Court of Appeals for the Ninth Circuit holds that Uber can compel arbitration of claims that it misclassified its drivers as independent contractors rather than employees. • Lambda Legal and Helen Thornton sue Nancy Berryhill, Acting Commissioner of the Social Security Administration, in the U.S. District Court for the Western District of Washington after the SSA denies Thornton's claim for survivor benefits on the ground that Thornton — who was barred by Washington law from marrying her same-sex partner at the time of her partner's death — was ineligible for benefits. • In the wake of new reports on the sexual abuse of children in the Catholic church, Pennsylvania lawmakers enact legislation extending the statute of limitations for victims of childhood sex abuse to seek civil redress and eliminate the statute of limitations in criminal cases altogether.

September 26: The U.S. Court of Appeals for the Fifth Circuit reverses an order from the U.S. District Court for the Middle District of Louisiana invalidating Louisiana's Unsafe Abortion Protection Act as unconstitutional, and holds that the law's "admitting privileges" requirement for doctors performing abortions does not impose a substantial burden under the U.S. Supreme Court's 2016 decision in *Whole Woman's Health v. Hellerstedt*.

September 27: Dr. Christine Blasey Ford and Supreme Court nominee Judge Brett Kavanaugh testify separately before the Senate Committee on the Judiciary; Ford testifies that she is "100 percent certain" that Kavanaugh

was the man who sexually assaulted her at a high-school house party, while Kavanaugh categorically denies the allegation and accuses Democrats of engaging in calculated character assassination. • The SEC files suit against Tesla CEO Elon Musk in the U.S. District Court for the Southern District of New York, alleging that Musk caused confusion and disruption in the market for Tesla stock when he made a series of false statements on Twitter about the prospects of taking the company private.

September 28: The ABA, which had issued a "well qualified" rating of Supreme Court nominee and Judge Brett Kavanaugh, asks the Senate Committee on the Judiciary to suspend its vote on Kavanaugh's nomination so as to permit an FBI investigation of allegations that Kavanaugh sexually assaulted women during high school and college. • After the Senate Committee on the Judiciary votes along party lines to advances Kavanaugh's nomination to the full Senate, Senator Jeff Flake comes to an agreement with Senator Christopher Coons to suspend a final vote on the nomination until the completion of a limited, one-week FBI investigation into allegations that Kavanaugh sexually assaulted women in high school and college. • Judge Emmet Sullivan of the U.S. District Court for the District of Columbia holds that congressional Democrats have standing to sue President Trump for allegedly violating the Foreign Emoluments Clause of the U.S. Constitution.

September 30: California Governor Jerry Brown signs a bill seeking to reinstitute network neutrality regulations that the Federal Communications Commission jettisoned in its "Restoring Internet Freedom Order," prompting the U.S. Department of Justice to ask a federal district court to enter a preliminary injunction barring enforcement of the law.

OCTOBER 2018

October 1: The United States, Canada, and Mexico agree to replace the North American Free Trade Agreement ("NAFTA") with the United States Mexico Canada Agreement ("USMCA"). • The Trump Administration begins to enforce a new policy of denying entry visas to the unmarried, same-sex domestic partners of United Nations officials and foreign diplomats — the same rule it has long applied to unmarried, opposite-sex domestic partners. • The U.S. Supreme Court hears oral argument in *Weyerhaeuser Company v. United States Fish and Wildlife Service*, a case testing the limits of a federal agency's power to designate private property as "unoccupied critical habitat"; *Mount Lemmon Fire District v. Guido*, which presents the question of the applicability of the Age Discrimination in Employment Act to state and local government employers with less than 20 employees; and *Madison v.*

Alabama, in which the Court considers whether a state would violate the Eighth Amendment by executing an individual whose dementia and cognitive decline render them unable to remember their capital crime.

October 2: Following the publication of a report in the *New York Times* indicating that President Trump inherited over $400 million from his father via various tax schemes, New York City Mayor Bill de Blasio directs the City's Department of Finance to investigate "tax and housing violations" and work with New York State authorities to determine whether the Trump family paid all the taxes those transfers required.

October 3: The U.S. Supreme Court hears oral argument in *Knick v. Township of Scott, Pennsylvania*, a case concerning the extent to which petitioners must exhaust their state-law remedies before seeking constitutional takings relief in a federal court, and *New Prime Inc. v. Oliveira*, concerning the applicability of exemptions in the Federal Arbitration Act to independent contractors and the respective roles of federal judges and arbitrators in construing those exemptions.

October 4: The FBI concludes a limited investigation into allegations that Supreme Court nominee and Judge Brett Kavanaugh sexually assaulted women during high school and college, and provides Senators with a report on its findings. • The Department of Justice indicts seven Russian military officers accused of computer hacking, wire fraud, aggravated identity theft, and money laundering in connection with a coordinated effort to discredit athletic anti-doping regimes and distract from a doping scandal that implicated Russian government officials.

October 5: After U.S. Senator Susan Collins announces her support for Supreme Court nominee and Judge Brett Kavanaugh in a 45-minute speech on the Senate floor, the Senate votes for cloture on Kavanaugh's nomination and schedules a final vote for October 6. • Judge William H. Orrick of the U.S. District Court for the Northern District of California invalidates restrictions that the Trump Administration had imposed on sanctuary cities' access to Edward Byrne Memorial Justice Assistance Grants ("Byrne JAG" funding), and grants a writ of mandamus directing the Administration to release Byrne JAG and Community Oriented Policing Services grant funding to California and San Francisco.

October 6: By a vote of 50 to 48, the U.S. Senate confirms Judge Brett Kavanaugh's nomination to the U.S. Supreme Court. Chief Justice Roberts swears-in Kavanaugh shortly after the vote.

October 9: The U.S. Supreme Court hears argument in two cases, *Stokeling v. United States* and *United States v. Stitt*, testing the violent felony require-

ment of the Armed Career Criminal Act's sentencing enhancement scheme. • Judge Robert N. Scola, Jr. of the U.S. District Court for the Southern District of Florida sentences Guy Vallerius, also known as "Oxymonster," to 20 years in prison after Vallerius pleads guilty to conspiracy to possess with the intent to distribute controlled substances and conspiracy to launder money in connection with his administration of the dark web drug marketplace "Dream Market."

October 10: Justice Ginsburg temporarily stays orders from the U.S. District Court for the Southern District of New York requiring U.S. Department of Commerce Secretary Wilbur Ross and Acting Assistant Attorney General John Gore to sit for depositions pertaining to their roles in adding a citizenship question to the 2020 U.S. Census.

October 11: In an opinion by Chief Justice Mary E. Fairhurst in *State v. Gregory*, the Supreme Court of Washington holds that the state's death penalty regime is unconstitutional because it is "administered in an arbitrary and racially biased manner," and "fails to serve penological goals." • Civil rights groups file suit under Section 2 of the Voting Rights Act to enjoin Georgia Secretary of State and gubernatorial candidate Brian Kemp from enforcing House Bill 268, an "exact match" law that has resulted in the voter registrations of some 50,000 Georgia voters being placed on hold.

October 12: Judge Nanette K. Laughrey of the U.S. District Court for the Western District of Missouri holds that a number of the State of Missouri's parole hearings deprive those serving juvenile life-without-parole sentences of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" in violation of the Eighth Amendment.

October 15: Judge Ann Aiken of the U.S. District Court for the District of Oregon grants in part and denies in part motions for judgment on the pleadings and for summary judgment in *Juliana v. United States*, dismissing President Trump from the case but permitting the plaintiffs to take to trial their claim that the federal government violated their Fifth Amendment rights by incentivizing the use and development of fossil fuels. • Sears Holdings Corporation files for bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York, announcing its intention to remain in business but close 142 stores by the end of 2018. • Lambda Legal and a group of individual plaintiffs file suit in the U.S. District Court for the District of Kansas, and allege that a Kansas policy that precludes transgender individuals from changing the gender on their birth certificates violates the Equal Protection Clause of the Fourteenth Amendment.

October 16: The U.S. Department of Justice reaches agreement with Nomura Holding America Inc. and several of its affiliates on a $480 million penalty to resolve federal civil claims that Nomura misled investors in connection with the marketing, sale, and issuance of residential mortgage-backed securities between 2006 and 2007. • The State of Minnesota files suit against insulin manufacturers Sanofi-Aventis US, Novo Nordisk, and Eli Lilly in the U.S. District Court for the District of New Jersey, and alleges that the insulin manufacturers fraudulently raised insulin prices in violation of the Racketeer Influenced and Corrupt Organizations Act, among other counts.

October 17: Senior Judge John Rainey of the U.S. District Court for the Southern District of Texas sentences Marq Perez, the individual responsible for burning down the Victoria Islamic Center in Victoria, Texas, to almost 25 years in prison following Perez's conviction on hate crime charges.

October 18: The Center for Biological Diversity, Defenders of Wildlife, and Animal Legal Defense Fund file suit against the U.S. Department of Homeland Security and Secretary Kirstjen M. Nielsen in the U.S. District Court for the District of Columbia, alleging that the Department's bid to exempt certain sections of land near the U.S.-Mexico border from environmental review in advance of wall construction would violate the Take Care and Presentment Clauses of the U.S. Constitution and the Separation of Powers and Non-Delegation Doctrines.

October 19: The U.S. Department of Justice unseals a criminal complaint charging Elena Alekseevna Khusyaynova for her role in a Russian scheme to unlawfully influence the results of the 2016 presidential election.

October 22: The U.S. Supreme Court stays an order of the U.S. District Court for the Southern District of New York requiring Secretary of the U.S. Department of Commerce Wilbur Ross to submit to a deposition pertaining to his role in adding a citizenship question to the 2020 U.S. Census.

October 23: The U.S. Court of Appeals for the Ninth Circuit reverses and remands a decision of the U.S. District Court for the Central District of California dismissing allegations that Nestle, Cargill Cocoa, Archer Daniels Midland, and a variety of affiliates aided and abetted the use of child slave labor on the Ivory Coast. • Immigrant rights organizations file suit against the U.S. Immigration and Customs Enforcement ("ICE"), Acting ICE Director Ronald Vitiello, and U.S. Department of Homeland Security Secretary Kirstjen Nielsen in the U.S. District Court for the Western District of Washington, seeking declaratory and injunctive relief from ICE's alleged policy of focusing resources on deporting immigrant activists.

October 24: The U.S. Department of Justice, the U.S. Environmental Protection Agency, and the Mississippi Department of Environmental Quality announce a national settlement with Chevron, resolving claims that the company violated provisions of the Clean Air Act; the settlement requires Chevron to pay a $2.95 million civil penalty and spend $150 million on safety improvements at all of its petroleum refineries across the United States. • Judge Kimba M. Wood of the U.S. District Court for the Southern District of New York sentences former New York State Senator Dean Skelos to four years in prison following Skelos's conviction for accepting over $300,000 in bribes and extortion payments in exchange for official favors. • Citing procedural due process principles, Judge Leigh Martin May of the U.S. District Court for the Northern District of Georgia enters a preliminary injunction barring enforcement of Georgia's "exact match" signature law enabling state officials to reject absentee ballots if a voter's signature on the ballot does not match a signature on other state records. • Judge Richard A. Jones of the U.S. District Court for the Western District of Washington applies Ninth Circuit precedent and invalidates restrictions that the Trump Administration had imposed on so-called "sanctuary cities" — here Seattle and Portland — conditioning access to Edward Byrne Memorial Justice Assistance Grants ("Byrne JAG" funding) on cooperation with federal immigration authorities.

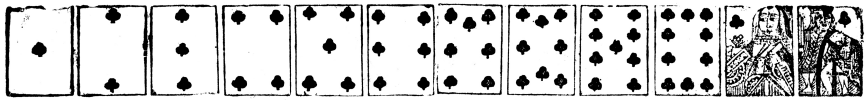
October 27: Robert Bowers opens fire in the Pittsburgh, Pennsylvania Tree of Life Synagogue, killing eleven worshippers and wounding six other individuals, including four police officers.

October 29: The U.S. Supreme Court declines to grant certiorari in *Turzai v. Brandt*, in which Pennsylvania legislators asked the Court to take up a challenge to the authority of the Pennsylvania Supreme Court to order a redistricting plan to remedy violations of the state constitution. • The U.S. Department of Justice asks the U.S. Supreme Court to stay the impending trial in the U.S. District Court for the Southern District of New York over the addition of a citizenship question to the U.S. Census. • Four individuals file a class action complaint against the Trump Organization, President Trump, Donald Trump Jr., Eric Trump, and Ivanka Trump in the U.S. District Court for the Southern District of New York, alleging violations of the Racketeer Influenced and Corrupt Organizations Act stemming from the defendants' allegedly false and misleading statements encouraging the individuals to invest in the American Communications Network, a media company that allegedly paid the Trumps to make supportive statements. • Tree of Life Synagogue shooter Robert Bowers appears in federal court for the first time, and is advised by U.S. Magistrate Judge Robert Mitchell of the U.S. District

Court for the Western District of Pennsylvania of the federal charges against him.

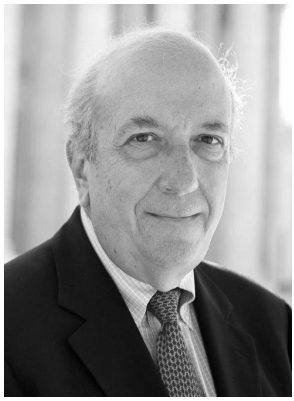
October 30: The U.S. Supreme Court hears oral argument in *Washington State Department of Licensing v. Cougar Den, Inc.*, an appeal presenting the question of whether a Washington state tax on fuel importation impinges on an 1855 treaty guaranteeing native American tribes the ability to freely import goods to market. • The Spirit Lake Sioux Tribe files suit against North Dakota Secretary of State Alvin Jaeger in the U.S. District Court for the District of North Dakota, alleging that North Dakota's voter registration law — which requires voters to possess identification that lists their current residential address — interposes an unconstitutional impediment on their right to vote, especially given that many Native Americans lack a residential address because the federal government declines to give them one.

October 31: A federal grand jury indicts Tree of Life Synagogue shooter Robert Bowers on 44 counts, including counts alleging that Bowers obstructed the free exercise of religious beliefs and counts alleging that Bowers illegally used and discharged a firearm to commit murder. • The U.S. Supreme Court hears oral argument in *Frank v. Gaos*, which presents the question of whether *cy pres* awards resulting from class action settlements violate Rule 23 of the Federal Rules of Civil Procedure, and *Jam v. International Finance Corporation*, an appeal inviting the Court to decide whether the International Organizations Immunities Act provides immunity to international organizations that is coextensive with the immunity provided to foreign governments under the Foreign Sovereign Immunities Act.



Gary Cooper (not that one) was convicted of five counts for his role in a scheme to steal from a labor union.

United States v. Cooper
886 F.3d 146, 149 (D.C. Cir. 2018)



Tony Mauro[†]

A YEAR IN THE LIFE OF THE SUPREME COURT

2018

A summary of developments involving the Supreme Court of the United States in 2018, most of which are unlikely to be memorialized in the United States Reports.

Age-old Recusal: A letter made public by Clerk of the Supreme Court Scott Harris in March stated that Justice Anthony Kennedy would recuse himself, belatedly, from participating in *Washington v. United States*, a long-running dispute over tribal treaty rights for northwest Indian tribes. "Justice Kennedy learned recently that, while serving as a judge on the Ninth Circuit Court of Appeals, he participated in an earlier phase of this case. The ordinary conflict check conducted in Justice Kennedy's Chambers inadvertently failed to find this conflict," Harris wrote. Kennedy's tenure on the Ninth Circuit ended 30 years ago.

Health Concerns: In the first of several health issues justices faced this year, Justice Sonia Sotomayor injured her left shoulder in a fall at her home on April 16, and underwent shoulder replacement surgery later in the month. In November, Justice Ruth Bader Ginsburg suffered a fall in her court chambers that broke three ribs. Examinations related to the injury, in turn,

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revealed in December that she had malignant tumors in her lung. The tumors were removed and her doctors said no further treatment was necessary. But her recuperation led her to miss oral arguments in January 2019, a first in her career. As is customary when a justice is ill, Ginsburg participated in the argued cases by reading briefs and transcripts from home.

Native American Clerk: In what appeared to be a historic first, it became known in April that Justice Neil Gorsuch had hired Tobi Young, a Native American lawyer, to be one of his law clerks starting in the summer. An Oklahoma-born citizen of the Chickasaw Nation and general counsel to the George W. Bush Presidential Center, Young is believed to be the first Native American to serve as a law clerk for a justice. After Young's clerkship was announced, it was revealed that Notre Dame Law School professor Richard Garnett, who clerked for Chief Justice William Rehnquist in 1996 and 1997, is an enrolled member of the Choctaw Nation of Oklahoma. But Garnett told *The National Law Journal* that when he was a clerk, he was not aware of his roots and was not a Choctaw member at that time. After the clerkship, he learned more about his ancestors, applied for membership, and became an enrolled member of the Choctaw Nation of Oklahoma.

Moving Admission: In a routine ritual on April 17, Assistant to the U.S. Solicitor General Jeffrey Sandberg moved the admission of his husband Elliott Mogul, a fellow Yale Law School graduate. Chief Justice John Roberts Jr. granted the motion, mentioning the applicant by name. It may have been the first time — or one of the first times — that a lawyer has explicitly moved the admission of his or her same-sex spouse to the Supreme Court bar in the court chamber. "My guess is that with the volume of bar admissions, it's probably happened before," said Paul Smith, a veteran advocate who is gay. "That said, I'd say it's worth a mention. Given that it's less than three years since the court's ruling in *Obergefell* was accompanied by four separate strongly worded dissents, it's interesting to see such an event happening without anyone batting an eye."

In Chambers Opinions: In a rare move, the court on June 18 in its decision on the Maryland gerrymandering case *Benisek v. Lamone* cited two "in chambers opinions." Those one-justice decisions rule on applications that are brought not to the entire court but to the justice who oversees the circuit from which the case arises. They first appeared in the 1830s, but now are rarely issued or cited. The justices cited *Fishman v. Schaffer*, a 1976 Justice Thurgood Marshall chambers opinion and *Lucas v. Townsend*, a 1988 Justice Anthony Kennedy opinion, as precedent for the proposition that "in election cases as elsewhere," a party seeking a preliminary injunction "must generally show

reasonable diligence." The last time a justice issued an in-chambers opinion was in 2014.

Kennedy Retires: Justice Anthony Kennedy, who was often the "swing vote" in an ideologically divided Supreme Court for more than a decade, announced his retirement on June 27, setting the stage for a bruising nomination battle for his successor. Kennedy made his announcement after the court had recessed for the summer. In a letter to President Donald Trump, he said his retirement was effective July 31 and he would then assume senior status. "For a member of the legal profession it is the highest of honors to serve on this court," Kennedy, 81, wrote in the letter, addressed to "My dear Mr. President." "Please permit me by this letter to express my profound gratitude for having had the privilege to seek in each case how best to know, interpret, and defend the Constitution and the laws that must always conform to its mandates and promises."

Honest Broker: Speaking at the biennial conference of the U.S. Court of Appeals for the Fourth Circuit on July 2, Chief Justice John Roberts Jr. said, "I feel some obligation to be something of an honest broker among my colleagues and won't necessarily go out of my way to pick fights." He also said that at times, "You would sort of sublimate your views." His comments came against the backdrop of speculation that he would replace Justice Anthony Kennedy as the court's swing vote in hot-button cases. Asked if he felt that "the weight of the office circumscribes your freedom in a way that an associate justice does not face," Roberts said "there is something to that," and that unlike some of his colleagues who "like to dissent," he sometimes will remain silent, though that "may be more just an individual preference."

Kavanaugh Nominated: President Donald Trump on July 9 announced his plan to nominate Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit to replace retiring Justice Anthony Kennedy on the Supreme Court. In picking the 53-year-old Kavanaugh, Trump opted for a hard-to-defeat nominee whose Ivy League credentials are similar to those of Justice Neil Gorsuch, the president's first Supreme Court nominee. Both are white males who attended Georgetown Preparatory School and clerked for Kennedy in 1993 and 1994. Kavanaugh got his law degree from Yale, while Gorsuch got his from Harvard.

Confirmation Hearing Begins: The Senate Judiciary Committee began Judge Brett Kavanaugh's confirmation hearing on September 4 with protesters interrupting frequently, and Democratic senators asking hostile questions of the nominee. Kavanaugh was repeatedly asked whether he would abide by precedents such as *Roe v. Wade*. He said the abortion ruling was settled

precedent, adding that "One of the important things to keep in mind about *Roe v. Wade* is that it has been reaffirmed many times over the last 45 years." But he did not say whether *Roe* was correctly decided. After his hearing ended on September 7, allegations that Kavanaugh sexually assaulted females while he was in high school and college surfaced.

Allegations Against Kavanaugh: The Senate Judiciary Committee agreed to reopen the Judge Brett Kavanaugh nomination hearing, a move that called to mind belated accusations against then-Judge Clarence Thomas decades earlier, Christine Blasey Ford, the main accuser, testified on September 27 and stood by her claims against Kavanaugh. Kavanaugh also testified, angrily stating that, "This whole two-week effort has been a calculated and orchestrated political hit." He later expressed regret for his remarks, stating, "I was very emotional last Thursday, more so than I have ever been. I might have been too emotional at times. I know that my tone was sharp, and I said a few things I should not have said."

Kavanaugh Confirmed: After the contentious hearings ended, Senate Republicans put Judge Brett Kavanaugh's nomination up for a vote. On October 6, the Senate confirmed Kavanaugh by a 50 to 48 vote, one of the narrowest margins in court history. Soon after the vote, Chief Justice John Roberts Jr. administered the constitutional oath, and Justice Anthony Kennedy, for whom Kavanaugh had once clerked, administered the judicial oath. Both ceremonies took place privately in the court's conference room. Kavanaugh's first sitting on the court came on October 9, when he participated in oral arguments and asked eight questions over two hours.

In the Pool: In an early sign of his pledge to be a "team player" on the Supreme Court, new Justice Brett Kavanaugh decided to join the court's "cert pool," a system for sharing law clerks to screen the thousands of incoming petitions for review. It eliminates the need for clerks in all nine chambers to write memos about each case for their justices. Two justices — Neil Gorsuch and Samuel Alito Jr. — have stayed out of the pool, which means that their clerks give them independent assessments of petitions, apart from the pool memos.

