ALMANAC EXCERPTS

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AKA

THE "ETHEREAL VERSION" OF THE

GREEN BAG ALMANAC

OF USEFUL AND INTERESTING TIDBITS FOR LAWYERS

&

READER

OF EXEMPLARY LEGAL WRITING FROM THE YEAR JUST PASSED

2022

EDITED BY

ROSS E. DAVIES & CATTLEYA M. CONCEPCION

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ALMANAC
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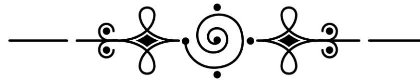


When lilacs last in the dooryard bloom'd,
And the great star early dropp'd in the
western sky in the night,
I mourn'd, and yet shall mourn with ever-
returning spring.

Walt Whitman
When Lilacs Last in the Dooryard Bloom'd (1881)

Preface

An Efflorescence of Useful and Entertaining Scholarship

This is the 17th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

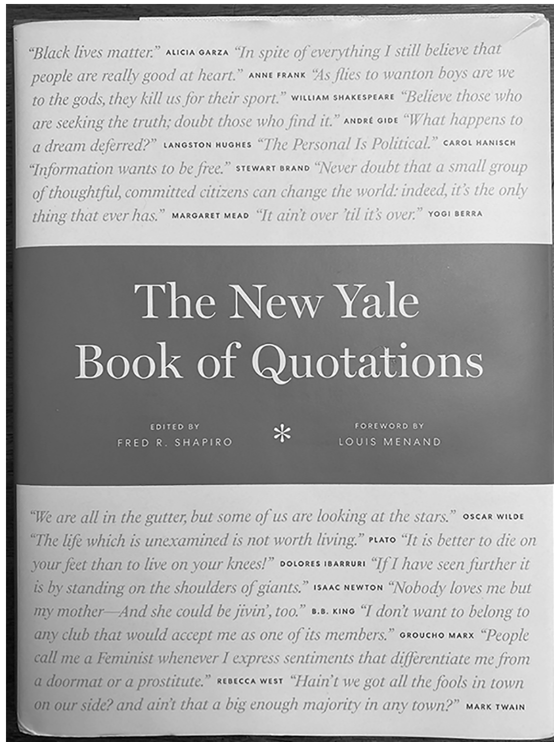
I.

The organizing theme for this year's *Almanac* is flowers and the law. We have a basketful of appropriate — and useful, and entertaining — new scholarship on that subject, ranging from floral features in the architecture and decoration of the U.S. Supreme Court Building, to the history of the regulation of street-side flower vendors, to the difficulties of imposing criminal penalties for the unlawful importation of wild orchids, to the fair use of flowers, and on and on. So, read on.

II.

We are pleased to welcome back exemplary legal writing recommenders Lee Epstein and Cedric Merlin Powell. Their returns are most welcome changes back to the way things used to be!

Our treatment of legal writing is different this year in one other significant respect. We usually select for full reproduction in these pages a handful of judicial opinions explaining decisions made in the conventional case-or-controversy context. In 2021, however, there were a number of especially interesting and important decisions and opinions by tribunals — public and private — acting outside that conventional context. So, we picked a couple of those works to reprint here, with one eye on current interest and one on posterity, since we do aspire to produce an annual sample-snapshot of the year in law that someone might pull off the shelf a century or two from now to get a sense of what the world of lawyers was like at this moment in time. These works may not be enjoyable reading, but they probably merit revisiting anyway, now and later.



III.

All the little flower quotes scattered throughout this volume are drawn from *The New Yale Book of Quotations*, the latest big project by the scholar the *Green Bag* calls "The King of Quotations" — Fred R. Shapiro, of the Lillian Goldman Library at Yale Law School.[1] For us, it was one of the publishing highlights of 2021. In addition, it was an entry in Shapiro's book that first brought to mind the possibility of including an extra short story at the end of this volume. And why not? We aspire, after all, to be entertaining as well as useful (attributes that are also both on display, by the way, in the *Book of Quotations*). We hope you enjoy every bit of it.

[1] Alas, while we've found entries for "green" and entries for "bag," so far we've had no luck finding any for "green bag." Fred R. Shapiro, ed., The New Yale Book of Quotations (2021). We'll know the *Green Bag* has truly arrived if we make it into his next edition.

IV.

One other feature of this *Almanac* involves flowers. Scattered throughout you will find images susceptible to that special kind of gilding performed by small hands (and sometimes large ones) holding crayons or colored pencils. The inspiration for this was a combination of an old memory (of the fun readers had with the pig-drawing exercise in the 2016 *Almanac*[2]) and a more recent one (of the joy kids and their parents got out of the law-themed balloons we sent to our Extravagant subscribers during the pandemic lockdown[3]). Enjoy! And if you or someone you know is especially pleased with a particular piece of colorizing, please feel free to email a scan or photograph of it to the *Green Bag* at editors@greenbag.org.

IV.

As ever, the value of our readers cannot be overstated. They contribute good work and generously subscribe, and also generously and gently flag our occasional missteps. Thanks to all!

In the 2021 *Almanac*, as in all its predecessors, we made enough missteps to look like the Scarecrow in *The Wizard of Oz*.

First, from Timothy Sandefur, we have this:

> On page 370 of the 2021 *Almanac*, footnote 2 includes the phrase, “It is hard to understate David Lloyd George’s impact on British history.” I believe Professor Jones meant to say that it would be hard to overstate his impact, since if a person’s impact is immense, most brief descriptions of that impact will by definition tend to understate it.