O'Connor Announcement: In an extraordinary letter to her friends and the public, retired Justice Sandra Day O'Connor on October 23 revealed that she had been diagnosed with early stage dementia and said she would no longer be able to participate in public life. "Since many people have asked about my current status and activities, I want to be open about these changes, and while I am still able, share some personal thoughts," wrote O'Connor, 88, who said she wanted to use her remaining years to advance civics learning

and engagement. "I feel so strongly about the topic because I've seen firsthand how vital it is for all citizens to understand our Constitution and unique system of government, and participate actively in their communities."

Changing the Rules: On November 1, proposed changes in the court's rules came as an unpleasant shock to many court advocates. The biggest changes were significant cuts in the word limits on merits briefs — from 15,000 to 13,000 words — as well as reply briefs and amicus briefs. Trimming reply briefs from 6,000 words to 4,500 seemed to be the most unpopular proposal. A coalition of 18 law firms that specialize in Supreme Court advocacy told the court that proposed rules aimed at reducing the length of briefs "would be harmful" to lawyers' ability to "thoroughly and thoughtfully brief issues that are critical to the court's resolution of the cases before it." The firms' letter to Supreme Court Clerk Scott Harris added that "a high percentage of the Court's merits cases are of great national importance and therefore warrant comprehensive briefing."

A Bonus Too Far? The hiring bonus that law firms offer to former Supreme Court law clerks has reached $400,000, *The National Law Journal* reported. The Jones Day firm announced that it had hired 11 former clerks from the previous term, which meant the firm invested $4.4 million in the new hires, not counting their annual salaries. Sidley Austin partner Carter Phillips, who recalled offering former clerks $10,000 hiring bonuses for the first time in 1987, commented, "Things have changed a bit over the past 30-plus years. I am now hoping my grandchildren get clerkships. It will be $1 million by then."

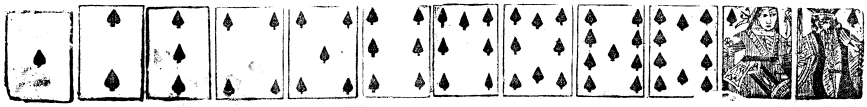
Roberts Pushes Back: In a rare rebuke, Chief Justice John Roberts Jr. on November 21 defended the nation's independent judiciary against President Donald Trump's attack on the U.S. Court of Appeals for the Ninth Circuit and an "Obama judge" for delivering an "automatic loss" to cases brought by the Trump administration. "We do not have Obama judges or Trump judges, Bush judges or Clinton judges," Roberts said in a statement issued by the court. "What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."

Court Crier: At the beginning of the court's session on December 4, Chief Justice John Roberts Jr. paid tribute to George Hutchinson, the last crier of the court. The 95-year-old Hutchinson was in the audience as Roberts recounted Hutchinson's decades of connection to the court, beginning as a page in 1938. He later became an assistant marshal and crier who would open court sessions, holding that title until 1962. "He participated in many

historic moments," Roberts said. "To cite just one example, he cried the Court for both arguments in *Brown v. Board of Education* and was here for the announcement of the decision. He remains a member in good standing of our bar. Mr. Hutchinson, welcome back!"

Anonymous Amici: A growing trend in Supreme Court amicus practice hit a speed bump in December. Several organizations filing amicus curiae briefs with the Supreme Court had turned to GoFundMe campaigns as a way to build support and generate donations for covering the cost of the briefs. But because GoFundMe allows anonymous contributions, Supreme Court Clerk Scott Harris reminded the filers of the court's rule 37.6, which requires that amicus filers "shall identify every person other than the amicus curiae, its members or its counsel, who made such a monetary contribution." Harris said in a statement, "The Clerk's Office interprets this language to preclude an amicus from filing a brief if contributors are anonymous." The amicus filers responded by either giving back the anonymous donations or asking if the anonymous donors would let their names be made public.

Job Not Finished: In his year-end annual report on the state of the federal judiciary on December 31, Chief Justice John Roberts Jr. said that recent efforts to combat workplace harassment in federal courthouses around the country were strengthening "our culture of accountability and professionalism," but that more needed to be done to foster the "exemplary workplace that we all want." Roberts said, "the job is not finished until we have done all that we can to ensure that all of our employees are treated with fairness, dignity, and respect."



I'm enjoying my coffee out of an Alito mug. It's supposedly French roast, but the waters seem to be of the United States.

Roger V. Skalbeck
email to *The Green Bag* (Jan. 16, 2018)

Wendy Everette & Catherine Gellis[†]

THE YEAR IN LAW & TECHNOLOGY

2018

JANUARY

Welcome to 2018, a year in which software got better at parsing contracts, there were more redaction foibles, data crunching and metrics got even bigger, and emoji again ruled the year. Part guessing game, part Supreme Court jurisprudence pop quiz, @SCOTUSemoji arrived on Twitter in January to summarize current cases using emoji, like *Gundy v. United States*, presented in emoji form as

• One of our favorite themes is the use of technology to improve access to justice. This month, CuroStudio began offering software development and

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support services, "focus[ing] on the centralization of data collection and analysis" to "pursue ventures that will make a significant impact on the future of legal services." • A skirmish in the #robotwars was held in a hotel bar between CARA and EVA. CARA is an "AI legal research technology" from CaseText, while EVA is a new technology from the makers of ROSS Intelligence that helps find relevant case law. Although the makers of EVA did not show up to the head-to-head competition, the CaseText team set up an EVA log in and their CARA tool, and performed their "search by brief" competition to gather relevant case law on both platforms. • Judge Brian Currey channeled the popular dating application Tinder's gesture based UX ("user experience") when writing his opinion in *Candelore v. Tinder*, opining "[a]ccordingly, we swipe left, and reverse," in a nod to Tinder's swipe left to "reject." • The *Wall Street Journal* covered emoji evidence in court cases in "Lawyers Faced With Emojis and Emoticons Are All ¯_(ツ)_/¯," asking what the "unamused face"

meant, and highlighting an Israeli case that involved a "series of emojis, including a smiley face, a comet, a champagne bottle, dancing yellow Playboy bunnies and a chipmunk" at the center of a debate over an apartment lease. • The first #GlobalLegalHack (more at https://globallegalhackathon.com) kicked off, covering six continents in 54 hours. Finalists included Revealu, which helps request a data export of your personal data under the European Union's General Data Protection Regulation (GDPR); browser plugin Decoding Law; Lex Lucid, which helps analyze contracts; and Rights Now, which offers a voice search of laws. • Legal tech pioneer Avvo was bought by Internet Brands. Avvo provided several online services, including search engines that aimed to assist potential clients in finding a lawyer. Avvo launched 11 years ago, and focused on helping the public to find lawyers through sometimes controversial features such as lawyer reviews and ratings as well as a specialized search engine for finding local lawyers who worked on various types of legal issues. • We love to see collaboration in legal innovation. Working together to make more case law available to the public, Free Law Project (@freelawproject) and Big Cases bot (@big_cases) teamed up to make sure that "the RECAP Archive will have all the latest documents from the top 75 federal cases super quickly." Big Cases bot tweets out updates from popular cases that receive a lot of press attention, while Free Law Project maintains the RECAP Archive, which publishes PACER files that users

pull while using the RECAP browser plug-in. • Deputy Attorney General Rod Rosenstein continued to find himself in the news, only this time for his comments at State of the Net calling for encryption backdoors.

FEBRUARY

Dockets. Pretty simple, right? Like all machine parsing. Mike Lissner shared a thread on Twitter that documented all the ways in which dockets are not so simple. Plain text, tables within tables, and links titled "doc" instead of the docket ID number were among the "PACER horrors of the day." • The U.S. Court of Appeals for the Ninth Circuit (en banc) held in *FTC v. AT&T Mobility* that the common carrier carve-out in Section 5(a)(2) of the FTC's unfair or deceptive acts jurisdiction is activity-based and not status-based. An earlier Ninth Circuit decision had held that any actions by a common carrier fell under the carve-out. In overruling the earlier decision, the Ninth Circuit ruled in *FTC v. AT&T Mobility* that the FTC was prevented "from regulating 'common carriers' only to the extent that they engage in common carriage activity. By extension, this interpretation means that the FTC may regulate common carriers' non-common carriage activities." • Software for software's sake doesn't appeal to lawyers, wrote Ivy B. Grey in *It's Not Me, It's You: Lawyers Don't Want Lousy, Overpriced Tech*. Instead, lawyers turn to legal tech solutions to solve "price, proof, predictability, pain points, and permanency" and to help with "problems that we encounter every day in legal practice: writing, billing, collecting, and client relationship management." • The Institute for Technology Law & Policy at Georgetown Law held a symposium on the "Governance and Regulation of Information Platforms" this month. Panels reviewed problems of access, amplifying lies or facts in online media, mitigating harassment, and regulating code. Papers were published in Volume 2 Issue 2 of the *Georgetown Law Technology Review*, available at https://georgetownlawtechreview.org. • Don't Google that For Me. The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 478, noting that Rule 2.9(C) of the 2007 ABA Model Code of Judicial Conduct prevents judges from researching facts involved in cases online, unless that fact is subject to judicial notice. • When there are robot lawyers, will what they do be considered the practice of law? Or is there an essential requirement that law can only be practiced by humans because only human intelligences can tailor legal advice for clients? William McGeveran relayed a comment made at the *University of Miami Law Review* Symposium "Hack to the Future," tweeting "Alvin Lindsay of @HoganLovells asks: if a machine can do it, how can it be the practice of law in the first

place? Echoes comments yesterday that #legaltech -> attorneys spend their effort on creativity. #UMLR2018" • Privacy law has been a fast-growing area in recent years, and we're delighted to see growing attention paid to this area of the law. Lawyers in this field must often have a significant understanding of technologies such as websites, mobile applications, ad tracking, and data analytics. At the same time, there are many varying regulations and statutes that govern this area. To assist lawyers entering the field, IAPP released their *Getting Started in Privacy* resource guide at "Introduction to Privacy" (https://iapp.org/resources/article/introduction-to-privacy/) this month, offering a helpful resource to lawyers new to the field or those seeking to read the latest white papers. • Sarah Jeong (@sarahjeong) live tweeted *Waymo v. Uber* from the courthouse. Her tweets informed, but also delighted, as she relayed the action to followers, including this gem: "I REPEAT, THE JURY IS GOING TO SEE A TEXT THAT IS COMPOSED OF A WINKY EMOTICON AND A LINK TO A YOUTUBE CLIP OF MICHAEL DOUGLAS'S GREED IS GOOD SPEECH FROM WALL STREET" and an interesting question for the lawyers in the audience, "Question to tech law twitter: have tech corporations previously asserted trade secret protection in machine learning data?" • It really wouldn't be the Year in Law and Technology without Judge William Alsup. This year, an imposter attempted to pose as Alsup on Twitter, leading the judge to have to declare to a courtroom, as reported by Sarah Jeong during the above-mentioned *Waymo v. Uber* hearing, "I don't have a Twitter account. I don't. I don't do those things. For obvious reasons." We understand the judge's reluctance, but stand ready to welcome him if he ever signs up. • In past years we've featured service by social media in international cases, and this year we bring you Toronto lawyer Tara Vasdani, who served a defendant through a private message on Instagram. The Ontario Superior Court found service effective, and did not require a read receipt. No word on what hashtags were used on the process of service. • The Fourth Circuit held in *BMG v. Cox* that the Digital Millennium Copyright Act (DMCA) requires ISPs to institute a meaningful policy to terminate the service of repeat copyright infringers. Cox's automated "thirteen-strike policy" was found to not meet the unstated requirements of the DMCA, which calls for the service provider to have done nothing more than "adopt[] and reasonably implement[] . . . a policy that provides for the termination in appropriate circumstances of subscribers . . . who are repeat infringers." Instead the court found that "Cox very clearly determined not to terminate subscribers who in fact repeatedly violated the policy," citing emails from Cox stating they would "collect a few extra weeks of payments for their account. ;-)" and "DMCA = reactivate." Neither the onslaught of invalid takedown

notices that plaintiffs had sent Cox, nor the First Amendment implications of kicking users off of a full-service ISP, seemed to have any bearing on Cox's apparent duty to terminate its users. • Docket Alarm, which uses analytics for case tracking and predictions, began tracking the gender diversity of attorneys appearing in court for various firms. They found some firms excelled at diversity and inclusivity in litigation (women appeared 47% of the time in patent cases for both McCarter & English and Crowell & Moring) but far lower diversity in the litigators appearing for most other firms. • Head-to-head between robots and lawyers! Ok, maybe not robots, but some lawyers did face off in a contract-reviewing contest. LawGeex held a competition between their "AI contract review automation solution" and 20 corporate lawyers, testing them on issue-spotting in five non-disclosure agreements. The NDAs were chosen from the "Enron Data Set" (publicly released emails from about 150 Enron employees), and varied in length from two to five pages. The software averaged 26 seconds to parse each contract, with an accuracy rating of 94% (against the predetermined scoring matrix), while the attorneys took an average of 92 minutes with an accuracy rating of 85%. Many of the attorneys interviewed after the contest noted that this NDA review featured low-stakes but repetitive contracts of the types that they would welcome an automation assist on, freeing their time up to handle more complicated and custom work. • Backup restoration, especially when those backups are on physical tapes, is expensive. But in a contracts case, *Physicians Alliance Corp v. Wellcare Health Insurance of Arizona*, where $20 million was in dispute, the court ordered the defendant to restore tapes holding data relevant to the dispute, despite initial cost claims of up to $584,300 to produce the tapes — later lowered to $12,968. In comparison to the sum at stake, however, the court found the data restoration cost was not unduly burdensome, following the proportionality guidance in Federal Rule of Civil Procedure 26(b)(1). • Lots of people use social media. Including terrorists. But this month the U.S. Court of Appeals for the Ninth Circuit shut down one of the first cases to reach a federal appellate court where the estates of terrorists' victims were trying to hold social media platforms liable for the harm the terrorists caused. A lower court decision in *Fields v. Twitter* had found the platforms immune under 47 U.S.C. § 230 (or "Section 230" for short, since we'll be talking about it again). In the appeal the Ninth Circuit did not reach the Section 230 question and instead determined that the Anti-Terrorism Act itself did not allow the plaintiffs to recover from social media platforms. • Own a building? Wanna let someone paint on it? Better think twice, if you might ever want to repaint your building ever again. A federal judge in the Southern District of New York held a building owner liable for

$6.7 million dollars in damages under the Visual Artists Rights Act for having painted over the "5Pointz" graffiti installation he had long ago allowed to adorn the walls of his building as he prepared the property for redevelopment — even though that very same judge had earlier refused to enjoin him from doing so based on the same claim.

MARCH

The U.S. District Court for the District of Columbia ruled for a veterans group, the National Veterans Legal Services Program, in a case about PACER fees for access to federal court records. In *National Veterans Legal Services Program v. U.S.*, Judge Ellen Segal Huvelle ruled that while PACER fees may be used for some courtroom technologies, they must be ones that "provide the public with access to electronic information maintained and stored by the federal courts," with the goal of making court information "freely available to the greatest extent possible." • Microsoft, Pro Bono Net, and the Legal Services Corporation launched the "Simplifying Legal Help Blog" at https://simplifyinglegalhelp.org to track their project to create an "Access to Justice" portal, focusing first on Alaska and Hawaii. The project aimed to "enable people to navigate the court system and legal aid resources" and to assist them with court filings. • The Library of Congress launched free online access to more than 35,000 cases heard by the Supreme Court, dating back to the court's first decision in 1791. These decisions, from the *United States Reports*, are now freely available online at http://loc.gov/collections/united-states-reports as page images in a searchable format. • A class action lawsuit against Yahoo based on their data breach was allowed to move forward. Judge Lucy Koh found claims by plaintiffs stating that they would have moved email services to be credible in the *In Re: Yahoo! Inc. Customer Data Security Breach Litigation* case. In October, plaintiffs offered to settle the case for nearly $50 million. • The U.S. District Court for the Northern District of California found that a "violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," allowing claims under Illinois's Biometric Information Privacy Act ("BIPA") to move forward in *In re: Facebook Biometric Information Privacy Litigation*, based on Facebook's "Tag Suggestions" of friends to tag in photographs uploaded to the Facebook service. • When using an instant messaging transcript as evidence, don't fake the chat logs. In *GoPro, Inc. v. 360Heros, Inc.*, 360Heros offered a Skype transcript that they represented as a true and correct copy of the chat. GoPro found a copy of the same chat on their own servers, found that it did not match the copy that 360Heros had submitted, and hired a forensics expert

to confirm that GoPro's version was accurate. The judge allowed an adverse inference jury instruction and ordered that GoPro's forensics expert fees be covered. • It's *Erie* how the question of whether state anti-SLAPP laws can apply in federal diversity cases keeps getting decided. In *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, the Tenth Circuit decided that the New Mexico anti-SLAPP statute could not. • In one of the most significant events for the Internet, Congress passed FOSTA (the Allow States and Victims to Fight Online Sex Trafficking Act), which significantly changed Section 230 (as well as amended various other statutes), ostensibly to help fight sex trafficking. The only effect it has definitely had is to lead to greater censorship by Internet platforms. In an early example, Craigslist removed its online personal ads for fear of liability under this new law.

APRIL

Mike Lissner began tracking his efforts to persuade 25 federal district courts to provide RSS feeds for their PACER/ECF systems by including them in a twitter thread, providing an enjoyable journey through the court systems. His motivations? "Honestly, I just do this work to hear people's accents." • Ogletree Deakins became the first law firm to publicly license document-drafting technology from LegalMation. The document-drafting software assists with generating a draft Answer from the text of a Complaint. This type of pattern-based text generation, based on a particular stylized type of input text (where the originating text is easier for the software to parse because it always follows particular patterns), is a common area for legal automation, as it can leverage machine learning and natural text processing advances that are being developed across several industries, not just the legal industry. • The Coding for Lawyers (C4L) Summit was held in Boston for professors who planned to teach courses on programming in law schools. It aimed to "explore the purposes, methods, and future of these courses, with an overarching goal of being descriptive, rather than prescriptive." • Sarah Burstein (@design_law) asked #appellatetwitter how to cite a portion of a livestream video of a speech given at a federal agency event. In response, Steve Schultze (@sjschultze) pointed to footnote 48 in his article, *The Price of Ignorance* (106 Georgetown Law Journal 1197), citing to a timestamp in the video hosted on YouTube. • When is a mustache emoji just a mustache? Reporters at *Bloomberg Law* tracked the increasing appearance of emoji in employment lawsuits as "evidence of discrimination, harassment, or retaliation." They found six employment law cases featuring emoji in 2016, twelve in 2017, and at the time of publication in April, five in 2018 so far. • LSAC named

its first Presidential Innovation Fellow, Miguel Willis, who will be focusing on the A2J Tech Fellows Program, which is a summer fellowship program for law students, focusing on training them in technology and law skills. • Stanford held its sixth annual CodeX Future Law conference, featuring talks on algorithmic fairness and accountability and AI-assisted legal research, as well as a keynote by Hilarie Bass on "Breaking Down Silos Between Law, Technology and Innovation." • Should the right to be forgotten, which is part of the GDPR (and so now important to more companies), treat artificial intelligence and computer memories differently from human memories? This question was raised by a new article by Eduard Fosch Villaronga, Peter Kieseberg, and Tiffany Li, *Humans forget, machines remember: Artificial intelligence and the Right to Be Forgotten* (34 *Computer Law & Security Review* 304). • Ever wonder what Congress was thinking when it wrote Section 230 into law back in the 90s? Wonder no more, thanks to an amicus brief submitted on behalf of former Congressman Chris Cox, who co-authored it, in *HomeAway and Airbnb v. Santa Monica*, a Ninth Circuit case testing the bounds of the law.

MAY

The Delaware Supreme Court asked "When a person voluntarily accepts a 'friend' request on Facebook from an undercover police officer, and then exposes incriminating evidence, does the Fourth Amendment protect against this mistaken trust?" and answered "no" in *Everett v. Delaware*. The police monitoring of the defendant's Facebook page, after he accepted a friend request from an undercover officer, did not constitute a search, as the defendant knew that his Facebook friends could see the photographs posted. • At "The Future Is Now: Delivery of Legal Services 2.018," a conference held in Chicago this month, Susan Nevelow Mart discussed "The Algorithm as a Human Artifact: Implications for the Duty of Competent Representation," which explored the need for attorneys to understand how algorithms work, and the ethical obligations to seek out the best-performing legal research assistance software available. • The day that all privacy lawyers have been waiting for finally arrived: on May 25, the GDPR went into effect. The regulation brought a host of new rules, such as the Right to be Forgotten, data exports, data security standards, and a requirement for most companies to name a privacy officer. The biggest impact we saw this month was a flurry of emails in our inbox, letting us know about updated privacy policies every company was adopting. • Host mugshots? Better be careful — despite them being considered public records in most states, you might get arrested if you charge people to have theirs removed from your site. In an arrest that raises First Amend-

ment questions of editorial decisions shaped by a profit motive, that's what California authorities did in May to the operators of Mugshots.com.

JUNE

California passed a landmark privacy law, the California Consumer Privacy Act ("CCPA"), which enacts many GDPR protections for California residents. It will go into effect, with promulgating regulations, during the summer of 2019. Under the CCPA, California residents will be able to request the information that a company has about them, request deletion of the data that a company holds about them, and opt out of having their personal information sold by the company, among other new rights. • A Kansas District Court found that use of Google Translate to ask for consent for a search nullified consent for a car search under the Fourth Amendment in *U.S. v. Cruz-Zamora*, based in part on professional translators listening to recorded audio from the stop and determining that Google Translate "provided a literal but nonsensical translation." • Austrian startup LeReTo, short for "Legal Research Tool," won the top prize at the Legal Tech Startup Awards 2018. LeReTo won the prize after making a three-minute pitch to a professional jury in the final round of the awards; the tool searches legal text for sources that are mentioned, and creates links to those documents in European legal databases. • The *New York Times* covered the effort to increase access to legal advice, especially in civil cases, through technology. "Legal Aid With a Digital Twist" profiled some new projects that seek to level the legal playing field for those who can't afford their own attorneys, such as MDExpungement, which assists with expunging records, and CLUE (Client Legal Utility Engine), which helps with clinic intake by finding related problems affecting potential clinic clients. • Should cell phone site location data (CSLI) be considered metadata or content under the Fourth Amendment's warrant requirement? The Supreme Court held this month in *Carpenter v. U.S.* that cell phone users have a reasonable expectation of privacy in their location information, and that the third-party doctrine warrant exception did not apply because consumers do not voluntarily turn over all of their location information to the mobile phone service provider. CLSI was "an entirely different species of business record — something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. . . . If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement." • Journalists' ability to promise sources anonymity took a hit in New York when the state's highest

court interpreted its state shield law narrowly. • Let's go crazy: the long, long, *long* running litigation over the video of a toddler dancing along to a Prince song in a home video posted online was finally settled before the kid got to high school. Stephanie Lenz, the mom who posted the video, had sued Universal Music for issuing a takedown notice that caused the video to be removed under Section 512(f) of the DMCA, which allows those who send invalid takedown notices to be sued by those who have wrongfully been censored by them. However, the Ninth Circuit had earlier determined that recovery was limited only to those who had sent wrongful notices without "subjective" good faith, which had stalled the litigation. • On his way out the door to retirement, U.S. Supreme Court Justice Anthony Kennedy penned the majority opinion in *South Dakota v. Wayfair* — a decision that turned decades-long settled practice on Internet sales taxes, as well as long-arm jurisdiction generally, on its head. In the wake of South Dakota's complaints that it couldn't figure out how to tax its residents, the Court decided that the state could go ahead and tax out-of-state companies selling to its residents instead.

JULY

Todd Ruger (@ToddRuger) shared this charming anecdote from the Ninth Circuit: to select an en banc panel, he writes, "A deputy clerk brings 'literally a bird cage,' filled with 'a little stick' representing each judge, to a sitting judge who picks the names out of the cage, says Judge O'Scannlain." • The Canadian Bar Association traveled back to 1984 to share an article in their newsletter, featuring lawyer Jim Moore discussing the purchase of his first computer (a "microcomputer" that cost over $6,000!). Even in 1984, lawyers sought efficiency when using new technologies. The main appeal of a computer for Moore? It's a time saver. • Tweets about law and technology hypotheticals are appearing in casebooks now. James Grimmelmann's eighth edition of the *Internet Law: Cases and Problems* casebook featured a hypothetical from Matt Blaze (@mattblaze). Blaze asks, "Cops riding around the city, repeating over the PA system: 'Alexa, send message.' and then later 'recordings@localpd.gov, right.'" For those who haven't used voice assistants, if an assistant picked up the first command it would start a recording in the house, and then email the recording to the address in the second command. • Building litigation metrics decks came to "all case types in state courts, federal courts, administrative courts, and other jurisdictions" as Fastcase released their new "Analytics Workbench" based on Docket Alarm's earlier product, which had been limited to a smaller number of courts and jurisdictions. • Following the passage of FOSTA, Section 230 has been limping along. However, it did help the

California Supreme Court to decide, in *Hassel v. Bird*, that platforms could not be enjoined to delete content. In that case, Yelp could not be forced to delete a user-provided review. • Open-source-law advocate Carl Malamud achieved the first of two significant victories in court this year when the D.C. Circuit vacated an injunction that had required him to take down the standards incorporated by reference into the Code of Federal Regulations. For the moment, the appeals court's instructions are for the district court to look harder into whether such posting is fair use, leaving for another day the question of whether the posted material is copyrightable at all.

AUGUST

Robert Chesney and Danielle Keats Citron published *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, in which they grappled with "deep-fake technology," i.e. photographs, videos, and audio clips that look completely convincing but are instead generated by computers, either from scratch or by altering different source material. The article analyzes "the existing and potential tools for responding to" these images and clips, as well as the legal issues that responses raise. • Law firm computer security continued to be a theme throughout 2018. At the ILTACON conference, a 15-year-old computer security expert helped drive the point home by showing the audience how easy it would be to hack into a law firm and access client data. *Above the Law* summed up the panel memorably as, "[i]f you labored under the illusion that hacking is a difficult, arcane skill that only well-resourced, highly trained attackers can pull off, Weinberger shattered all that in a matter of minutes showing off his arsenal of equipment that he purchased for pocket change." • Would you like an email each time there is a new filing in a case you are following? We have just the feature launch for you: Free Law Project announced their new alerts for PACER dockets this month, available online at https://www.courtlistener.com/help/alerts/. • Attorneys are just like everyone these days, with too many passwords to remember. New Jersey courts aren't helping matters, citing vague authority in "NIST" to require that passwords used to access the e-filing system be changed every 90 days. We direct the court's attention to NIST SP 800-63B which states, "verifiers SHOULD NOT require memorized secrets to be changed arbitrarily (e.g., periodically)." Here's hoping that arbitrary and capricious password policies fail to make an appearance in 2019. • The ABA's House of Delegates (which is the policy-making body of the ABA) voted this month to update a comment on Model Rule 1.1 of the Model Rules of Professional Conduct. The comment on "Maintaining Competence" was reworded to require attorneys to "keep abreast of changes in the law and its practice, in-

cluding the benefits and risks associated with relevant technology." • Ed Walters published a new book, *Data-Driven Law*, covering "Data Analytics and the New Legal Services" for attorneys who are tasked with learning how to make best use of new technical capabilities in their practices. The book covers, among other topics, how to use new data mining techniques to parse and analyze files of past cases in order to more effectively serve clients.

SEPTEMBER

North Carolina became the second state, after Florida, to require attorneys to include at least one hour of approved training in technical competence training in their annual CLE. The North Carolina State Bar amended its CLE requirements to include the new "technology training" requirement. • Orin Kerr released an updated version of his article, "Compelled Decryption and the Privilege Against Self Incrimination," which covers the rights of accused who are asked to unlock digital devices. In announcing the update, he thanked his Twitter audience for the "genuinely helpful feedback I received on Twitter. (Really, this can happen.)" We're happy to see the legal Twitter community supporting each other on social media and offering feedback for paper drafts online. • Machine learning and data processing are helping attorneys with ever more jobs, including tedious and error prone tasks like the generation of spreadsheets from funding documents. Atrium LTS, a machine learning startup specializing in digitizing legal documents such as the funding spreadsheets, raised a $65 million round led by Andreessen Horowitz. • Our home, *The Green Bag*, published possibly the first set of threaded tweets (that is, tweets that link to each other to form a list of related individual tweets) expanded to a law journal article when they published Rachel Gurvich's excellent "Tweets to a Young 1L." The annotated version of her Twitter thread included sage advice that we second, including the advice to take the professor, not the class, when picking classes, and to take a law school clinic. • The Washington, D.C. Bar held an unusual CLE this month. "Lunch and Learn: A Software Development Primer for Lawyers: When, Why and How to Build your own Digital Products" provided lawyers with an overview of how to make a "build versus buy" decision, reviewed the software development process, and discussed how to hire a team of engineers to build the project if the attorney decided that building was the right direction to head in. • Can monkeys hold copyrights in the selfies they take of themselves? No. The en banc Ninth Circuit finally answered the question when it denied rehearing of the panel's April decision, which a member of the court had tried to revisit in May.

OCTOBER

Carl Malamud achieved the second of his two significant victories in court this year when the Eleventh Circuit ruled in his favor, finding that Georgia's annotated laws were not covered by copyright. Georgia has long contracted with a private company to add annotations to the state laws. This annotated version, the *Official Code of Georgia Annotated*, is the "official" version of state laws, but is hosted online behind a restrictive Terms of Service. The court found that despite the private markups, the law of Georgia still belongs in the public domain: "where the work was created through the procedural channels in which sovereign power ordinarily flows — it follows that the work would be attributable to the constructive authorship of the People, and therefore uncopyrightable." • Machine readable legal data continued making inroads in 2018. Harvard's Library Innovation Lab launched their Caselaw Access Project, "which puts the full corpus of published U.S. case law online for anyone to access for free" — 360 years of case law searchable by API or to download at http://case.law. Readers may remember this project from our 2016 summary, when we shared a tidbit from the digitizing of the physical books being ingested. • Suffolk University's David Colarusso launched a new issue-spotting game, "Learned Hands," that asks attorneys to either classify a problem in a domain such as family law, landlord-tenant, or criminal law, or to issue spot within a particular domain. As issues are classified by players, the data is fed into a machine learning algorithm. The use of human classifiers to train an algorithm reminded us of the idea of a Mechanical Turk — something that appears to be artificial intelligence but is really using human intelligence to solve a problem. • Meanwhile, Thomson Reuters rounded up several studies on automation in the legal field to ask "[h]ow will artificial intelligence affect legal practice?" McKinsey & Co. estimated that up to 23% of legal work could be done by software, while Frank Levy of MIT and Dana Remus of the University of North Carolina School of Law came to a more conservative estimate of 13%. Thomson Reuters found that legal automation came in three general groupings: structural classification, which analyzes something like a contract to parse the clauses and possibly find alternate clauses to substitute; data extraction, which can be used to find all the names and dates in a piece of text; and natural language processing, which aims to classify items and parse large amounts of human generated "natural" text to extract meaning. • This month, Vermont became the 32nd state to require technical competence from practicing attorneys. The measure was adopted on October 9 and becomes effective on December 10. For those following along at home, Bob Ambrogi has a list of states now recognizing a duty of

technical competence at https://www.lawsitesblog.com/tech-competence/. • Kyle E. Mitchell launched Canting Tribe, an effort to standardize common business contracts, with their first shared contract, an NDA. Their goal is to "attack[] the problem of having to read and reread terms that solve that problem over and over and over again" by promulgating shared contracts through network effects and "rigorously versioned" changes. Read their NDA, which is available for use, and some more about the project at https://cantingtribe.com.

NOVEMBER 2018

Effective redaction continued to be a challenge for our industry. In November, Facebook's lawyers failed to properly redact files in the *Facebook v. Six4Three* case, allowing Cyrus Farivar of *Ars Technica* to read the redacted text after opening Facebook's PDFs in a text editor. The text editor did not render the redaction marks, allowing the underlying text to be read. To learn about properly redacting a PDF, see the helpful guide at https://lawyerist.com/how-to-redact-a-pdf/. • In other technical competence news, @socmediaJD on Twitter shared this e-discovery gem. U.S. Magistrate Judge Iain D. Johnston of the Northern District of Illinois, Western Division, brought a smile to our nerdy lawyer hearts when he reassured lawyers that "[i]n life, there are many things to be scared of, including, but not limited to, spiders, sharks, and clowns — definitely clowns, even Fizbo. ESI is not something to be scared of." (ESI stands for electronically stored information, and is shorthand for things like emails, databases, social media, and other native-electronic format data.) • Whose Twitter followers talk about "low bono"? Sarah Glassmeyer (@sglassmeyer) ran the same poll about familiarity with the term "low bono" on Twitter as Bryan Garner (@BryanAGarner), but came out with opposing results. While 36% of Garner's Twitter followers have heard of "low bono," 63% of Glassmeyer's followers are familiar with the term. • Meanwhile, more low bono sites launched in 2018, including Basic Counsel, which began offering basic legal services to clients in Oregon and Washington. The site allowed attorneys to create packages of services, and offered a service tracker to clients to help them understand when each step of a multi-step service was complete, helping to make confusing multi-step legal processes easier to follow for clients. • The FTC held three of their series of hearings on "Competition and Consumer Protection in the 21st Century" this month, covering topics at the intersection of technology and antitrust law, including algorithms and predictive analytics, algorithmic collusion, and privacy issues. Archived videos of the hearings are available on the FTC's website at https://www.ftc.gov/policy/hearings-competition-consumer-

protection. • In *Roe v. Halbig*, a California appeals court affirmed that anonymous speakers who successfully quash subpoenas seeking to unmask them are entitled to recover their attorney's fees under California Code of Civil Procedure Section 1987.2.

DECEMBER

Which courts have cited the "laughing face" emoji? Eric Goldman released his emoji case law data set of "about 165 opinions referencing emojis or emoticons, of which about 30% are from 2018." His data set, available at http://bit.ly/emojidataset, lists case names and the cited emoji, including the context in which the emoji was used, such as email, IM, or "[h]and-written."

• Start your data crunching: when federal agencies collect data, it will now be open by default. Congress passed the Open, Public, Electronic, and Necessary Government Data Act ("OPEN Government Data Act"), mandating open data standards, such as those promoted by data.gov, including releasing data sets to the public in non-proprietary formats and ensuring that data is machine readable. • On the un-readable data front, the *Washington Post* reported that data provided by Google for the Senate Intelligence Committee to analyze as part of a report on misinformation was presented in a hard-to-parse format, making the researchers' jobs more difficult. "The ads data was provided in lengthy PDF format whose pages displayed copies of information previously organized in spreadsheets (Google could have provided the original spreadsheets in CSV or JSON files)." • How many U.S. Justice Department indictments from 2018 are cybersecurity related? MITRE Cybersecurity engineer Katie Nickels used CourtListener and crowdsourcing on Twitter to find the answer — at least 21 indictments in 2018. You can currently find her thread of cases on Twitter at https://twitter.com/likethecoins/status/1076542615825383435. Along the way, people brainstormed how to best do this sort of collaborative research (GitHub repositories?), how to avoid PACER fees, and where to find references to cybercrime-related cases. Several participants noted that there was a wealth of material in this set of indictments, so we look forward to reading a law review note or two on the cybercrimes of 2018 next year. • The year ended before there were any more high-profile redaction disasters, but stay tuned for the 2019 update . . .

JANUARY

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The almanac has long been regarded and held as a part of the law of the land.

Finney v. Callendar
8 Minn. 41, 43 (1862)

FOUR RECOMMENDATIONS

Susan Phillips Read[†]

I selected these four opinions for style, not substance. But a well-written appellate judicial opinion is always persuasive on the merits, as is the case with each of these writings. Next, appellate judicial opinions either reveal the outcome of the appeal upfront in the opening paragraphs, or eschew doing so. Each approach has its advantages and its drawbacks; its fans and its critics. I, for one, have always favored letting readers know from the beginning where the writing is headed and will end up, and each of these opinions does that. What follows is a short explanation of why in particular I consider each of these opinions to exhibit exemplary judicial writing.

Build, Inc. v. Utah Department of Transportation
2018 UT 34, 428 P.3d 995 (Utah 2018)
opinion for the court by
Associate Chief Justice Thomas R. Lee

Sequentially numbered ¶¶ 1-4 are a précis of the opinion to follow, a boon for the reader. A boon for the Utah judiciary is the way in which the Court, after reconciling the internal conflict in its "law of the case" precedent,

[†] Of Counsel, Greenberg Traurig, LLP; Associate Judge (ret.), New York Court of Appeals.

twice clearly states the rule to be followed going forward (¶¶ 32, 56). The variation in sentence length and use of vivid verbs ("double[] down", ¶ 51; "infect[]", ¶ 55) and figurative language and phrases (a successor judge "should measure twice before cutting down the decision of a predecessor"; ¶ 30) create pace and liveliness in the writing.

Hassell v. Fischer
879 F.3d 41 (2d Cir. 2018)
opinion for the court by
Senior Circuit Judge Jon O. Newman

The New York Court of Appeals' decision in *People v. Catu*, 4 N.Y.3d 242 (2005), has spawned 15 years and counting of follow-on litigation in New York's state and federal courts. The opening five paragraphs of the opinion present just enough of this complicated background information and the facts to tee up the Court's disposition of the appeal. The remainder of the opinion, which expands on the facts and discusses and applies relevant state and federal post-*Catu* precedents, is likewise a model of concision and clarity.

Olagues v. Perceptive Advisors LLC
902 F.3d 121 (2d Cir. 2018)
opinion for the court by
Senior Circuit Judge Gerard E. Lynch

This writing resolves a dispute over the proper interpretation of regulations defining the application of a statutory restriction on insider trading to derivative securities such as options. And yet it is readable! The opinion makes good use of footnotes to include helpful or necessary information that would have cluttered the narrative if included in the text (e.g., footnote 6, which discusses and dispatches an argument made by the plaintiffs). Figurative language and phrases embellish the writing (e.g., "The statute is strong medicine for the ill Congress sought to address," and the statute's policies "do not always pull in the same direction").

Shiel v. Rowell
480 Mass. 106 (2018)
opinion for the court by
Associate Justice Elspeth B. Cypher

This opinion sums up the issue in an evocative first sentence: "At the root of this case lies a distinctively neighborly type of dispute about who should have the responsibility for monitoring and cutting back an intruding tree."

Here, the Court declines the plaintiff's invitation to "fell" longstanding precedent (and the defendants' tree). The opinion explains bedrock principles of stare decisis and its rationale in an economical two paragraphs that consist mostly of notable quotations unlikely to have been improved upon by paraphrase. Importantly, these quotations are not merely strung together; they are placed and connected just so.

I was reading in a newspaper the other day that Isaiah Thomas' apprentice, while composing the almanac, came to his master to know what he should put opposite the 14th of June. The master, being engaged, told him "anything." The boy put, "rain, hail, snow and sleet." It so happened that it both hailed and snowed on that day. A large dose of Emprick's pills, noted for their efficacy in recovering strayed cattle, drove the countryman aside from the road, where, to be sure, he found the ox. I doubt much if even in these days and goings down of the sun, either the quack or Mr. Thomas would have been adjudged within the letter or spirit of this statute — the one for the price of his pills, or the other for the recipes of his almanacs.

State v. Church
3 Ohio Dec. 85, 91 (Ohio Ct. of Common Pleas 1823) (argument of counsel)

FEBRUARY

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"Half the Truth is often a great Lie."

U.S. v. Spanier
2017 WL 1336998 (S.D. Cal. Apr. 7, 2017)
(quoting Benjamin Franklin in *Poor Richard's Almanack* (1758)),
rev'd 744 Fed.Appx. 351 (9th Cir. 2018)

FIVE RECOMMENDATIONS

Lee Epstein[†]

Robert J. Hume
Ethics and Accountability on the U.S. Supreme Court: An Analysis of Recusal Practices
(SUNY Press 2017)

Controversies over recusals — more precisely, failures to recuse — flare up every now and then. Who can forget the Scalia-Cheney duck-hunting saga? Or calls for Kagan and Thomas to step out of the Obamacare litigation, which apparently prompted Roberts to declare, "I have complete confidence in the capability of my colleagues to determine when recusal is warranted." Later the Chief found himself in the awkward position of having to recuse from a patent case *after* he had participated in oral arguments. Accompanying these and other recusal controversies are spikes in commentary on the justices' choices, as well as calls for reform. Enter Hume, who brings to the debate the hard-nosed sensibility of the political scientist that he is. Based on a nifty and rigorous empirical analysis, which unearthed exactly zero examples of egregious judicial misconduct, Hume finds no "compelling public policy justifications" for reform. If there's a problem, he concludes, it lies not in the

[†] Ethan A.H. Shepley Distinguished University Professor at Washington University in St. Louis.

Court but with political commentators ever more willing to "play the ethics card in an attempt to remove justices whose policies they dislike."

Richard L. Hasen
The Justice of Contradictions:
Antonin Scalia and the Politics of Disruption
(Yale University Press 2018)

These days, when even the mildest criticism of its hero mobilizes the Scalia squad — former clerks and conservative/libertarian bloggers, academics, and lawyers — Hasen is brave to write sentences like this: "Scalia used his ostensibly neutral jurisprudential theories — which he argued were necessary to legitimatize judicial decisionmaking, even though he did not consistently follow them — to politicize the Court and delegitimize his opponents, leaving us with a weakened Supreme Court." Or this: "Thomas reaches the kinds of decisions Scalia would have reached if he had the courage of his convictions." To be sure, Hasen's book is no paean to Scalia but neither is it a diatribe. By rehearsing the many opinions in which Scalia jettisoned originalism in favor of precedent, public policy considerations, and, yes, political values, Hasen makes a case for Scalia that even the justice's harshest critics might appreciate. Judging, after all, necessitates judgment; and good judgment may involve — even require — mixing and matching methods. Or at least Churchill suggested as much: "It is better to be both right and consistent. But if you have to choose — you must choose to be right."

Matthew E.K. Hall
What Justices Want:
Goals and Personality on the U.S. Supreme Court
(Cambridge University Press 2018)

Personality plays a prominent role in histories of the Court and, of course, in biographies of the justices, but not so much in large-n empirical studies. One challenge is generalizing about a subject that is inherently unique. Another, assuming generalization is possible, is categorizing judges; putting them on the couch or even administering personality tests is hard to imagine. Hall meets both. Using concurring opinions, he ranks the justices on each of the Big Five personality traits (Openness, Conscientiousness, Extraversion, Agreeableness, and Neuroticism) and then connects the traits to agenda setting, voting, and opinion writing. For social scientists, *What Justices Want* is game changer. For legal academics and historians, Hall's personality rankings present a real opportunity to explore the fit between quantified data and expert

narratives. *E.g.*, should Kagan fall at the high end of the Extraversion scale and Scalia rank among the most Conscientious? Don't you wonder what Hasen, author of *The Justice of Contradictions*, would think?

James L. Gibson & Michael J. Nelson
Black and Blue:
How African Americans Judge the U.S. Legal System
(Oxford University Press 2018)

That blacks are considerably less supportive of the U.S. Supreme Court than whites doesn't seem especially surprising considering near-daily reports of serious racial disparities in the criminal justice system. What is surprising: Gibson and Nelson find *no direct* connection between judgments about the fairness of the justice system and support for the Court. So what accounts for the support gap between blacks and whites? The answer lies less in inter- than in intra-racial differences. It turns out that blacks with the strongest psychological attachment to their group are less likely to support the Court but those with weaker group identification view the Court as positively as whites. In this way local (in)justice does enter the picture: With group identification on the rise (the authors point to the Black Lives Matter movement) overall support for the Court could continue to decline among blacks. The implications of these findings await development but a clear takeaway is that Court's legitimacy may depend on the justices giving more serious consideration to conditions on the ground, though so far only Sotomayor has gestured in that direction (see her dissent in *Utah v. Strieff*, 2016).

Michael F. Salamone
Perceptions of a Polarized Court:
How Division Among Justices Shapes the Supreme Court's Public Image
(Temple University Press 2018)

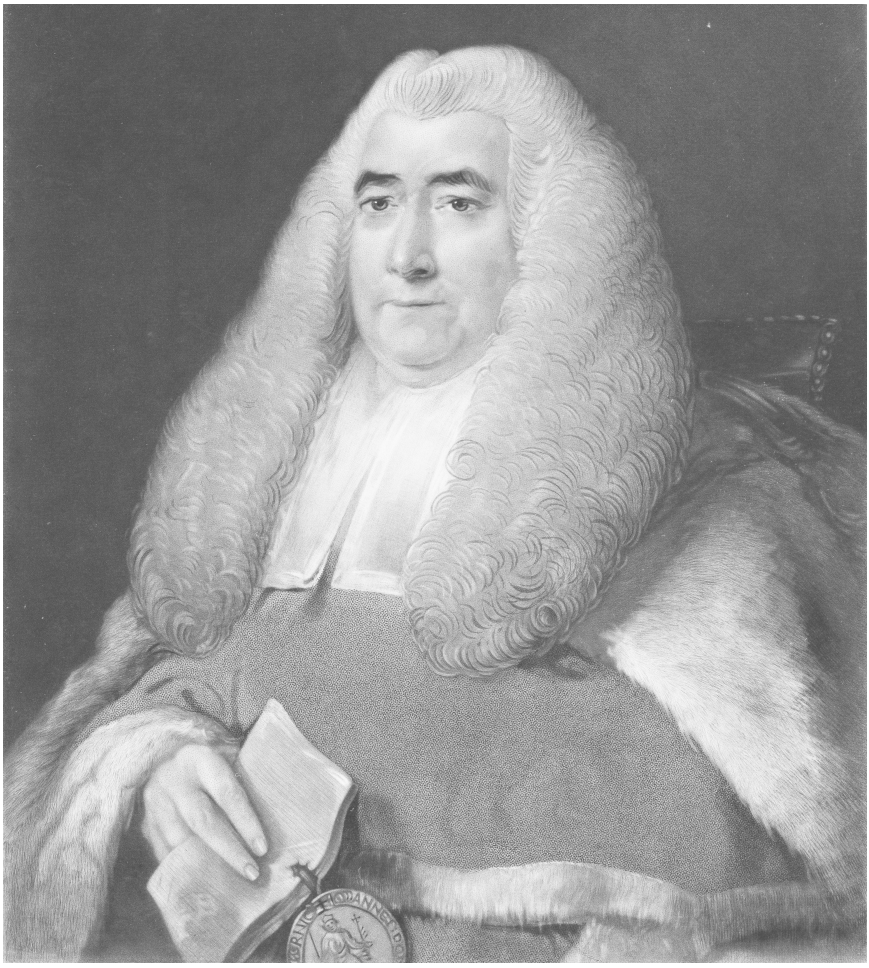
Chief Justice Roberts has offered a long list of reasons for promoting consensus among the justices: it "contributes to stability in law," reflects a more "cautious" approach, brings the justices closer together, and promotes the Court's legitimacy. Some of Roberts' colleagues too have an expressed a desire to "muffle" disagreements. But outside the Court the consensus project has its share of detractors. Geoffrey R. Stone calls attempts to bury disagreement "bad policy." Melvin Urofsky emphasizes the role of dissent in the "nation's constitutional dialogue"; and even Warren's legendary mission to issue a unanimous decision in *Brown v. Board of Education* is now in question: "Whatever modest gain Warren realized from *Brown*'s unanimity in the form

of squelched dissent . . . could have been counterbalanced — and perhaps even outweighed — by the attendant loss of watering down the opinion's condemnation of Jim Crow," says Justin Driver.

Salamone joins the detractors, though not with reasoned speculation but with data in the form of experiments embedded in surveys. His study shows that in disputes of high public salience — say, over same-sex marriage — it matters not whether the Court is divided or unanimous; Americans' willingness to agree with or even accept the decision is almost solely a function of how they stand on the issue. Worse news for Chief comes from Salamone's analysis of lesser salient decisions. In these, dissents actually boost support for the Court because they amount to consolation prizes for Americans who disagree with the decision: even losers get representation. Should Salamone's results — recently replicated, btw, in Norway — prod the justices to reconsider the consensus project, especially if more efficacious (not to mention more realistic) ways exist to promote their institution's legitimacy (see Gibson & Nelson's *Black and Blue*)? Maybe so.

LAWYER'S ALMANAC — Kissimmee City Attorney Ed Brinson says you can put those warm clothes away for the season on March 3. You'll need some of them right up until then, he says, but on Saturday, March 3, real spring will be here. How does he know? Why, says he, the weather is always lousy when the Citrus Open starts, but the final Saturday and Sunday always turn out beautiful and the last of the cold weather is gone. "You can bank on it."

Mark your calendar; March 3 to herald arrival of spring
The Little (Orlando) Sentinel, Feb. 24, 1978, at 24



Our almanacks, which are in every man's hands, give you no instructions concerning lunar months, but they tell you all about the calendar months. All our calculations, all our reckonings, all our popular divisions of time, are solely governed by the calendar month and not the lunar. So little are lunar months attended to in our rural economy, and even in our legal proceedings, that Judge Blackstone's lunar month is as little known, or as little understood as his trial by battle; and, I believe, the latter will be as soon revived as the former. Then, I think, we are authorized by Judge Blackstone himself, to adopt the popular meaning, and say that the act means calendar months.

Alston v. Alston

3 Brevard 469, 474 (Const. Ct. App. S.C. 1814) (opinion of Smith, J.)

March

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Nor does the district court point to an unquestionably accurate source — a respectable almanac is the usual example — to support its proposition.

U.S. v. Hoyts Cinemas Corp.
380 F.3d 558, 570 (1st Cir. 2004)

FIVE RECOMMENDATIONS

Cedric Merlin Powell[†]

Larry Gonick & Tim Kasser
Hypercapitalism:
The Modern Economy, Its Values, and How to Change Them
(The New Press 2018)

One part graphic novel, one part commix, and wholly provocative, *Hypercapitalism: The Modern Economy, Its Values, and How to Change Them* offers a compelling account of economic inequality and the underlying distortion of values accompanying it. Tim Kasser, a professor of psychology, and Larry Gonick, a cartoonist, describe hypercapitalism as an economic system premised on extreme materialism and the displacement of humanistic values. The first part of the book is a comprehensive analysis of the debilitating impact of hypercapitalism on impoverished communities, offering sociological research, stark narratives, and themes that underscore the pervasiveness of structural inequality. Conceptualizing "The Five Commandments of Hypercapitalism," Gonick and Kasser identify its defining principles as: (i) excessive consumption; (ii) globalization and displacement; (iii) deregulation and no corporate

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taxation; (iv) low wages for labor; and (v) privatization so that the market controls all social and economic outcomes. Gonick and Kasser posit that hypercapitalism threatens our well-being as individuals and as members of a free, functioning democracy.

While part one of the book illustrates the disconcerting reality of hypercapitalism, the second part of the book offers a blueprint for dismantling structural inequality, with an emphasis on individual and collective actions to restore the values displaced by hypercapitalism. Tracing evolving social protests that have challenged hypercapitalism, Gonick and Kasser conclude that "[i]n the end, hypercapitalism is only one social system among many, and social systems can change if many people, individually and collectively, work to bring about change wherever they are and however they can."

Robin DiAngelo
White Fragility:
Why It's So Hard for White People to Talk About Racism
(Beacon Press 2018)

Exploding the limited and literal narratives surrounding identity politics and race, Robin DiAngelo's *New York Times* best seller, *White Fragility Why It's So Hard for White People to Talk About Racism*, offers a nuanced and critical conception of white privilege. *White Fragility* references the defensive moves and neutralizing techniques that whites use whenever a challenging racial issue arises. Writing as a white progressive to a white audience, DiAngelo unpacks the complexities of white privilege and dominance by dissecting how any challenge to racial hierarchy is perceived as "racial stress" which is "intolerable" to whites. To relieve this stress, a set of defensive responses are deployed to disrupt any attempts at meaningful dialogue and positive social change: "These responses work to reinstate white equilibrium as they repel the challenge, return our racial comfort, and maintain our dominance within the racial hierarchy. . . . [W]hite fragility is triggered by discomfort and anxiety, it is born of superiority and entitlement. . . . [White fragility] is a powerful means of white racial control and protection of white advantage."

Thus, assertions such as white people are now the oppressed group, the white poor have been forgotten, affirmative action is nothing more than a racial spoils system for undeserving people of color, and American culture is being undermined, are all variants of the defensive narrative moves used by whites to escape racial stress and that ultimately reinforce and perpetuate inequality. Rather than pointing an accusatory finger at whites for the inherent systemic inequality that plagues society, DiAngelo offers a path for opening new discursive space to have difficult discussions about the eradica-

tion of racism. She calls for a fundamental disruption of white privilege: "We can interrupt our white fragility and build our capacity to sustain cross-racial honesty by being willing to tolerate the discomfort associated with an honest appraisal and discussion of our internalized superiority and racial privilege."

Arjun Singh Sethi
American Hate: Survivors Speak Out
(The New Press 2018)

American Hate: Survivors Speak Out is a collection of narrative essays chronicling the experiences of survivors of hate. Editor Arjun Singh Sethi, a civil rights lawyer and law professor, integrates inspiring stories of survival in a world dominated by hate targeting people of color and those who are stigmatized for exclusion. Acknowledging that the United States "was built on a hate crime," Sethi offers a collection of personal narratives that illustrate the present day effects of this sad history of hatred and systemic oppression.

What is particularly compelling about this compilation is how those targeted because of "race, national origin, sex, gender identity, sexual orientation, faith, disability, immigration status, and other personal characteristics," find the strength to confront hate and survive. Adopting a "testimonial format," each survivor in the edited collection is allowed to tell their own story in their own unfiltered voice. Focusing on the perspectives of women and young people because they are on the front lines of struggle and most susceptible to the ravages of hatred, *American Hate* offers a devastating on-the-ground catalogue of the impact of hate and violence in our polarized nation.

Anders Walker
The Burning House:
Jim Crow and the Making of Modern America
(Yale 2018)

Diversity is embraced as a defining hallmark of our pluralistic society, but it is structured, constrained, and impacted by the living legacy of Jim Crow. In *The Burning House: Jim Crow and the Making of Modern America*, Saint Louis University law professor and historian Anders Walker offers an original, powerful, and insightful analysis of dual American societies, separated by the colorline, and how they have functioned and thrived separately, but nevertheless coalesced around fundamental tenets of our polity. Rejecting integration as a societal goal of inclusion for African-Americans, James Baldwin referred to white American society as a "burning house" that would inevitably destroy them if they moved in. This searing metaphor underscores Walker's central

enterprise: to uncover the intellectual exchanges between authors with Southern roots on how racial justice could be advanced without integration. Integration, because of its homogenizing effect, could undermine the cultural uniqueness and vibrancy of the separate white and Black cultures. Of course, Jim Crow was brutal, violent, and oppressive, but within its stigmatizing separateness, there were cultural and societal traditions wholly worthy of preservation. This would require a fundamental reinterpretation of Jim Crow and *Brown v. Board of Education*. Unpacking the cultural nuances of the separate Black and white societies, Walker writes, "For such voices — white and black — ending segregation was less important than providing opportunities and jobs from within a framework that also respected racial traditions, racial identities, and loosely defined notions of racial culture. Such debates constituted an important, if counterintuitive chorus to the epic saga of civil rights at the time, which focused on desegregating public accommodations and schools."

With this history in mind, Walker advances a pathbreaking reinterpretation of *Regents of the University of California v. Bakke*, centering on race and pluralistic diversity, not substantive equality. Walker conceptualizes this as "southern pluralism" — the fraught balance between diversity and the inequality that is tolerated to preserve a distinct cultural group identity. Walker argues, "Jim Crow also gave us diversity." Walker's important work deconstructs structural inequality in a new way because he squarely debunks the myth that *Bakke* is a liberal decision advancing the sound constitutionality of affirmative action. Rather, as Walker skillfully illustrates, *Bakke* actually preserves liberal individualism at the expense of substantive equality: "diversity was not about achieving equality so much as defending separate institutional spheres." Paradoxically, diversity preserves the very separateness that it seeks to eradicate — it is this separateness that defines modern America to this day.

Steven Levitsky & Daniel Ziblatt
How Democracies Die
(Crown 2018)

In this turbulent age, there is a burgeoning canon of books on democratic governance, separation of powers, and impeachment. *How Democracies Die* is a riveting addition to this oeuvre. Harvard government professors Steven Levitsky and Daniel Ziblatt pinpoint four characteristics of autocrats: (i) a weak commitment to democratic rules; (ii) denial of the legitimacy of opponents; (iii) tolerance of violence; and (iv) a willingness to curb civil liberties or the media. All of these autocratic imperatives are on full display today, and they directly threaten the viability of our constitutional democracy.

Levitsky and Ziblatt make the point that democracies die because there is a consistent erosion of the foundational principles that sustain a healthy democracy: "The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy — gradually, subtly, and even legally — to kill it." There is a disconcerting paradox here because the autocrat is legitimate because he was elected by the people, but he seeks to undermine the very process that has given him legitimacy by unilaterally expanding his power by discarding core constitutional principles of separation of powers, institutional deference to co-equal branches of government, and faithful adherence to the rule of law. As Levitsky and Ziblatt explain, two essential democratic norms — mutual toleration (or the recognition that the opposing party is legitimate) and forbearance (the exercise of restraint in deploying institutional power) — have been substantially weakened.

Nowhere is this more apparent than the recent government shutdown. This contrived emergency was a bald power play by the Chief Executive. Drawing upon racial divisions and civic unease, autocrats create emergencies derived from the very havoc that they consistently engender. In a recent *New York Times* article, Levitsky and Ziblatt note that "*Autocrats Love Emergencies*," because "they provide a seemingly legitimate (and often popular) justification for concentrating power and eviscerating rights." But the contrived emergency that caused the longest government shutdown in history illustrates the limits of presidential power and unintended consequences because it was the voices of the people that ultimately ended the shutdown, at least for the time being. Levitsky and Ziblatt tell us what we all know — it is up to us to make sure that our democracy does not die.

"Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong."

State v. Mauthe
366 N.W.2d 871, 878 (Wisc. 1985)
(quoting Aldo Leopold, *A Sand County Almanac* 203 (1948))

April

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Although not stated in the Amended Complaint, an almanac, of which I may take judicial notice pursuant to Federal Rule of Evidence 201, reveals that April 4, 2012 fell on a Wednesday.

Williams v. Pennridge School District
2016 WL 6432906 (E.D. Pa. Oct. 31, 2016)

THREE RECOMMENDATIONS

Stephen Dillard[†]

Autauga Quality Cotton Association v. Crosby
893 F.3d 1276 (11th Cir. 2018)
opinion for the court by
Circuit Judge Kevin C. Newsom

Judge Kevin Newsom is not just a brilliant jurist, he's also a heck of a storyteller. I don't often find myself captivated by a liquidated-damages case, but Newsom's opinion in *Autauga Quality Cotton Association v. Crosby* draws the reader in immediately. In just three short sentences, he makes a (seemingly) garden-variety breach-of-contract case about cotton come alive. The writing is crisp, clear, compelling, and, just as importantly, respectful of the parties and the underlying dispute. As a relatively new jurist, Newsom has already demonstrated an uncanny ability to make even the most dry material leap off the pages, and *Autauga* is a perfect example of his considerable writing talent.

United States v. Maturino
887 F.3d 716 (5th Cir. 2018)
opinion for the court by
Circuit Judge Don R. Willett

Judge Don Willett knows how to turn a phrase. In his relatively short tenure as a federal appellate judge, he has already published several opinions with memorable writing and evocative imagery. This isn't surprising. Willett

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[†] Chief Judge, Court of Appeals of Georgia.

spent over 12 years publishing a slew of gripping and forceful opinions as an associate justice on the Supreme Court of Texas, and little has changed since he joined the Fifth Circuit. Unlike many federal judges, who toil away in their majestic courthouses with little notice or fanfare, Willett — a former social-media superstar — is closely watched and scrutinized by the appellate cognoscenti. Indeed, his first published opinion was a rip-roaring tour de force involving the sentencing of a hapless Mexican drug cartel member who attempted to buy 144 live grenades, only to discover that all but one of them were inert. It's a fun read, littered with sparkling writing and a few choice Scaliaesque one-liners.

United States v. Obando
891 F.3d 929 (11th Cir. 2018)
opinion for the court by
Circuit Judge William H. Pryor, Jr.

There's a reason Judge Bill Pryor is a perennial Supreme Court short-lister. Outside of the nine justices, he is perhaps the most prominent (and faithful) textualist jurist in the nation. Pryor is also a superb and clever writer; and his refined skills as both a textualist and storyteller are on full display in *United States v. Obando*, a fascinating statutory construction case involving a dodgy vessel in international waters. Indeed, in considering whether a flag painted on the side of a vessel is "flying" for purposes of a federal maritime statute, Pryor extensively and incisively addresses the issue, peppering his cogent analysis with colorful graphics and interesting historical tidbits.

> The ability to provide guidance about the common problems of life — marriage, children, alcohol, health — is a foundation of human interaction and society, whether this advice be found in an almanac, at the feet of grandparents, or in a circle of friends. There is no doubt that such speech is protected by the First Amendment.
>
> *Serafine v. Branaman*
> 810 F.3d 354, 369 (5th Cir. 2016)

May

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In such a case the race is to the swift, and priority is established by the almanac.

Farmers' & Merchants' State Savings Bank of Manchester v. Kriegel
195 N.W. 624, 627 (Iowa 1923)

SEVEN RECOMMENDATIONS


G. Edward White[†] *& Sarah A. Seo*[*]

Richard H. Fallon, Jr.
Law and Legitimacy in the Supreme Court
(Harvard University Press 2018)

Richard Fallon likely did not plan the publication of this book to coincide with the aftermath of the Kavanaugh hearings or the phrase "Obama judges or Trump judges, Bush judges or Clinton judges." After all, the author has been writing about legitimacy and the law for over a decade, and this book brings together many of his ideas in previously published law review articles. But the timing could not be better, all the more so for young scholars or those otherwise new to Fallon's writings who will appreciate an accessible account for why and when Supreme Court decisions merit legitimacy even if we do not agree with them. Fallon submits the argument — a bold one during these polarized times, a reasonable one during any other — that no one theory of interpretation can answer all constitutional questions and suggests that we make room for valid disagreements; "moral legitimacy can exist along a spectrum," he posits (167). In a similar tenor, Fallon proposes the "Reflective Equilibrium Hypothesis" that allows Supreme Court justices leeway to "refine and revise their methodological approaches on an ongoing basis" (170),

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

which is a sensible recognition that smart and thoughtful individuals will, and should, change their minds with new information. To enhance their legitimacy, the justices simply need to be transparent and consistent about their reflective equilibrium. Fallon claims that his proposals can promote civil discourse and civil disagreement. Unfortunately, the book comes with no guarantees.

Robert A. Ferguson
Metamorphosis:
How to Transform Punishment in America
(Yale University Press 2018)

Ferguson's book is something of a sequel to his *Inferno: An Anatomy of American Punishment* (2014), which precipitated an outpouring of letters to him from people in prison. *Metamorphosis* uses those letters to construct a vision of the experience of inmates in a prison system that features harsh, long sentences and a culture of fear and degradation. He argues that the original goal of a "penitentiary" system, rehabilitation of offenders through opportunities to reflect upon and reconsider their past conduct, has nearly vanished in the current obsession with using prisons as a means of simply removing offenders from the population at large and "punishing" them through indifferent and often cruel treatment.

The current atmosphere of prisons, Ferguson maintains, dehumanizes all the participants in prison life. Prison officials focus almost exclusively on discipline, tacitly permitting some prisoners to abuse others so long as a surface order is maintained. Guards are given nearly unlimited discretionary authority over prisoners, resulting in a culture of callousness and brutality and the self-selection of persons for guard positions who relish the exercise of arbitrary power. Prisoners, facing long sentences and daily perturbations, develop attitudes of fatalism and despair, undermining efforts at rehabilitation. Violence against inmates is a constant background presence, resulting in most inmates needing to spend the bulk of their time developing strategies to protect themselves against attacks. The cumulative effect, Ferguson shows through prison letters, is to make contemporary American prisons the equivalent of hellholes.

Ferguson is a reformer in the sense of wanting incarceration policies to move away from using prisons as storehouses for offenders, in which the inmates are simply housed out of sight of the general population with virtually no concern for their welfare, to a renewed emphasis on rehabilitation, in which prison populations would be reduced (currently a large percentage of inmates are incarcerated for non-violent crimes, such as drug use, but are

mingled with violent offenders and serve what appear to be disproportionately long sentences) and genuine efforts would be made to allow inmates to use prison as a basis for developing their faculties. But the strength of *Metamorphosis* comes not from particular reform proposals but from its power in creating a narrative of prison as the equivalent of purgatory. When incarceration is used as a basis for simply forgetting about a resident population that is consistently degraded, frightened, and isolated from redemptive human contacts, something has gone radically wrong. The prison atmosphere that Ferguson vividly creates, through the contributions of inmates who wrote him about their experiences, is a powerful testament that America's prison policies having taken morally unjustifiable directions.

Issa Kohler-Hausmann
Misdemeanorland:
Criminal Courts and Social Control in an Age of Broken Windows Policing
(Princeton University Press 2018)

Alexandra Natapoff
Punishment without Crime:
How Our Massive Misdemeanor System Traps the Innocent and
Makes America More Unequal
(Basic Books 2018)

Misdemeanors are the underside of the iceberg of the criminal justice system. Though these cases attract little attention, they make up the vast proportion of criminal cases and profoundly determine what kind of justice our criminal justice system dispenses. Even more, as Issa Kohler-Hausmann and Alexandra Natapoff show, misdemeanor cases also reflect the health of our democracy and even define the kind of society we have. Notwithstanding some overlap between these two books, they complement each other in ways that make it worth reading them together.

Misdemeanorland focuses on New York City's courts to explain how the processing of sub-felony cases exerts social control. In the 1990s, the city adopted "broken windows policing," which focused law enforcement's efforts on order maintenance. An expected consequence was a sharp uptick in the number of misdemeanor arrests. An unexpected consequence was a sharp decrease in the rate of convictions. By following how misdemeanor courts handled the insurmountable caseload, Kohler-Hausmann discovered that they simply did not adjudicate most cases. Instead, defense lawyers, prosecutors, and judges fashioned a system to manage — discipline — defendants until their cases could be resolved, often dismissed, without going through the

time-consuming and resource-draining procedures of formal adjudication. *Misdemeanorland* concludes with a provocative question: What, exactly, is wrong with the managerial model for non-felonious crimes? Does it not make sense to assess whether low-level offenders can demonstrate rule-abiding behavior over time without subjecting them to — and spending scarce resources on — the full-blown procedures and consequences that attend serious crimes?

Natapoff's own answer to this question is the focus of *Punishment without Crime*. Both Natapoff and Kohler-Hausmann criticize mass misdemeanors for entrenching class and racial inequalities in American society. Some parts of Natapoff's account may be familiar, such as the disregard for actual innocence in the processing of misdemeanors and the fines and fees that basically add up to a regressive tax on minorities and the poor. But she goes on to engage in a necessary discussion about why our democracy depends on reforms to the misdemeanor system, whether change is possible, and which changes she would like to see.

Intriguingly, the chapter titled "History" comes in the middle of the book, separating the chapters in the first half that describe the problem and the later chapters that outline the reforms. This chapter traces the use of petty offenses as a method of social control, beginning with the Jim Crow era, to the postwar period of vagrancy policing, and finally to the decades of broken windows policing. Natapoff's takeaways from this history are somewhat in tension. On the one hand, American society has for a long time used criminal laws to oppress those on the margins of society. On the other hand, there has been progress; broken windows policing is an improvement over vagrancy policing, which is a far cry from the system of convict labor that essentially reenslaved black Americans after the Civil War. In *Punishment without Crime*, history provides context — today's problems with race and criminal justice are not new. It also offers guarded hope that although the struggle is never ending, progressive change is possible.

Sarah E. Igo
The Known Citizen:
A History of Privacy in Modern America
(Harvard University Press 2018)

Privacy has a history, one that is broader than the legal histories often told through Samuel Warren and Louis Brandeis's *Harvard Law Review* article, "The Right to Privacy," *Griswold v. Connecticut*, and *Roe v. Wade*. "Privacy" as a concept has also entailed more than freedom from unreasonable searches and seizures, government surveillance, or data mining. According

to Sarah Igo, thinking and arguing about privacy is a distinctly modern phenomenon that goes straight to heart of the meaning of citizenship itself. Since the late 19th century, Americans have debated privacy in a wide range of contexts, including public health, Social Security, scientific research, and all the records that schools, government agencies, and private corporations maintain. By expanding the inquiry, Igo masterfully sets forth the surprising and complex stakes of being a "known citizen" in the 20th-century United States. Privacy was never an unalloyed good that has been lost sometime in the past few decades. Privacy has been, and continues to be, an unsettling and difficult question precisely because fears about intrusions to our privacy have always accompanied the desire to be visible as a rights-bearing, status-holding individual.

Jennifer E. Rothman
The Right of Publicity:
Privacy Reimagined for a Public World
(Harvard University Press 2018)

Rothman's book makes two contributions. The first is to construct a narrative history of the "right of publicity," now primarily understood as allowing persons to capture the commercial value of their names or likenesses against potential appropriation by others, as having spun off of the original common law right of "privacy" in a fortuitous and not fully defensible fashion. The core meaning of the action of common law privacy, as it developed in the early 20th century, was protecting persons from having their names or likenesses made public without their consent for any reason. In early privacy cases plaintiffs were not complaining that the publication of their images or stories about them robbed them of the opportunity to capitalize on their prospective fame or notoriety. They were claiming that they suffered humiliation and other forms of emotional harm simply because they did not want their names or images, or incidents about them, exposed to the general public at all. Their objection to the publicizing of information about them was based on feelings that it was "humiliating" for young women to have their portraits made part of commercial advertisements for flour, or it was misleading to place a photograph of an artist on an advertisement for insurance. Neither of those plaintiffs was maintaining that they should have been paid for the use of their likenesses. They were objecting to pictures of them being displayed in public at all.

As the right of privacy expanded in the mid 20th century, a case came before the U.S. Court of Appeals for the Second Circuit in which one manufacturer of chewing gum sued another for allegedly unauthorized use of the names and likenesses of major league ballplayers in "baseball cards" accom-

panying packets of gum. The suit was originally based on interference with contract because the players had allegedly given one of the companies exclusive rights to use information about them and their careers for limited periods. That issue was complicated because the players had assigned their rights to third parties who had then assigned them to gum companies. The players were paid nominal sums for the assignments, which were exclusive but of short duration. A central issue in the case was whether the third parties were able to assign the rights they had received from the players to other persons.

Although the case of *Haelan Laboratories v. Topps Chewing Gum* was understood by all the judges who decided it as an interference with contract case, the question of assignability affected that issue, and at one point judges for the Second Circuit concluded that the players had a "right of publicity" that was personal to them and could only be assigned if they consented to the assignment. That issue was not necessary to the case, because all of the players had signed waivers of any rights they had to prevent third parties from using their names or likenesses. The Second Circuit was also incorrect in concluding that the common law right of privacy in New York encompassed a "right of publicity": there was no common law right of privacy in the state, only a statute that prevented anyone's using the name or likeness of an individual "for the purposes of business or trade" without the individual's consent.

Nonetheless *Haelan* was read by other courts to have created a "right of publicity" distinct from one of privacy, akin to an intellectual property right. Over the decades after *Haelan* that reading was to have three significant implications. One was that rights of publicity, like other intellectual property rights, were alienable: they could be transferred to other persons who could prevent the commercial appropriation of someone's name or likeness. A second was that, subject to jurisdictional limitations, rights of publicity were inheritable: the rights of entertainers to control the distribution of their names or likenesses could succeed to relatives. Finally, a Supreme Court decision in 1977, in a case involving a news station's broadcast of the entire 'human cannonball" act of a performer at a state fair, held that no First Amendment privileges constrained rights of publicity. A performer could capture the value of his "act," and prevent others from rebroadcasting it without his consent, even if it was "newsworthy."

In this form the "right of publicity" has expanded, distorting the original understanding of rights of privacy and arguably creating problems for persons who want to creatively reproduce the names or likenesses of others. Rothman's second contribution is to suggest that in this capacity the right of publicity arguably restrains creativity and places too much power in the hands of celebrities and their relatives, who simply want to get paid anytime someone else

makes use of their names and likenesses. She points to several cases in which celebrities successfully sued others for representations of their names and likenesses when the representations were sufficiently "transformative" that no one would have thought them simply an effort to make money on the literal appropriation of a name or likeness. One case involved an advertisement by Samsung featuring a robot dressed like the television performer Vanna White which looked nothing like White, although it performed arguably "robotic" functions similar to White's turning the "Wheel of Fortune" board. The ad was designed to communicate the message that Samsung electronic devices would still be available when, in some future, robots might replace humans as performers.

Rothman would disengage the "right of publicity" from privacy and seek to restore the original thrust of disclosure privacy actions, where persons sought simply to prevent public disclosure of information about them, or their names or likenesses, without their consent. She argues that in an increasingly "public" world, whose inhabitants are besieged by social media and other devices that serve to gratuitously publicize intimate details of their daily lives, there is a need for a more robust version of disclosure privacy, and "right of publicity" cases have amounted to establishing a doctrinally flawed barrier to the emergence of that version.

Mary Ziegler
Beyond Abortion:
Roe v. Wade and the Battle for Privacy
(Harvard University Press 2018)

Ziegler's book may be said to compliment Rothman's in that both seek to complicate "histories" of privacy in the 20th century. Whereas Rothman's history focuses on the concept of privacy in tort law, Ziegler's focus is on privacy as a constitutionally protected "right," a form of "liberty" under the Due Process Clauses. She shows how when *Roe v. Wade* came to the Court, the idea of constitutional privacy rights in the area of reproduction was at a high-water mark, with the Court's *Griswold* and *Eisenstadt* decisions discovering a right of privacy that justified the unrestricted use of contraceptives in the Constitution and extending it beyond married couples to individuals. *Roe*, challenging efforts by the state of Texas to outlaw abortions, seemed a logical next step, and so a Court majority grounded a woman's choice to terminate a pregnancy, up to certain times in a gestation cycle, in a "liberty" to make decisions affecting reproduction and her body under the Due Process Clauses.

The choices to apply privacy rights to abortion decisions, to limit the scope of unrestricted abortion choices to the early stages of a pregnancy, and

to associate the abortion decision not only with the rights of pregnant women but with their physicians turned out, Ziegler demonstrates, to make the *Roe* decision far more controversial than it might have been. By treating the choice to terminate a pregnancy as an individual right, but limiting the scope of that choice to the early stages of a pregnancy because of a corresponding "right" in a fetus, the decision galvanized persons on both sides of the abortion issue and suggested that the Supreme Court was siding with "pro-choice" rather than "pro-life" supporters, for reasons that did not seem wholly convincing to many. The focus on individual privacy rights also suggested that *Roe* might have effects beyond abortion itself, such as the purported right to terminate one's life. The relatively thin doctrinal basis of the *Roe* opinion, which received abundant criticism even from pro-choice advocates, raised a difficulty that the Court has habitually faced when it chooses to intervene on one side of a contested social issue. The difficulty with *Roe*, as opposed to other controversial Court interventions such as *Brown v. Board of Education*, is that the moral basis of *Brown* — that classifying persons differently on the basis of race or skin color was simply erroneous and unjustifiable — seemed lacking in *Roe*. Both sides in the abortion debate believed that their positions — the state should not be able to dictate to individuals what they might choose to do about procreation and child-rearing; or humans should not be allowed to terminate the lives of other humans merely by labeling them as "fetuses" or "unborn" — were morally unassailable.

Ziegler spends most of her narrative on the legal and political difficulties that followed from the Court's choice to decide *Roe* when it did and the way it did. She alludes only briefly to a counterfactual dimension of the *Roe* decision. What if the Court had chosen to ground a decision on the part of woman to terminate a pregnancy not on "privacy," but on equality? That basis would have underscored the fact that when states restrict the abortion decision, they are imposing unique burdens solely on females. It is women who become pregnant, carry fetuses to term, and may have their own health, as well as that of a fetus, affected by the process. When a state says to a woman, "you must not terminate your pregnancy," it is telling her how she needs to take care of her body, and of a future child she is carrying, for a lengthy period of time. It is not issuing comparable instructions to the father of the prospective child or any of the child's other putative relatives. And the burdens it is imposing on the woman are burdens imposed on her because she is female, and therefore uniquely capable of carrying a fetus to term. In restricting abortion states are, in effect, telling pregnant women what is "good" for them. They are not communicating a similar message to males, nor are they communicating that message to women who are not pregnant. Moreover, the capacity

of women to become pregnant and bear offspring is an immutable characteristic, like skin color or gender.

Thus there might have been arguments based on the Equal Protection Clause which could have functioned as justifications for *Roe*. There was no realistic possibility, at the time *Roe* was decided (1973), that such arguments would have been advanced. The Court was only beginning to interpret the Equal Protection Clause to prevent some forms of gender discrimination, and feminism was only on the edge of becoming mainstream. In retrospect, it might have been better for the Court to have delayed a decision on the abortion issue while arguments premised on gender equality were percolating. Ziegler only briefly alludes to that possibility: her focus is on the controversial baggage of "privacy" rights that has prevented privacy from playing a more substantial role in Court decisions and American culture at large. But it is intriguing to speculate about what might have happened had the Court's abortion decisions been grounded differently.

For example, despite plaintiffs' burden to provide an "extensive analysis" of state law variations, they have not explained how their multiple causes of action could be presented to a jury for resolution in a way that fairly represents the law of the fifty states while not overwhelming jurors with hundreds of interrogatories and a verdict form as large as an almanac.

In re Ford Motor Co. Ignition Switch Products Liability Litigation
174 F.R.D. 332 (D.N.J. 1997)

June

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To call a judgment a finding makes it none the less a judgment. A summons is not an execution, nor an almanac a pleading, even if called so on authority of a court.

Nuckolls v. Irwin
2 Neb. 60, 68 (n.d., pub. 1872)

FIVE RECOMMENDATIONS


Femi Cadmus[†] *& Casandra Laskowski*[*]

Joseph Blocher & Darrell A.H. Miller
The Positive Second Amendment:
Rights, Regulation and the Future of Heller
(Cambridge University Press 2018)

Blocher and Miller provide a comprehensive overview of the landscape following the Supreme Court's Second Amendment decision in *District of Columbia v. Heller*, protecting an individual right to keep and bear arms. The authors note that post *Heller*; a wide divergence between constitutional doctrine and public debate persists. There continues to be a polarization between those who hold an absolutist view of the Second Amendment, an unwavering belief in the unfettered, unregulated right to bear arms and those holding an extreme view of regulation, with some even calling for the removal of the individual right to bear arms. The authors maintain that the Second Amendment is highly nuanced and does not fall into either one of these camps. Rather, there needs to be a positive interpretation, a debate

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[*] Technology and Research Services Librarian, Lecturing Fellow at Duke Law School.

that reflects an understanding and respect for constitutional doctrine and the substance and method of law.

Cyrus Farivar
Habeas Data: Privacy vs. the Rise of Surveillance Tech
(Melville House 2018)

Farivar travels the reader through the lives and conflicts that shaped Fourth Amendment jurisprudence. He begins with a behind-the-scenes look at the making of *Katz v. United States*, where a young Laurence Tribe doggedly yet persuasively changed Justice Potter Stewart and the Court's mind. This story sets the tone for a series of close calls, incremental changes, and unforeseen applications that have shaped the privacy landscape in our country. Apple fights against the FBI request to circumvent their encryption on the public stage. Ladar Levison, the founder of Lavabit, sits in his living room with his tiny dog Princess when FBI agents inform him that he must circumvent his email services encryption and hand him a national security letter preventing him from speaking to anyone, even with his attorney, about the request. And Daniel Rigmaiden, after being brushed off by the ACLU and EFF, uncovers law enforcement's covert, widespread, and unchecked use of cell site simulator technology called Stingrays. Though Farivar discusses the law, it is the people that stand out in his telling, both those who helped shape the law and those who are affected by it. He ends the book by spotlighting those individuals and communities advocating for change and implementing better policies, such as the city of Oakland, which formed a Privacy Advisory Commission charged with developing policies for any new surveillance technology that the city wants to adopt.

Paul Finkelman
Supreme Injustice: Slavery in the Nation's Highest Court
(Harvard University Press 2018)

Finkelman examines what he describes as the "slavery jurisprudence" of three supreme court justices, pre-antebellum, Chief Justices John Marshall and Roger B. Taney and Associate Justice Joseph Story. He posits that had they all taken a different approach that adhered to the nation's founding ideals of equality and liberty, that trajectory would have led to different outcomes, including freedom from slavery. Instead, the court, with very few exceptions, reinforced and strengthened the institution of slavery, upholding (never with support from Marshall, Taney, or Story) a few freedom claims. Marshall and Taney were lifelong slave owners, and while Story did not own

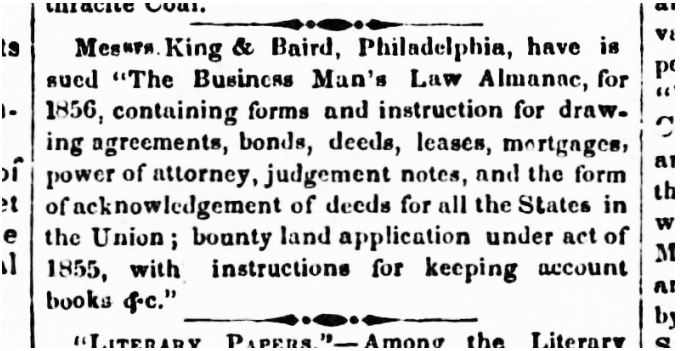
slaves, he abandoned his early anti-slavery principles, aligning with the court's pro-slavery stance. Finkelman reiterates that while the court's decision-making alone was not the basis for sectionalism or secession, it did provoke frustration and intolerance in the North for the court's pro-slavery status quo. The book delves into the backgrounds and motives of all three justices, starting with Marshall, Chief justice from 1801 to 1835, reiterating that he wrote almost every decision reinforcing slavery as an institution and debunking writings that state otherwise or were silent on the issue. Story had originally exhibited a hostility and abhorrence towards slavery but later took on a supportive role, concurring with Marshall on the court. The chapter on Taney, "Slavery's Great Justice", cites his harsh and racist decision in the *Dred Scott* case, referred to as an accurate depiction of the jurisprudence of the Taney court.

John B. Nann & Morris L. Cohen
The Yale Law School Guide to Research in American Legal History
(Yale University Press 2018)

The Yale Law School Guide to Research in American Legal History is special in that it fills a void in modern-day research guides tailored specifically to meet the needs of scholars and researchers of American Legal History. It addresses and accommodates the unique viewpoints and contexts of historians and lawyers. The guide begins with an examination of general bibliographic sources, including catalogs, bibliographies, and websites. Using a six-step approach to historical legal research (much of which simulates a general approach to legal research), the research journey is framed in time periods, starting with English foundations of American law (the common-law system), moving on to the colonial law, U.S. constitutional law in the 1780s, the early republic in the 1790s to 1870s, and concluding with the administrative state through the present day. Attention is also given to the development of a more sophisticated organization of research, which started at the end of the 19th century with codification by the federal government and collection of case law in reporter form by the West Publishing Company. A chapter on international law and civil law in the U.S. traces the development of international law at the founding, the exposure of the founders to the law of nations, classic writings of international law, sources of international law, and treaties. There are useful research examples provided at the end of every chapter which walk the researcher through scenarios with application of resources utilized to find information. A list of further readings, important sources mentioned in each chapter, and database resources serve as additional useful tools for the researcher.

Jill Norgren
Stories from Trailblazing Women Lawyers
(New York University Press 2018)

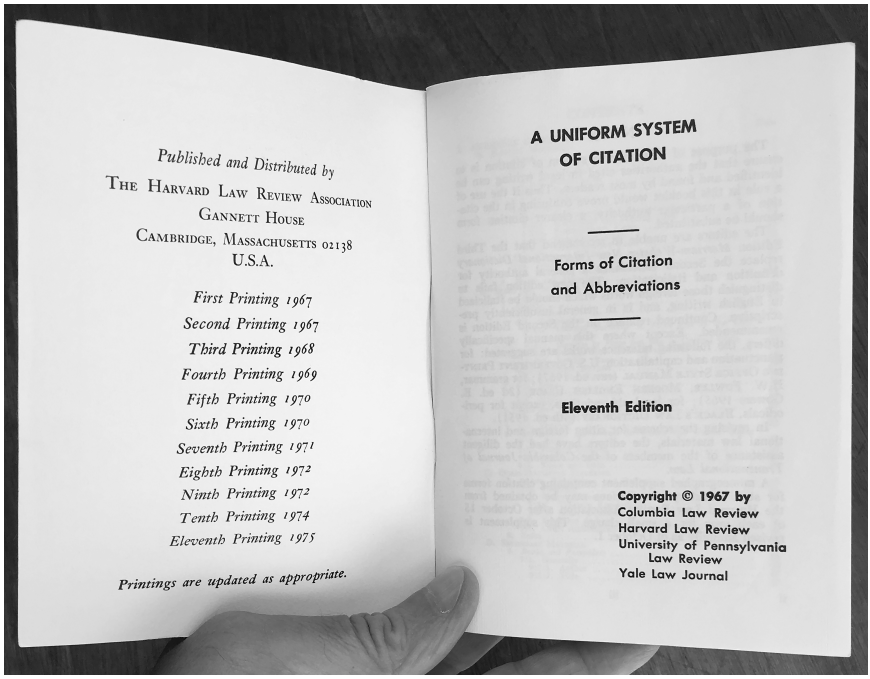
The ABA and American Bar Foundation's Women Trailblazers Project is a treasure trove of oral histories. With 96 current entries, it is difficult to decide where to begin, which is why this book is a great introduction. Norgren dives into that trove for us and weaves together the stories along a common timeline of experience (from childhood to practice). She highlights parallel experiences and unique struggles, such as racism, which she gives its own section in the first chapter. By combining stories this way, you get multiple perspectives of common events, like the infamous women's dinners hosted by Harvard Law School Dean Erwin Griswold. In one of my favorite stories, African American Attorney Constance Harvey is forced to purchase a new outfit because a judge, a renowned racist according to her, would not swear her in unless she changed her outfit because it looked as though she had come from a "honky tonk." Harvey proceeds to wear that same outfit every time she is in court before him. These moments help define the trailblazers in the collection. Limited by the structures of the time, each finds ways to push back against it in their way. Norgren also does additional research, expanding on these women's stories, making the book a welcome partner to the collection.



Messrs. King & Baird, Philadelphia, have issued "The Business Man's Law Almanac, for 1856, containing forms and instruction for drawing agreements, bonds, deeds, leases, mortgages, power of attorney, judgement notes, and the form of acknowledgement of deeds for all the States in the Union; bounty land application under act of 1855, with instructions for keeping account books &c."

From the Pittston (Pennsylvania) Gazette, Dec. 7, 1855, at 2.

Ceci n'est pas the Bluebook



There is no "the" Blue Book nor a "the" Red Book, any more than there is a "the" Almanac, but the authorities may use this type publication as a guide, and in the absence of merited complaint adopt figures given by the publication as valuations which would be subject to the assessment ratio.

Appeal of Carolina Quality Block Co.
155 S.E.2d 263, 266 (N.C. 1967)

July

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The almanac further states "[r]eal monster trout will take those salt-flavored minnows as if they are going out of style."

Arkie Lures, Inc. v. Gene Larew Tackle, Inc.
119 F.3d 953, 960 (Fed. Cir. 1997) (Michel, J., dissenting)
(quoting *Salted Dynamite for Lunker Trout*, in
The 1974 Sports Afield Almanac (Ted Kesting ed., 1974))

FOUR RECOMMENDATIONS

Charmiane G. Claxton[†]

In re Paige
738 Fed. Appx. 85 (3d Cir. 2018)
opinion for the court by
Senior Circuit Judge Richard L. Nygaard

This short but sweet masterpiece is included because it touches on one of my favorite topics — civility. There is no circumstance under which a litigant or advocate should use the legal system to abuse any of the participants in the process. That a party appears *pro se* is no excuse for poor behavior. There is often much merit to the saying that "every man who is his own lawyer, has a fool for a client."[1] The stress of litigation should never lead a party to address the court in the manner that the Paiges repeatedly pursued. Proper decorum and professionalism should be the beacon for all who practice before courts of any level — from the Supreme Court Justices to Magistrate Judges.

[†] Magistrate Judge, U.S. District Court for the Western District of Tennessee.

[1] Often attributed to Abraham Lincoln, as well as to Henry Kett, 2 *The flowers of wit, or a choice collection of bon mots* 185 (1814).

Meador v. Apple, Inc.
911 F.3d 260 (5th Cir 2018)
opinion for the court by
Circuit Judge Stephen A. Higginson

Mobile devices have become such an integral part of our lives that we believe we must respond to every buzz or ping. Or at least that's what Ashley Kubiak tragically believed on April 30, 2013. Ms. Kubiak was driving her truck that day when a text message notification caught her attention and she redirected her eyes from the road ahead of her to the screen of her Apple iPhone. When she returned her attention to the road, it was too late to avoid the collision with a car containing two adults and a child. The adults were killed as a result of the crash and the child was rendered a paraplegic. Ms. Kubiak was convicted on two counts of criminally negligent homicide.

The representatives of Ms. Kubiak's victims sought to hold Apple liable for not implementing "[l]ock-out mechanisms for driver handheld computing device" on the iPhone 5, the device that Ms. Kubiak was using. Apple was awarded for a patent on the lock-out mechanism in 2003 but chose not to implement it. The patent specifically addresses the dangers of texting while driving. The district court granted Apple's motion to dismiss for failure to state a claim for which relief may be granted, and the plaintiffs appealed. This opinion from the Fifth Circuit provides very instructive analysis on the law of causation. Among the issues that the Fifth Circuit had to address in reaching its conclusion was whether Texas law would hold a smartphone manufacturer liable for torts committed by the phone user "because the neurobiological response induced by the phone is a substantial factor in her tortious act." The closest analog that the court could find is in the area of dram shop liability. Ultimately, the court held that mobile phone users bear responsibility for the consequences of their actions.

Taylor v. FAA
895 F.3d 56 (DC Cir. 2018)
opinion for the court by
Chief Judge Merrick B. Garland

Much of our lives is governed by an ever-growing number of regulations. Largely because of the volume of regulations, many of us are unaware of the reach they have in our day-to-day activities. Adding to this is the complicated interplay between the regulations and the implementing statutes. This case layers onto this the emerging popularity and availability of small, unmanned aircraft or drones. What makes this opinion special is that the court takes

what could have been an incredibly technical and difficult to understand area of law and provides a user-friendly explanation of the applicable law.

The *pro se* petitioner is a model aircraft hobbyist seeking review of a new rule that governs the use of certain drones. The 2012 FAA Modernization and Reform Act, 49 U.S.C. § 40101, authorized the promulgation of rules to "safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." The act exempts from regulation "model aircraft" that meet specified operational criteria but creates an exception within that exception for "persons operating model aircraft who endanger the safety of the national airspace system." It is petitioner's belief that certain implementing regulations exceed the scope of the FAA's regulatory authority. The D.C. Circuit explains in a well-reasoned and easily digested opinion why each of the petitioner's contentions is incorrect. This is extremely important in a case where the petitioner is proceeding *pro se* and where there the potential audience for the opinion is not just lawyers but lay readers.

Turner v. United States
885 F.3d 949, 955 (6th Cir 2018)
opinion concurring dubitante by
Circuit Judge John K. Bush

> *dubitante* (d[y]oo-bi-*tan*-tee) [Latin] Doubting. • This term was usu. placed in a law report next to a judge's name, indicating that the judge doubted a legal point but was unwilling to state that it was wrong. — Also termed *dubitans*.
>
> "[E]xpressing the epitome of the common law spirit, there is the opinion entered *dubitante* — the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent." Lon L. Fuller, *Anatomy of the Law* 147 (1968).[2]

John Turner appealed the denial of his 28 U.S.C. § 2255 claim of ineffective counsel to the U.S. Court of Appeals for the Sixth Circuit. Turner was charged in state court with the aggravated robbery of four businesses. While the state case was pending, the state prosecutors notified Turner's attorney that the United States was considering federal robbery and firearms charges against Turner that upon conviction could result in a mandatory minimum prison sentence of 82 years. The federal prosecutor communicated a 15-year plea offer to Turner's lawyer that would expire upon Turner's indictment by a federal grand jury. While there is a dispute between Turner

[2] *Black's Law Dictionary* (10th ed. 2014) (Bryan A. Garner, ed.).

and his lawyer regarding their discussions of the plea offer — Turner says he never got it; his lawyer says he rejected it — there is no dispute that it was not timely accepted. Turner ultimately retained new counsel for the federal case and accepted a plea agreement that resulted in a 25-year sentence. Turner argued on appeal that because his original attorney did not effectively represent him during the plea negotiations his rights to the effective assistance of counsel pursuant to the Sixth Amendment was violated.

While the main opinion in this case involving the attachment of Sixth Amendment rights to preindictment plea negotiations is effective in explaining why the Sixth Amendment does not attach at this stage, the real excitement is in Judge John Bush's concurrence *dubitante*. Judge Bush provides the reader with a historical perspective of the right to counsel, beginning with a review of the Founders' intent and meaning regarding the words "accused" and "criminal prosecution." Although he concurred in the result based on Supreme Court precedent, it is clear that Judge Bush believes the originalist understandings of when the right to counsel should attach would lead to the opposite result. The opinion is a very thorough, considered piece that will provide a scholarly basis for future challenges before the Supreme Court.

It was Abraham Lincoln who said, "Let reverence for the law be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in the schools, in seminaries, in colleges. Let it be written in primers, spelling books and almanacs. Let it be preached from the pulpit, proclaimed in legislative halls, enforced in courts of justice, and, in short, let it become the political religion of the nation."

U.S. v. Dewey
37 F.Supp. 449 (D. Kan. 1941)

August

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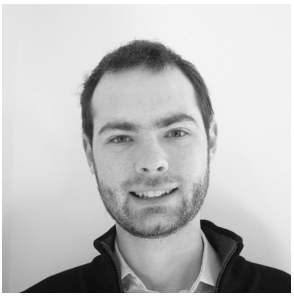
When readers seek health information, they subscribe to health oriented publications, for spiritual advice they read religious tracts, and for astrology they read sidereal almanacs.

S.E.C. v. Lowe
725 F.2d 892 (2d Cir. 1984) (Brieant, J., dissenting),
rev'd Lowe v. S.E.C., 472 U.S. 181 (1985)

FOUR RECOMMENDATIONS



Jed S. Rakoff[†] *& Lev Menand*[*]

The Secret Barrister
The Secret Barrister: Stories of the Law and How It's Broken
(Pan Macmillan 2018)

In an age of mass incarceration, it is not so easy to find good in the U.S. criminal justice system. But *The Secret Barrister* makes you appreciate the better aspects of our system by showing just how dysfunctional the corresponding English system has become. The book — written by an anonymous junior barrister — is a devastating, sometimes hilarious, and frequently heart-breaking account of how the criminal justice system in England and Wales is not only broke financially but broken in its ability to deliver justice, whether to prosecutors, defendants, victims, or the public.

Because of the unique British system enabling barristers (i.e., courtroom lawyers) to represent the prosecution in one case and an accused person in the next, the author is able to illustrate her widespread accusations with accounts of recent cases she handled and to maintain an objectivity rarely found in such first-person accounts. But what she recounts is alarming. Continuous reductions in the financial support given to the criminal justice system in the U.K. have led to a situation where none of the players — the police, the

[†] U.S. District Judge, Southern District of New York.
[*] Law Clerk to the Honorable Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit.

prosecutors, the defense lawyers, or even the judges — are given the tools to do their jobs adequately. To give just one example, one of the cases in which the Secret Barrister served as prosecutor involved a heroin addict named Rob who seduced a young girl, Amy, when she was 14, forced her to inject heroin and, once she herself became addicted, forced her to have sex with his dealers in order to pay for their supply. Over the next few years, Rob regularly beat Amy when she protested in the slightest, and finally he almost beat her to death when she was 22. In the hospital, Amy finally confided her plight to the doctors, who contacted the police, who in turn, after an investigation, arrested Rob on serious assault charges. But when the day came for Rob to stand trial, the prosecutor (i.e., the Secret Barrister) found that the authorities had misplaced the basic documents (such as witness statements required to be provided to the defense) necessary for the case to go forward. No fewer than four adjournments followed over the course of the next three months, as the prosecutor made every effort to obtain the missing documents, only to be confronted with the sad reality that the police, already stretched to the limits, had in their view more important things to do than search for misplaced documents. And so, the case was dismissed. According to the author, this kind of thing happens regularly.

To cope with financial contraction, moreover, the U.K. authorities have resorted to "efficiencies" (i.e., cheap, halfway measures) that in the U.S. would be considered a denial of due process. For example, an ever-increasing number of criminal cases (not just misdemeanors, but felonies as well) are now tried by three-judge panels of volunteer "lay magistrates" — i.e., non-lawyers who volunteer to give 13 days a year to hear such cases. About the only law that enters into their deliberations comes from an assigned law clerk (called a "legal advisor"), whose advice they frequently disregard. While defenders of this system note that it has roots in the common law going back at least to the fourteenth century (and what could be a better justification than that!), in fact, as the Secret Barrister notes, the only real defense for this bizarre lay-magistrate system is that it is quick and cheap.

Although both the book and the author of *The Secret Barrister* have created something of a swirl in British legal circles, the book remains relatively unknown in the U.S. But we ignore its lessons at our peril.

Lucy E. Salyer
Under the Starry Flag
(Harvard University Press 2018)

This fascinating and beautifully written work of legal history deals with a right guaranteed by U.S. law that many of us have never heard of: the right

of expatriation, i.e., the right to renounce a citizenship you previously held. More especially, it traces the far-from-peaceful origins of the Expatriation Act of 1868.

In 1867, forty Irish-American, most of them veterans of the Civil War and all of them naturalized U.S. citizens, sailed from New York to Ireland with a shipload of armaments, intending to aid the cause of Irish independence (the "Fenian Revolt"). But most of them were arrested by British authorities as soon as they reached Ireland, and several were then tried for treason, on the theory that they were still British subjects. At various points in the trial, the defendants' lawyers (who were hired by the U.S. government) argued in one way or another that the defendants had, as part of the oath they took to become U.S. citizens, expressly renounced any allegiance to Britain. Accordingly, whatever else they might be guilty of, they could not be held guilty of treason. But the British judges were quick to reject such arguments, citing the great Sir Edward Coke for the proposition that the British citizenry of these naturalized Americans was "written by the finger of the law in their hearts" forever.

Although the defendants were duly convicted and sentenced to prison, the notion that citizenship was not renounceable infuriated Americans who had not so long before fought a Revolution against the British Crown and who were building a nation composed of immigrants. Vehement protest rallies were held in New York and elsewhere, and not just among Irish-Americans, for, in the words of one U.S. newspaper, the notion of perennial citizenship was a "monstrous monarchial assumption." Reacting to the mood, Congress quickly passed the Expatriation Act of 1868 — still good law — which states that "the right of expatriation is a natural and inherent right of all people" and that any ruling to the contrary is "inconsistent with the fundamental principles of this government" and hence null and void. Although the short-term effect was to further fray relations between the U.S. and Britain (already harmed by tacit British support for the South during the Civil War), the principal of the right to expatriation ultimately prevailed and was even adopted, a century later, by the United Nations.

This brief account does not begin to do justice to Professor Salyer's skillful weaving together of all the political, social, economic, and emotional threads that made the British trial of the American Fenians and its legislative aftermath in the U.S. an important development in the rise of U.S. nationalism and its impact on international law and relations. And, given all the issues involving every aspect of immigration law now being debated in the U.S., Salyer's contribution to legal history may have some immediate relevance as well.

Tim Wu
The Curse of Bigness: Antitrust in the New Gilded Age
(Columbia Global Reports 2018)

What — you reasonably might wonder — do checked bag fees and the ever-shrinking distance between your knees and the seat in front of you have to do with Cambridge Analytica, the Equifax data breach, and recent revelations that your phone company has been selling your location data to various "third-party service providers"? All of these things, Professor Wu tells us, are partially, if not primarily, the product of industrial concentration and the failure of the Justice Department to enforce our nation's anti-trust laws. Monopolists, it turns out, don't have to cater to consumers in the same way small firms do. Worse, mega-businesses can use their economic power to distort democracy.

Two parts historical narrative and one part call to arms, Wu's indispensable new survey of American anti-trust law seeks to explain how many American industries came to be dominated by just a handful of firms. On Wu's account, our anti-trust laws were originally designed in the 1890s and early 1900s not to ensure low prices for consumers, but to promote liberty and democratic self-government by limiting the accumulation and abusive exercise of private power. Specifically, Congress was concerned that the Constitution's protections against political oppression could not stop new, corporate oppressors, with names like Standard Oil, the Northern Securities Company, and American Tobacco. These trusts, Congress observed, controlled as much economic activity as the government and were not subject to the same restrictions. As one lawmaker put it, a people cannot be truly free if they are dependent, in their economic lives, on the "arbitrary will of another." Business tycoons like John D. Rockefeller, another lawmaker explained, possessed a "kingly prerogative," which was "inconsistent with our form of government."

American democracy survived, Wu suggests, because a series of presidents, beginning with Teddy Roosevelt in 1901, enforced the laws passed by Congress prohibiting contracts and combinations "in restraint of trade" and the monopolization of "trade or commerce." But beginning in the 1970s, Wu explains, a group of academics reconceived anti-trust law, arguing, with little basis, that Congress really meant merely to promote competition so as to ensure low prices. In 1979, these academics even convinced the Supreme Court. The result, Wu says, is our New Gilded Age, where prices are low, but the concentration of private power has suppressed wages, slowed economic growth, stifled innovation in science and technology, increased inequality, hampered democratic self-government, and fueled fascist political movements in the U.S. and abroad.

At the end of his book, Wu proposes a series of reforms, recommending breaking up media, technology, and transportation conglomerates, stopping mergers before they happen, and studying commercial practices in concentrated industries. Wu is a structuralist, and *The Curse of Bigness* is an important contribution to the emerging "law and political economy" literature, which examines how legal rules shape markets and how, in turn, markets shape legal rules. Wu's approach reveals that there is nothing inevitable about present arrangements; just as there was nothing inevitable about the break-up of Standard Oil a century ago. When President McKinley, awash in secret corporate campaign contributions, won the presidency in 1896, it seemed like the sun would never set on J.P. Morgan's railroad empire. Then a few years later, Roosevelt took the oath, brought suit against the Northern Securities Company, and the Gilded Age gave way to the Progressive Era.

Adam Winkler
We the Corporations:
How American Businesses Won Their Civil Rights
(W.W. Norton 2018)

American businesses today enjoy many of the same rights as living, breathing American citizens, including freedom of speech, freedom of the press, freedom of religion, due process, equal protection, freedom from unreasonable searches and seizures, the right to counsel, and the right to trial by jury. Indeed, businesses routinely sue the government when they think one of these rights has been violated. And through such suits, businesses have successfully abrogated many duly enacted laws and deterred Congress and the states from enacting countless others. But it was not always so. In a sweeping new history of American constitutional law, Professor Winkler reveals how businesses won these rights and how, in many cases, they helped to define these rights, testing out new theories of constitutional interpretation that were later adopted by other groups and individuals seeking to vindicate their own rights.

Somewhat counterintuitively, Winkler shows that businesses achieved their many Supreme Court victories not by contending that corporations were legal "persons" entitled to the same protections as natural persons, but rather by arguing that, when it comes to the authority of the government to regulate their affairs, corporations were merely associations of natural persons whose rights the government must recognize, and courts must allow corporations to assert. For example, in what Winkler dubs the "first" corporate rights case, *Bank of United States v. Deveaux* (1809), the lawyer for the Bank, Horace Binney, convinced the Court that a corporation was a "mere collec-

tion of men" and that, accordingly, the Bank should be permitted to sue in federal court under Article III, section 2, which permits federal courts to hear cases "between citizens of different states."

Winkler fills out his narrative with lots of nourishing details about the lawyers and judges arguing and deciding the major cases. For example, he tells us how Roscoe Conkling, a drafter of the Fourteenth Amendment, lied to the Supreme Court in an effort to win new rights for businesses. (Conkling claimed, falsely, that Congress had intended the equal protection clause to apply to businesses, and that he had a notebook from the deliberations to prove it.) We also learn how a cabal of like-minded corporate rights enthusiasts passed off *Santa Clara County v. Southern Pacific Railroad* (1886) as standing for the proposition that corporations were persons within the meaning of the Fourteenth Amendment when the case was explicitly decided on other grounds.

Overall, Winkler is incredibly fair, taking pains to carefully dissect both sides of each case he examines. And, not every victory for a corporate plaintiff seems like a loss for the American people — or vice versa. For example, Winkler recounts how in *NAACP v. Button* (1963), the Supreme Court permitted the NAACP to assert the free speech and free assembly rights of its members in challenging a Virginia law that, among other things, required the NAACP to file annual lists of its members with the state. Drawing a line between when a corporation should be permitted to assert the rights of its members and when it should not is not as easy as it may seem. That is one of many reasons why a book like *We the Corporations* is long overdue and fills a hole in both our constitutional and corporate law scholarship.

"Economy is the method by which we prepare today to afford the improvements of tomorrow."

Clifford v. Raimondo
184 A.3d 673, 677 (R.I. 2018)
(quoting *Silent Cal's Almanack: The Homespun Wit and Wisdom of Vermont's Calvin Coolidge* 58 (David Pietrusza ed., 2008))

KEY DEVELOPMENTS IN THE LAW, 2018

The Word from West

In the 2016 edition of the *Green Bag Almanac & Reader*, we republished the title pages of the 2015 issues of one of our favorite periodicals — the biannual report on major changes to West's Key Number System. As we said back then,

> Twice a year, every year, Thomson Reuters distributes a glimpse into the company's judgment about developments in the law. In March and again in August, libraries all over the world receive a pamphlet reporting on "important changes and revisions . . . to West's Key Number System." The Key Numbers and their modern offspring, KeyCite, underlie many of the print and online legal research resources that lawyers and their colleagues use every day. The Keys are so quietly pervasive that they influence (as they long have) how lawyers think, even if we don't think about them or think they do.[1] The annual changes and revisions are not exciting news of the breaking, palpitating sort. The blogs will never buzz about them. The news in the March and August pamphlets is, rather, of a major legal institution's measured judgments about what legal topics have in recent years undergone changes sufficiently substantial to justify partial revisions of a widely used legal resource. These pamphlets of untrendy news about legal trends do not get much attention, and remarkably few libraries even bother to preserve them. So, this year — with permission from Thomson Reuters — we are giving our readers a second chance to notice these developments, by reprinting the front matter from last year's Key pamphlets. We hope to do this every year from now on, for our readers and for posterity.

We failed to fulfill that hope, and we have no excuses. We are trying again, starting now, with the 2018 issues (see the two pages after this one).

Last year's big news in the Key System involved law relating to:

Appeal and Error
False Pretenses
and
Finance, Banking, and Credit

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[1] *See* Bob Berring, *Ring Dang Doo*, 1 Green Bag 2d 3 (1997).

West's Key Number System

August 2018 Pamphlet

This complimentary pamphlet covers important changes and revisions made in 2018 to West's Key Number System

Contains Full Outlines and Translation Tables for:

Revised Topic—

FALSE PRETENSES

New Topic—

FINANCE, BANKING, AND CREDIT

The Outlines in this pamphlet will be included in the 2018 edition of West's Analysis of American Law, and both the Outlines and Translation Tables will be included in subsequent Digest Pocket Parts, Pamphlets, and recompiled Bound Volumes.

Reference Attorneys are available to assist you in using these new Key Numbers. They may be contacted at 1-800-REF-ATTY (1-800-733-2889).

THOMSON REUTERS™

September

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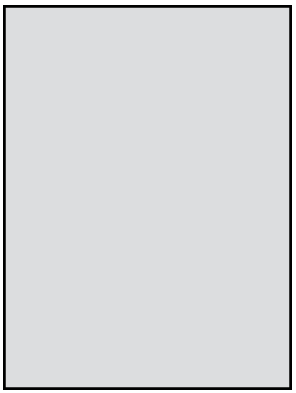
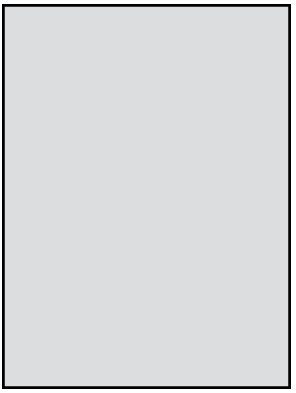
"The almanac is part of the law of England."

Wilson v. Van Leer
17 A. 1097, 1099 (Pa. 1889)
(quoting Pollock, C. B., in
Tutton v. Darke, 5 Hurl. & N. 649)

FIVE RECOMMENDATIONS





Richard W. Garnett[†] *& Christian R. Burset*[*]

Patrick J. Deneen
Why Liberalism Failed
(Yale University Press 2018)

It was at least a bit surprising — but no doubt good for sales! — when a political theorist's Wendell Berry- and Alasdair MacIntyre-inspired genealogy and diagnosis of liquid modernity appeared on President Barack Obama's Summer 2018 recommended-reading Facebook post. (He took care to note his disagreement with "most of the author's conclusions[.]") Patrick Deneen's provocative thesis is that much of what is identified, and lamented, as "illiberal" in the current context — *e.g.*, hair-trigger Twitter mobs, various officials' indifference to constitutional constraints and forms, increasingly aggressive application to mediating institutions and non-state associations of the logic of congruence, the on-campus repurposing of the language of "safety" and "violence" to de-platform controversial speakers, etc. — actually reflects the working out of liberalism's own fundamental premises and ani-

[†] Paul J. Schierl/Fort Howard Corporation Professor of Law, University of Notre Dame.
[*] Associate Professor of Law, University of Notre Dame.

mating commitments. The economic inequality criticized by progressives and the pulverizing of the family decried by conservatives turn out to be fruits of the same unhealthy, liberal tree. Whether it is the Main Street-destroying trade and economic policies championed by "right" libertarians or their "left" counterparts' demands for liberation from limits in the contexts of sexuality and bioethics, the key player in Deneen's story is liberalism's reductionist account of what it means to be human. Deneen is no Luddite, and he happily acknowledges liberalism's accomplishments, but his account should engage all those who sense that something's wrong. There is no "silver bullet" proposed or "miracle cure" identified; instead, Deneen urges an emphasis on concrete practices over abstract principle and a search for new forms of community that can sustain them.

Sam Erman
Almost Citizens:
Puerto Rico, the U.S. Constitution, and Empire
(Cambridge University Press 2018)

Puerto Rico is often described as the world's oldest colony, but recent events have given new urgency to questions about its legal and constitutional status. The slow recovery from Hurricane Maria and a government-debt crisis, in particular, have sharpened longstanding debates about Puerto Rico's relationship to the rest of the United States. More than a century after Congress formally granted U.S. citizenship to Puerto Ricans, Americans on and off the island continue to ask what it would mean for them to achieve true equality. Sam Erman's book is a timely contribution to this conversation. It also offers broader insights about the relationship between law and empire and the causes of legal change. Although Erman gives due attention to the familiar ambiguities of the Insular Cases, he integrates that well-known jurisprudential tale into a broader narrative that incorporates the racial legacies of Reconstruction, labor activism, and the interplay between private claim-making and constitutional conflict. In doing so, Erman builds on the recent tendency of legal and colonial historians to emphasize the agency and creativity of individual claimants. But his argument differs from that offered by many other scholars of empire, who have emphasized the ability of colonial subjects to exploit legal ambiguities for their own ends. Instead of praising the flexibility of colonial legal orders, Erman insists that "ambiguity has been the handmaiden of empire" (158). For Puerto Rico to escape its colonial status, he suggests, it must attain the certainties of equal citizenship.

Steven D. Smith
Pagans and Christians in the City:
Culture Wars from the Tiber to the Potomac
(Eerdmans 2018)

Writing a blog post about the 2015 controversy surrounding Indiana's religious-exemptions law, re-reading T.S. Eliot, and chatting with Stanley Fish all contributed, Steve Smith has reported, to the launching of his most recent book project. Five years after his *Rise and Decline of American Religious Freedom*, Smith here develops the intriguing claim that the relevant divide in our "culture wars" and our various religious-freedom fights over wedding cakes and insurance coverage for contraception is not really between the "religious" and the "secular," or between the believing and the unbelieving. An orientation toward the sacred is everywhere along our various political and other spectrums; the question is where we locate it: Is our sacred immanent or transcendent? The quality and intensity of many activists' purportedly "secular" attachments and commitments — like the fervor of their efforts to impose orthodoxy and combat heresy — seems more than a little bit "religious." To be clear, the idea of "paganism" is not used by Smith as a stand-in for "new age" or neo-Wiccan innovations but is instead meant to capture the older, but possibly still powerful, sense of immanent sacrality. The pagans of one era were at first confused, and then irritated and later worse, by the Christians' rejection of the state-as-sacred. Appreciating the presence, and the passion, of today's "pagans" contributes to our understanding of today's law-and-religion debates.

Jennifer Pitts
Boundaries of the International:
Law and Empire
(Harvard University Press 2018)

Jennifer Pitts's meticulously researched book reconstructs and critiques European arguments about the law of nations in the 18th and 19th centuries. In doing so, it makes a profound contribution to the history of international law — especially its recent critical turn, which has challenged the discipline's self-conception as a fundamentally "emancipatory" project. Although other scholars have previously uncovered the imperialism lurking at the heart of international law — Antony Anghie and Marti Koskenniemi have been especially prominent here — that work has focused either on earlier progenitors like Alberico Gentili, Hugo Grotius, and Francisco de Vitoria, or on the discipline's maturation in the late 19th and 20th centuries. Pitts's focus on the 18th and 19th centuries recovers a neglected but transformative period.

As in her first book, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton 2005), Pitts portrays that era as one of missed opportunities. The 18th century, she argues, generated unique possibilities for a more inclusive approach to ordering our world. As it happened, that potentially ecumenical moment collapsed into a "parochial universalism" that insisted both on the global applicability of European norms and on Europeans' unique capacity to apply them. This fascinating account of the interaction between universalism and particularism should excite not only readers with an interest in international law, but anyone trying to understand how we define the boundaries of civilized society.

Jeffrey S. Sutton
51 Imperfect Solutions:
States and the Making of American Constitutional Law
(Oxford University Press 2018)

A little over 40 years ago, Justice William Brennan argued, in *State Constitutions and the Protections of Individual Rights*, that litigators and state-court judges should use the states' constitutions (and the adequate-and-independent-state-grounds rule) to supplement, correct, and even resist what he worried was the Nixon Court's skepticism regarding the Warren Court's confidence. Probably because of the 2016 election and recent judicial appointments, similar calls for creativity in state courts, and for increased attention in law schools to the progressive potential of state constitutional law, have become more common. Judge Sutton's timing — both with *51 Imperfect Solutions* and with his co-edited West Publishing casebook, *State Constitutional Law: The Modern Experience* — is spot-on. True, there has long been an air of reactive opportunism surrounding the calls for invigorating state constitutional law. Sutton's book, though, pitches the project not simply as a one-way-ratchet way of getting in state courts what is not get-able (for now) in the Supreme Court, but instead as an opportunity for genuine comparison and learning. After all, state courts and state constitutions are more than vehicles for rejecting *Employment Division v. Smith*, or trimming the car-search-incident-to-arrest rule, or experimenting with positive rights. They can teach us about inter-branch conflicts, amendment procedures, judicial selection, term limits, and much more. And they raise the intriguing question whether the Supreme Court might do well, when employing the Supremacy Clause, to leave more space for continued education.

An Oath Upon an Almanac

"Q. Mrs. Miller, I ask you this question: 'Do you believe in the existence of a Supreme Being who controls the destiny of men, who rewards their virtues or punishes their transgressions here or hereafter?' A. No. I believe that man controls his own destiny.

"Q. Therefore, taking an oath and appealing to this Supreme Being would have no effect on you? A. I say any oath I take to tell the truth has a binding effect on me.

"Q. When you take it on the Bible and appeal to God, would that have an effect on you? A. Yes, it is an oath. Any oath will have an effect on me.

"Q. You might take it on an almanac just as you would on a Bible and it would have the same effect on you, wouldn't it? A. Yes — I'd tell the truth."

State v. Beal
154 S.E. 604, 611-12 (N.C. 1930)
(statement of the case)

THE

Methodist Almanac

FOR THE YEAR OF OUR LORD

1879,

BEING THE 103d YEAR OF AMERICAN INDEPENDENCE,

AND THE

113th OF AMERICAN METHODISM.

EDITED BY W. H. DE PUY, D.D.

NEW YORK:
NELSON & PHILLIPS.
CINCINNATI:
HITCHCOCK & WALDEN.

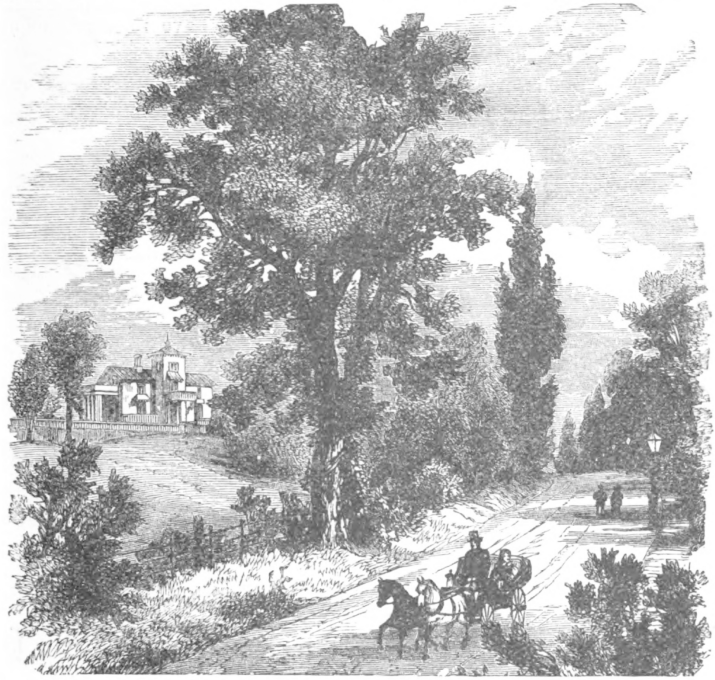
Go Because it Rains.

"I SUPPOSE that you wont go to Sabbath-school to-day, Lucy," said a mother one stormy Sabbath morning, settling herself to read.

"Please let me go to-day, mamma; I want to go because it rains."

"Why, Lucy, that is my excuse for staying at home. How can you make it a reason for going?"

"Our teacher always goes, mamma, in all weather, although she lives so far away. She told the class that one Sabbath when she went through the storm, and did not find even one scholar, she was so discouraged that she could not help crying. She asked us, too, if we did not go to our day schools in the



rainy weather; and she said, while we must obey our parents, if we asked them pleasantly to let us go, they would likely be willing. Mamma, will you please let me go to-day?"

"Well, I am willing, my dear, if you wear your school suit. Go and get ready."

But the mother no longer took any interest in her book, but said to her husband, (a lawyer,) who came in from the library, "Lucy is going to Sabbath-school to-day because it rains, so that her teacher may be encouraged by the presence of at least one pupil. Suppose we go to chapel for the same reason, if not for a better."

"Agreed. I never could plead a cause to an empty court-room, and the minister must find it hard work to preach to empty pews."

October

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A jury should be as neutral as a thermometer and as detached as an almanac. They should look at no party or witness in the light of how that party or witness might affect them personally.

Finney v. G.C. Murphy Co.
161 A.2d 385, 387 (Pa. 1960)

Sandra Day O'Connor
Phoenix, Arizona
October 23, 2018

Friends and fellow Americans,

I want to share some personal news with you.

Some time ago, doctors diagnosed me with the beginning stages of dementia, probably Alzheimer's disease. As this condition has progressed, I am no longer able to participate in public life. Since many people have asked about my current status and activities, I want to be open about these changes, and while I am still able, share some personal thoughts.

Not long after I retired from the Supreme Court twelve years ago, I made a commitment to myself, my family, and my country that I would use whatever years I had left to advance civic learning and engagement.

I feel so strongly about the topic because I've seen first-hand how vital it is for all citizens to understand our Constitution and unique system of government, and participate actively in their communities. It is through this shared understanding of who we are that we can follow the approaches that have served us best over time – working collaboratively together in communities and in government to solve problems, putting country and the common good above party and self-interest, and holding our key governmental institutions accountable.

Eight years ago, I started iCivics for just this purpose – to teach the core principles of civics to middle and high school students with free online interactive games and curriculum that make learning relevant and remarkably effective. Today, iCivics (www.icivics.org) reaches half the youth in our country. We must reach all our youth, and we need to find ways to get people – young and old – more involved in their communities and in their government. As my three sons are tired of hearing me say, "It's not enough to understand, you've got to do something." There is no more important work than deepening young people's engagement in our nation.

I can no longer help lead this cause, due to my physical condition. It is time for new leaders to make civic learning and civic engagement a reality for all. It is my great hope that our nation will commit to educating our youth about civics, and to helping young people understand their crucial role as informed, active citizens in our nation. To achieve this, I hope that private citizens, counties, states, and the federal government will work together to create and fund a nationwide civics education initiative. Many wonderful people already are working towards this goal, but they need real help and public commitment. I look forward to watching from the sidelines as others continue the hard work ahead.

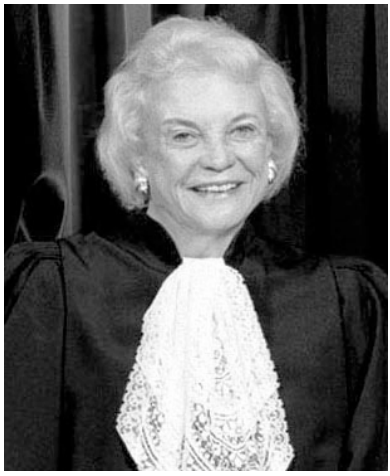
I will continue living in Phoenix, Arizona, surrounded by dear friends and family. While the final chapter of my life with dementia may be trying, nothing has diminished my gratitude and deep

appreciation for the countless blessings in my life. How fortunate I feel to be an American and to have been presented with the remarkable opportunities available to the citizens of our country. As a young cowgirl from the Arizona desert, I never could have imagined that one day would become the first woman justice on the U.S. Supreme Court.

I hope that I have inspired young people about civic engagement and helped pave the pathway for women who may have faced obstacles pursuing their careers. My greatest thanks to our nation, to my family, to my former colleagues, and to all the wonderful people I have had the opportunity to engage with over the years.

God bless you all.

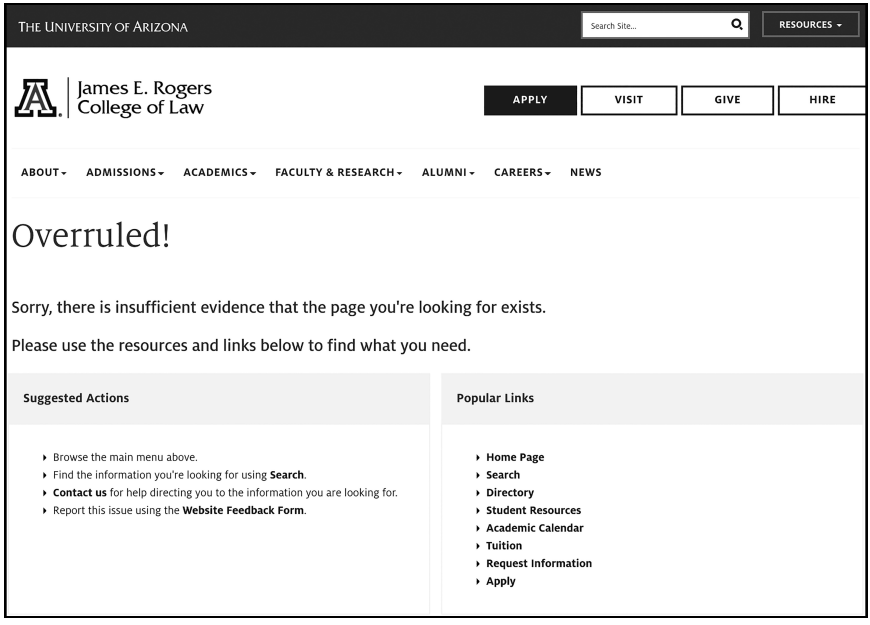
Sandra Day O'Connor



Justice Sandra Day O'Connor at the Supreme Court, January 2006.

Overruled on the Internet

The clever 404 error notice employed by the James E. Rogers College of Law at the University of Arizona (excerpt below) might or might not have been unique to the Rogers College of Law in 2018, or even new in 2018, but that is how we experienced — and enjoyed — it.



November

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"When the well's dry, we know the worth of water."

Pleasant Valley County Water District v.
Fox Canyon Groundwater Management Agency
2017 WL 5589178 (California Court
of Appeal, 2d Dist., Nov. 21, 2017)
(quoting Benjamin Franklin in *Poor Richard's Almanack* (1746))

FIVE RECOMMENDATIONS

Harold E. Kahn[†]

Brady v. Bayer Corp.
26 Cal. App. 5th 1156 (2018)
opinion for the court by
Associate Justice William W. Bedsworth

All of us who read judicial opinions know the sad truth: the great majority of them are dull. Justice William Bedsworth of California's Fourth District Court of Appeal (Orange County) apparently didn't receive the memo that judicial decisions should be boring. His opinion reversing a trial court's order sustaining a demurrer (similar to a 12(b)(6) motion) to a false advertising complaint alleging that that the "One A Day" label on a bottle of gummy vitamins is as entertaining as it is illuminating. Bedsworth's opinion rejects the arguments of Bayer (the vitamin maker) that language on the back of the bottle stating that the dosage is "two gummies daily" suffices to cure any misleading impression from the "One A Day" moniker on the front of the bottle. Bedsworth observes that reading the dosage language is "an ocular challenge." The decision concludes that there are both factual and legal infirmities in Bayer's positions. Factual infirmity: "Instead of relying upon lifelong experience that One A Day is a trustworthy company that has been studying and analyzing our health needs for decades and has much more

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

knowledge than laypeople, Bayer says consumers look at the label and decide just how much selenium, biotin, pantothenic acid and zinc they need and then make their purchase after comparing those values with the labels on the vitamin bottles. That's a stretch." Legal infirmity: "But as problematic as that factual depiction is, we must stretch further to adopt Bayer's legal position. We must conclude that consumers do that *as a matter of law*." My favorite line in the decision is found in footnote 20, where, after explaining that the vitamins are not likely perceived as medicine by their target audience given the ingredients, he concludes, "They're gummies, for crying out loud." The decision provides the dual joy of being legally exacting and providing an LOL experience.

De Havilland v. FX Networks, LLC
21 Cal. App. 5th 845 (2018)
opinion for the court by
Associate Justice Anne H. Egerton

Self-proclaimed "living legend" actress Olivia de Havilland alleged that the television docudrama *Feud: Bette and Joan* violated her right to control her own publicity and depicted her in a false light. In an elegant opinion befitting the subject of *Feud*, actresses of the golden Hollywood era, Justice Anne Egerton of California's Second District Court of Appeal (Los Angeles County) held that all of de Havilland's claims ran afoul of the First Amendment. At the outset of the decision, Egerton explained what animated her holdings: "Books, films, plays, and television shown often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star — a 'living legend' — or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people." The trial court judge had ruled that de Havilland's claims were viable because the creators of *Feud* wanted to depict de Havilland "as real as possible" and it created a false impression about de Havilland's character. Egerton explained the error of the trial court's reasoning: "The trial court's ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22. If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative — even fictitious and therefore 'false' — way, they face a false light lawsuit if the person portrayed does not like the portrayal. '[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals.'"

Hoard v. Hartman
904 F.3d 780 (9th Cir. 2018)
opinion for the court by
Circuit Judge Richard H. Paez

Sometimes a judicial decision rests on grounds that resonate from and reaffirm our nation's basic values. One such decision is Judge Richard Paez's opinion for a unanimous Ninth Circuit panel reversing due to instructional error a jury verdict against a prisoner who claimed that correctional officers had engaged in numerous acts of excessive force. Quoting from *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986), the trial judge instructed the jury that the prisoner had to prove that an officer "acted maliciously and sadistically for the purpose of causing harm." In response to a jury note, the trial judge further instructed that "sadistically means having or deriving pleasure from extreme cruelty." The issue on appeal was whether the phrase "maliciously and sadistically for the very purpose of causing harm" in *Whitley* required proof that an officer not only intended to cause harm, but also derived pleasure from his actions. Paez held that *Whitley* did not create such a requirement. He wrote: "the Constitution does not require proof of sadism, or pleasure from extreme cruelty, for excessive force claims brought under the Eighth Amendment . . . . [O]fficer intent — not officer enjoyment — serves as the core dividing factor between constitutional and unconstitutional applications of force." Paez addressed the *Whitley* language head on: judicial opinions, "unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis. Sometimes a word is just a word. And there is ample evidence here that the Supreme Court did not intend its use of 'maliciously and sadistically' in *Whitley* to work a substantive change in the law on excessive force beyond requiring intent to harm." Paez concluded that requiring proof of sadistic intent was "a grave injustice . . . . [T]he Eighth Amendment reflects this country's 'fundamental respect for humanity.' That respect is lost when courts close the doors to relief by asking plaintiffs to prove that they were the victims of not just cruelty, but sadism as well."

Janus v. AFSCME, Council 31
138 S.Ct. 2448 (2018)
dissenting opinion by
Associate Justice Elena Kagan

Janus held that an Illinois statute authorizing public employee unions to receive fees for non-political activities from non-consenting employees vio-

lated the First Amendment rights of the non-consenting employees. In so holding, the Court overruled *Abood v. Detroit Board of Education*, 431 US 209 (1977). In her dissent Justice Elena Kagan eloquently explained why she believed the majority went astray in overruling a 41-year-old precedent on insufficient grounds. Kagan did not pull punches. She wrote "The majority goes wrong at every turn" and "There is no sugarcoating today's opinion." Kagan stated "the worst part of today's opinion is where the majority subverts all known principles of *stare decisis* . . . Any departure from settled precedent (so the Court has often stated) demands a 'special justification' . . . And the majority does not have anything close. To the contrary, all that is 'special' in this case — especially the massive reliance interests at stake — demands retaining *Abood*, beyond even the normal precedent." Channeling longstanding antipathy toward judicial activism and judicial intrusion into democratic processes, in what is likely to be much quoted in the years ahead, Kagan accused the majority of preventing "the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy." At the close of the dissent, Kagan's anti-democratic critique became sharper still: "And maybe the most alarming, the majority has chosen the winners by turning the First Amendment into a sword . . . And it threatens not to be the last . . . almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things."

Regents of the University of California v. Superior Court
4 Cal. 5th 607 (2018)
opinion for the court by
Associate Justice Carol A. Corrigan

Determination of whether to impose a duty of care — an essential element of a negligence claim — has bedeviled common law courts for centuries, and this century is no exception. In *Regents* the California Supreme Court, in an opinion by Justice Carol Corrigan, held that "universities owe a duty to protect students from foreseeable violence during curricular activities." Reminiscent of some of the California Supreme Court's opinions in the days of Chief Justices Phil Gibson and Roger Traynor, Corrigan's opinion is a fine example of a common law court grappling with the many policy considerations that bear on whether a duty of care should apply. Corrigan provided a full recitation of the facts which, for present purposes, will be simplistically summarized

as one student who had exhibited unstable behavior, without warning or provocation, stabbed another student in a university chemistry laboratory. Corrigan explained that whether the university "was negligent in failing to prevent [the stabbing] . . . depends first on [the question of law] whether a university has a special relationship with its student that supports a duty to warn or protect them foreseeable harm. To answer that question, Corrigan surveyed numerous sources, including the *Restatement Third of Torts*, California case law, and decisions of other jurisdictions. Corrigan's opinion carefully balances the many applicable factors and arrived at a nuanced yet concisely stated holding. She elaborated on the scope of that holding: "The duty we recognize here is owed not to the public at large but is limited to enrolled students who are at foreseeable risk of being harmed in a violent attack while participating in curricular activities at the school. Moreover, universities are not charged with a broad duty to prevent violence against their students. Such a duty could be impossible to discharge in many circumstances. Rather, the school's duty is to take *reasonable steps* to protect students when it becomes aware of a *foreseeable* threat to their safety."

Of course, simply ignoring depreciation is ignoring a real expense for an ongoing business (particularly a "high end" night club claiming it would have earned profits for 15 years absent its landlord's breach of lease). (*Cf.* Kaufman, *Poor Charlie's Almanack: The Wit and Wisdom of Charles T. Munger* (2005) p. 120 ["I think that, every time you see the word EBITDA [*i.e.*, earnings before interest, taxes, depreciation, and amortization], you should substitute the words 'bullshit earnings'"].)

Giftime, Inc. v. KWI 1901 Newport Plaza, L.P.
2011 WL 6400626, n.7 (California Court of Appeal, 4th Dist., Dec. 21, 2011)

"Pete Seeger arrives at Fed. Court with his guitar over his shoulder," April 4, 1961.

David Dunaway wrote to the Federal Bureau of Investigation ("FBI") on May 23, 1976, requesting all materials in the FBI's files concerning The Almanac Singers, a musical group which performed from 1940 until 1945; The Weavers, a musical group which performed nationally from 1949 until 1962; People's Songs, Inc., an organization of songwriters which published the People's Songs Bulletin from 1946 until 1950; and People's Artist, an organization of musicians which existed from 1945 until 1952.[1]

Dunaway v. Webster
519 F.Supp. 1059, 1064 (N.D. Cal 1981)

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[1] Mr. Dunaway, a writer and graduate student at the University of California at Berkeley, made this request in connection with a book he is writing about Pete Seeger, the folksinger. Mr. Seeger was associated with each of these musical groups and organizations.

December

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As Sherlock Holmes said (when use of a new almanac did not serve as the code book but the prior year's almanac did) in *The Valley of Fear*: "'We pay the price, Watson, for being too up-to-date!'"

Fabre v. Taylor
2009 WL 162881 (S.D.N.Y. Jan. 20, 2009)

Our Poor Ending

Getting Permission for *The Almanack of Poor Richard Nixon* from a Book Publisher

Cattleya M. Concepcion[†]

Clearing rights to re-publish a copyrighted work is often a challenging exercise not only in copyright law but also in contract law. The rights arrangement — i.e., who holds the copyright and which rights the copyright holder retained or assigned under the publishing agreement — varies with each published work. Since the details about authors, publishers, and publishing contracts matter in this rights regime, there is danger in overgeneralizing from one experience. So, this essay is limited to: (1) explaining why we could not re-publish *The Almanack of Poor Richard Nixon* as the final law-related almanac in the *2019 Green Bag Almanac & Reader*; and (2) sharing some tips that might be helpful to researchers who are trying to clear rights with book publishers.

The Almanack of Poor Richard Nixon was published in 1968. At first glance, securing permission to re-publish an excerpt seemed straightforward. The authors, Jack Shepherd and Christopher S. Wren, held the copyright, so permission would need to come from them. Since I knew who held the copyright, the main challenge was finding current contact information to reach the authors. I received permission after sending an email and then dropping a letter in the mail for good measure.

A second, more careful read of the book's copyright page revealed that the permissions process would not be that simple or easy. The copyright page stated, "No part of this book may be reproduced in any form without written permission of the publisher . . . ." It appeared that the authors' contract with the publisher gave the latter some sort of license, so the permission that I had received from the authors (as copyright holders) was not enough.

Wikipedia Is a Place to Start But Don't Stop There

The two publishers named on the copyright page — World Publishing Co. (of Cleveland) and Nelson, Foster & Scott Ltd. (of Canada) — certainly

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[†] Head of Reference, Georgetown Law Library.

The authors of *The Almanack of Poor Richard Nixon* — Jack Shepherd (left) and Christopher S. Wren (right) — in the garden of Shepherd's Manhattan brownstone at the time of *Poor Richard*.

existed at the time of the book's publication in 1968, but neither publisher appeared to exist in 2019. There were no official websites to serve as starting points, but Wikipedia offered clues.

According to Wikipedia's article on World Publishing Co.,

> [i]n 1974, the Times Mirror Co. sold World Publishing to the U.K.-based Collins Publishers, with the trade publishing remaining with Times Mirror's New American Library subsidiary. In 1980 Collins broke up World Publishing, selling its children's line to the Putnam Publishing Group, the dictionary line to Simon and Schuster, and otherwise ridding itself of World's assets."[1]

The article referenced another article from the *Encyclopedia of Cleveland History*, which offered a similar, though not identical, timeline. According to the *Encyclopedia of Cleveland History*, "[Times-Mirror Inc.] sold World Publishing [] to Collins Publishing of Great Britain in 1974. In 1980 inflation

[1] World Publishing Company, Wikipedia, https://en.wikipedia.org/wiki/World_Publishing_Company (last revised Feb. 24, 2019).

caused Collins-World Publishing to sell its dictionary line to Simon and Schuster, the children's titles to the Putnam Publishing Group, and the Bible Division to Riverside Book & Bible House."[2]

If the *Encyclopedia of Cleveland History* was accurate, Collins (now called HarperCollins) was most likely the current holder of World Publishing Co.'s contract. But if Wikipedia's additional (and unsourced) details were true, then it was possible that HarperCollins never acquired the rights and that Penguin Random House (now home to the New American Library imprint) did. In the alternative, HarperCollins had acquired the rights but no longer owned any of World Publishing Co.'s assets. It seemed highly unlikely that *The Almanack of Poor Richard Nixon* would have been part of the children's titles that were sold to Putnam Publishing Group (now an imprint of Penguin Random House) or the dictionary line that was sold to Simon & Schuster.[3] However, if I could get confirmation from both Penguin Random House and Simon & Schuster that they did *not* control the rights, that would have been helpful too, since there were only a handful of big trade book publishers that could have ended up with the rights.[4]

Plan to Wait Two to Three Months for a Publisher's Response

So I reached out to all three — HarperCollins, Penguin Random House, and Simon & Schuster — and prepared for a long wait. Simon & Schuster estimated that a response could take up to twelve weeks.[5] HarperCollins needed at least eight weeks.[6] Penguin Random House aimed for six to eight weeks but indicated it would make every effort to inform requesters right away if it did not control the rights.[7]

The Permissions Department at Penguin Random House responded in six business days, well under its estimated turnaround time. Penguin Random House did not control the rights and suggested that I contact HarperCollins.

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[2] World Publishing Co., Encyclopedia of Cleveland History, https://case.edu/ech/articles/w/world-publishing-co (last visited May 28, 2019).

[3] It seemed almost impossible that the title would have been sold as part of the Bible division, so I did not pursue the possibility that Riverside Book & Bible House acquired the rights.

[4] HarperCollins, Penguin Random House, and Simon & Schuster are joined by Hachette Book Group and Macmillan as the top five publishers. Jim Milliot, Ranking America's Largest Publishers, Publishers Weekly, Feb. 24, 2017, https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/72889-ranking-america-s-largest-publishers.html.

[5] Email from Simon & Schuster Permissions (Dec. 21, 2018) (on file with author).

[6] Email from HarperCollins Permissions (Jan. 2, 2019) (on file with author).

[7] Penguin Random House, Permissions: Frequently Asked Questions, https://permissions.penguinrandomhouse.com/faqs.php (last visited May 28, 2019).

Simon & Schuster responded after seven weeks, comfortably within its twelve-week window, and similarly informed me that they did not control the rights. HarperCollins missed its eight-week estimate.

Know When and From Whom to Ask for Help

While I waited for a response from HarperCollins, I turned my attention to Nelson, Foster & Scott Ltd. of Canada. Unfortunately, Wikipedia did not provide any leads, and my general Internet searches uncovered little more than descriptions of other books' copyright pages naming the same publisher. The only additional detail I learned was that the publisher was from Toronto.

As a librarian, when I find myself researching a new and unfamiliar area, I typically turn to research guides. These are lists of resources that librarians (often from university libraries) curate on a specific topic to help researchers get started. Having no background in researching Canadian companies, I looked for a guide on company research authored by an academic library in Canada. One from the University of British Columbia[8] pointed me to a database of federal corporations from Corporations Canada,[9] the country's federal corporate regulator. A search of the database for Nelson, Foster & Scott quickly identified the company and provided information on its status. The publisher dissolved on September 15, 1980.

One question was answered, but a new one was posed: When Nelson, Foster & Scott dissolved, what happened to its assets? For help finding an answer, I turned to an expert. I contacted the Toronto Public Library and was connected with the Business, Science & Technology staff of the Toronto Reference Library. "Generally," I was told, "when a publisher ceases to exist, the contract terminates and the rights revert back to the author, and they may enter into a new contract with another publisher."[10] In this case, *The Almanack of Poor Richard Nixon* was never re-published. Either the authors held the Canadian rights, or the publisher who acquired the rights from World Publishing Co. did. I needed information from HarperCollins, the last player in my search for the rights-holding publisher.

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[8] University of British Columbia, Company Research, https://guides.library.ubc.ca/company/find (last revised April 26, 2019).
[9] Corporations Canada, Search for a Federal Corporation, https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html?locale=en_CA (last revised April 1, 2019).
[10] Email from Toronto Reference Library (Jan. 4, 2019) (on file with author).

Be Persistent If a Publisher Does Not Respond

Eight weeks turned into thirteen. Then I figured out how to contact the Permissions Department at HarperCollins. While HarperCollins invited requesters in my situation to follow up,[11] it made it difficult to do so by not providing any contact information for the Permissions Department. The permissions request form that I had originally submitted on the publisher's website generated an automatic confirmation email from noreply@harper collins.com, but I eventually figured out that permissions@harpercollins.com was a valid address.[12]

About two weeks later, HarperCollins finally responded. The publisher confirmed that it held the contract and controlled the rights for *The Almanack of Poor Richard Nixon* in the United States and Canada, while the authors controlled the United Kingdom and Commonwealth rights. The long delay in HarperCollins' response was due to difficulty in locating the contract, plus my request had "got[ten] lost in some paperwork."[13]

Don't Invest More Time Until You Agree to the License Fee and Terms

Even before confirming its rights, HarperCollins had asked me to send manuscript pages showing an excerpt from *The Almanack of Poor Richard Nixon*. The publisher made the same request after confirming its rights but before quoting a permission license. I provided information on the 30-page excerpt that the *Green Bag Almanac & Reader* sought to re-publish, but I declined to invest time (or hope) in preparing manuscript pages with an excerpt that had not been and might not be licensed. The publisher also requested the print run, approximate page count, publication date, and subscription price of the *Almanac & Reader* to provide a quote for a permission license.

Another three weeks later (and after one more follow-up email to push along a response), HarperCollins quoted a license fee: $1,000 for thirty pages. An excerpt of 750 words was $100, but much too short for a proper feel for the book.[14]

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[11] HarperCollins Publishers, Permissions FAQ, http://permissions.harpercollins.com/faq.aspx (last visited May 28, 2019) ("Please follow up only if you have not received a contract within 8 weeks of original submission.").

[12] A Google search will lead to a number of services that simulate sending an email to verify if an email address is valid.

[13] Emails from HarperCollins Permissions (April 16, 2019 & April 25, 2019) (on file with author).

[14] Emails from HarperCollins Permissions (May 21, 2019 & June 4, 2019) (on file with author). HarperCollins charges a minimum fee of $50 for a permission license. HarperCollins Publishers,

If You Can't Agree, Walk Away

In the end, the process to determine that we would not be able to secure rights to an excerpt from *The Almanack of Poor Richard Nixon* took from New Year's Day to just after Memorial Day. I am disappointed that while I received permission from the authors and copyright holders, I was unable to clear rights from HarperCollins, the publisher who holds the authors' contract from the now-defunct World Publishing Co.

We would have liked to present to readers excerpts from the beginning and end of *The Almanack of Poor Richard Nixon*: "High Tides" and "Low Tides" (pages 27-42); "Yarns Twice Spun" and "Changes of Seasons" (pages 164-173); and "Predicted Eclipses" and "Poor Richard's Farewell" (pages 184-190).[15] Narrowing to just these selections was a difficult task, and I encourage readers who are lucky enough to find a copy[16] to read it from cover to cover.

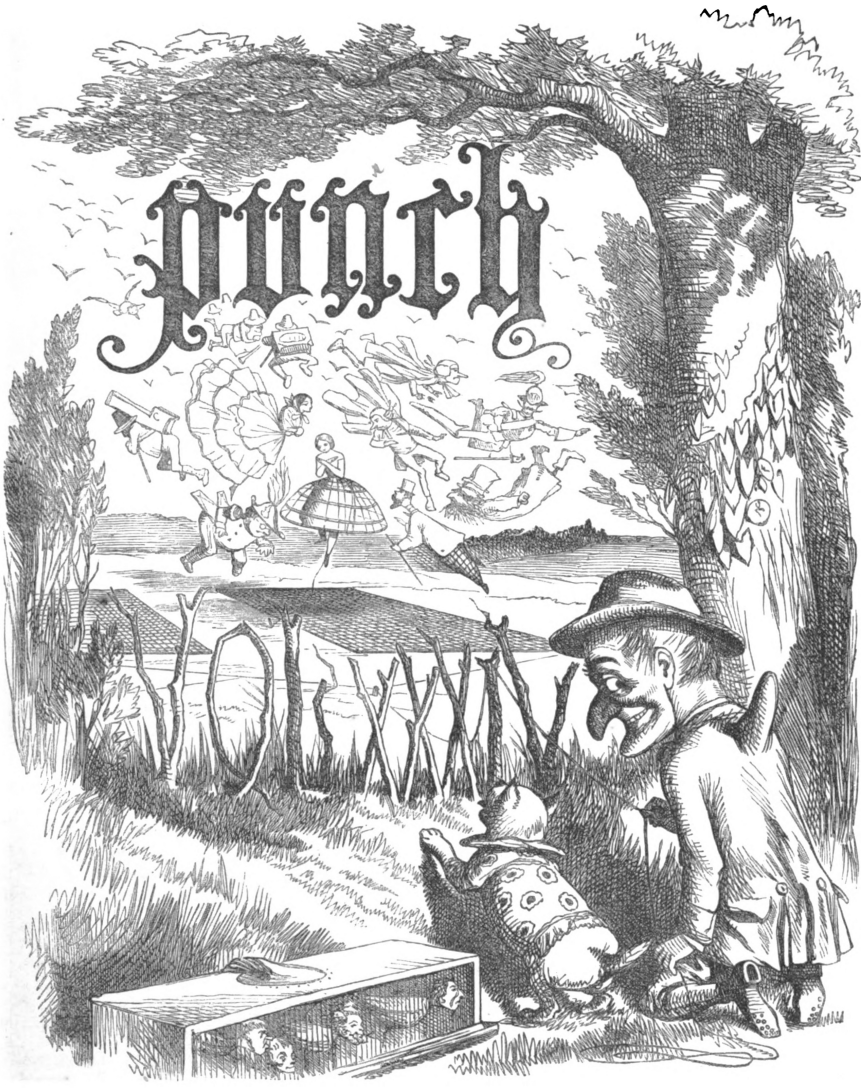
In our judgment a statement of unliquidated damages should be assigned to that category of requirements wherein some considerable latitude must be allowed, rather than ranked with a matter absolutely measurable by clock and almanac.

Central Vt. Ry. Co. v. Robbins & Pattison
184 F. 439, 442 (2d Cir. 1911)

Permissions Guidelines, http://permissions.harpercollins.com/ (last visited May 28, 2019).

[15] Jack Shepherd & Christopher S. Wren, *The Almanack of Poor Richard Nixon* (1968).

[16] According to WorldCat, over 70 libraries — including the Library of Congress, New York Public Library, and many university libraries — have copies of *The Almanack of Poor Richard Nixon* in their collections.



[JANUARY TO JUNE, 1858.]

LONDON:
PUBLISHED AT THE PUNCH OFFICE,
AND SOLD BY
BRADBURY & EVANS, 11, BOUVERIE STREET, FLEET STREET, E.C.

REFORM YOUR ALMANACKS.

IN a song rather popular some years ago, a gentleman used to pay this filial tribute to the talent of his departed parent :—

> "O, feyther had a jolly knack
> Of cooking up an Almanack."

The lines occurred to *Mr. Punch* as he was consulting a batch of Almanacks the other day, and he expressed a wish that the accomplished Almanack-maker commemorated in the song were alive and up to work. For everybody makes Almanacks now, and with very few exceptions, they are all stupid affairs. The Meteor which appeared to announce the publication of *Mr. Punch's* Own, and about which so many letters were written by astounded sky-gazers, was a very appropriate tribute to the single work of the kind that can be pronounced perfect. But though perfection is not to be expected elsewhere than at 85, Fleet Street, why need a thousand calendar-makers do their work so badly?

What is the use of sticking against certain dates, that HORNE TOOKE died—that BARBAROSSA was born—that Partridge Shooting begins—that the Battle of Ravenna was fought—that Pickles were invented—that CICERO was murdered—that GARRICK appeared—that the Granicus was crossed—that the Monument was finished—and so forth? Two-thirds of the dates which are usually commemorated nobody cares about, except those who will not be satisfied with such a barren record. Next, the jumble of things makes these memoranda more absurd, for the person who cares about BARBAROSSA does not care either for GARRICK or pickles, and the GARRICK fancier is not likely to be much interested in the Battle of Ravenna. As for the sporting entries, they are simply idiotic. What sportsman needs to be told when he may blaze at grouse, and when at pheasant? And who else wants to know anything about the matter?

Instead of a ridiculous mixture of uselessnesses and incongruities, why not have Class Almanacks? Let everybody have his record of matters appertaining to his own sphere. Don't tell the burglar when MARTIN LUTHER was born; don't tell the lawyer about HOWARD the philanthropist; and don't remind an honest man and woman of the execution of the MANNINGS. But let us have Almanacks prepared in this fashion, and then folks can please themselves. Here are specimen weeks :—

An excerpt from page 12 of the January 9, 1858, issue of *Punch*.

The Young Lady's Almanack.

TU. 14. St. Valentine.
W. 15. Polka invented.
TH. 16. Cellarius born.
FR. 17. Crinoline came in.
SA. 18. Mario first appeared.
SU. 19. New bonnet usual.
MO. 20. Doctors' Commons abol.

The Ticket-of-Leave Man's Almanack.

W. 1. Rush h.
TH. 2. Greenacre h.
FR. 3. Barthelemy h.
SA. 4. Courvoisier h.
SU. 5. Tawell capt.
MO. 6. Thurtell h.
TU. 7. Corder h.

The Lawyer's Almanack.

TH. 1. Rogue's March composed.
FR. 2. Criminal's Counsel allowed to plead.
SA. 3. Botany Bay discovered.
SU. 4. Oily Gammon d.
MO. 5. Statute of Frauds passed.
TU. 6. Pillory abolished.
W. 7. Snap struck off rolls.

The Wife's Almanack.

W. 3. Buttons invented.
TH. 4. Cold mutton discovered.
FR. 5. Mother-in-law prohibited.
SA. 6. Latch-keys first used.
SU. 7. Church clock before ready, 10 min. 30 sec.
MO. 8. Howell discovered James.
TU. 9. Swan first met Edgar.

The Real Soldier's Almanack.

SA. 14. Havelock b.
SU. 15. Wellington b.
MO. 16. Picton d.
TU. 17. Raglan d.
W. 18. Wolfe d.
TH. 19. Abercrombie b.
FR. 20. Hill b.

The Toy Soldier's Almanack.

SU. 11. Blackwall dinners begin.
MO. 12. Tattersall's rebuilt.
TU. 13. Opera opens.
W. 14. Casinos close.
TH. 15. Discount rises to £60 per cent
FR. 16. Duty laid on tobacco.
SA. 17. Pale ale came in.

The Author's Almanack.

MO. 13. Magazine article due.
TU. 14. Sea air pleasant.
W. 15. Bushy Chesnuts out.
TH. 16. Scriblerus d. of overexertion.
FR. 17. Napoleon shot a publisher.
SA. 18. Last day for Magazine art.
SU. 19. Begin Magazine article.

The M. P.'s Almanack.

FR. 1. Pitt got tipsy.
SA. 2. Fox got tipsy.
SU. 3. Castlereagh hit Canning.
MO. 4. Sadlier expelled.
TU. 5. Althorp taken into custody.
W. 6. Bribery Act passed.
TH. 7. Disraeli spoke 5 hours.

Mr. Punch begs to add that he reserves no copyright in these inventions, but places them at the service of the Almanack-making population, and he will be much disgusted if the Calendars of 1859 are not a marked improvement upon those of the present year.

Another excerpt from page 12 of the January 9, 1858, issue of *Punch*.

Credits

Author photos courtesy of the authors or their home institutions unless otherwise noted.

132: Libra. Heliocentric Astrology or Essentials of Astronomy and Solar Mentality, with Tables of Ephemeris to 1919 (1918) (detail: page 89).

181 & 187: Suit of playing cards. The Perpetual Almanack; Or, Gentleman Soldier's Prayer Book (circa 1840) (details).

182: Tony Mauro. Photo courtesy of Diego Radzinschi.

206 & passim: Astrological signs. The Atlantic Monthly Almanac 1914 (details).

212: William Blackstone. Portrait by Thomas Gainsborough, courtesy of the Miriam and Ira D. Wallach Division of Art, Prints and Photographs, New York Public Library.

237: A Uniform System of Citation (detail: title page). Photograph by the Green Bag.

251: West's Key Number System: March 2018 Pamphlet (detail: title page). Courtesy of Thomson Reuters.

252: West's Key Number System: August 2018 Pamphlet (detail: title page). Courtesy of Thomson Reuters.

259-60: The Methodist Almanac for the Year of Our Lord 1879 (details: title page, page 25).

263: Sandra Day O'Connor. Supreme Court of the United States, January 2006 (detail). Photo by Steve Petteway, from the Collection of the Supreme Court of the United States.

264: James E. Rogers College of Law web page (detail). Triggered by searching for "https://law.arizona.edu/greenbag" (unsuccessfully, of course).

271: Pete Seeger (Apr. 4, 1961). Photo by Walter Albertin. From the New York World-Telegram and the Sun Newspaper Photograph Collection, Library of Congress Prints and Photographs Division, reproduction number LC-USZ62-130860.

274: Jack Shepherd and Christopher S. Wren. Photo courtesy of Jack Shepherd.

279-81: Punch, January 9, 1858 (details: title page, page 12).