Second, from an unnamed reader with truly formidable proofing skills, we have word that references to a couple of works in the table of contents employ “United States” where the running heads on those works employ “U.S.” — without the excuse of a need for abbreviation in the running heads.

Third, we noticed that the “he” should be “be” on page 252, line 15.

Finally, on a cheerier note, we received a kind and complimentary letter from Professor R.H. Helmholz. He refers to “The Horse of the Law” tidbit (page 270) and recalls “the poster John Langbein kept outside his office as (I think) a joke.”

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[2] *See Arthur Conan Doyle’s Pig, and Yours: A Challenge*, 2016 Green Bag Alm. 537, 547.

[3] *See, e.g., Two New Treats*, 24 Green Bag 2d 2, 6 (2020); Leanne Kent, *Upliftingly Buoyant Balloons*, 24 Green Bag 2d 9 (2020); Christopher G. Bradley, *Impressively Knowledgeable Balloonists*, 24 Green Bag 2d 11 (2020).

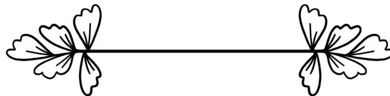
V.

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

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by thanking and apologizing to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to O'Melveny & Myers LLP (for its steadfast support of our work, especially from Marjorie Inparaj and Greg Jacob), and to the super-literate Ira Brad Matetsky,[4] who never fails to make any work he touches better.

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

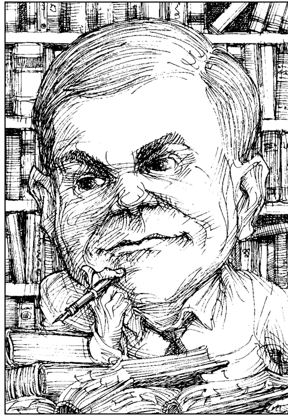
Ross E. Davies
October 31, 2022



Why is it no one ever sent me yet
One perfect limousine, do you suppose?
Ah no, it's always just my luck to get
One perfect rose.

Dorothy Parker
One Perfect Rose (1926)

[4] *Cf. Davies v. Mann*, 152 Eng. Rep. 588 (1882) (this is now the standard footnote that accompanies references to Ira's readings of *Green Bag* publications).



Bryan A. Garner†

THE YEAR 2021

IN LANGUAGE, GRAMMAR, AND WRITING

JANUARY

The *New York Times* reported that Dennis Baron, the noted linguist who wrote *What's Your Pronoun?* has expatiated on efforts to normalize a gender-neutral third-person pronoun. These efforts began as long ago as 1375. So many neologisms have been proposed that they fill a 60-page "chronology of gender-neutral and nonbinary pronouns." It's surprising to see that some current nominees, such as *ze*, *thon*, and *heer*, date from the mid-19th century. But as Baron points out, one pronoun has historical support: singular *they*, which came into use before the 1600s when plural *you* began pushing out *thou* and *thee*. No one today objects to *you* being both singular and plural, and singular *they* seems well on its way to universal acceptance. • The *Times* also reported on how the pandemic had influenced people's life-in-lockdown clothing — and the vocabulary to describe it. *Hate-wear* denotes clothes that are "neither stylish nor particularly comfortable, yet constantly in rotation,"

† Bryan A. Garner is the author of dozens of books about words and their uses, including *Garner's Modern English Usage* (Oxford, 5th ed. 2022). He is editor in chief of *Black's Law Dictionary* (West, 11th ed. 2019) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 17th ed. 2017). He coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012). Copyright 2022 Bryan A. Garner.

reflecting the wearer's "stress and sadness." Examples included a sweater with holes and oversized sweatpants. *Esquire* coined *sadwear* or "comfort-blanket" clothing as a "collective term for clothes that make us feel better when we're sad, specifically born out of the existential ennui of lockdown." It recommended pajamas and hoodies generally, but added: "It might be a stupid hat or novelty jumper or even a pair of joggers that feel great, but are laughably unflattering" because clothes are "various sartorial sticking plasters [*bespoke band-aids*?] people can employ to alleviate the gloom." • Is the term *nitty-gritty* racist? The BBC said no. Although the phrase's origin is unknown, anti-racism campaigns have declared that it refers to the detritus in the bottom of transatlantic slave ships. But the phrase first appeared in the 1930s, and never in any slavery-related contexts. A language researcher opined, "It may have originated in the USA as an African-American expression, but that's as near as it gets to slavery." Even so, some BBC viewers continued to object. • The *Anchorage Daily News* reported that Alaska's Division of Motor Vehicles was investigating why Nazi-themed vanity plates such as "FUHRER" and "3REICH" had been issued over a decade ago. One person who reported the offensive plates noted, "Etymology doesn't change the racist and dangerous history in which the words Fuhrer and 3rd Reich came into popular English usage." A rabbi opined, "While much of this speech is protected under the 1st Amendment, I feel it is important that our leaders, and those of us who are privileged with a wide audience, work hard to ensure that speech is not used to repress or harm others." The DMV recalled the offensive license plates and issued replacements. When recalled plates weren't returned, the DMV informed police that they were now invalid. • Multiple news outlets reported that in Georgia, the defendants accused of murdering Ahmaud Arbery asked the court to forbid reference to Arbery as a "victim" because it would be prejudicial to them. The defendants asserted that the order was necessary, "to prevent the prosecution from ignoring its duty to prove beyond a reasonable doubt that crimes were actually committed . . . . Due process requires minimal injection of error or prejudice into these proceedings. Use of terms such as 'victim' allows the focus to shift to the accused rather than remain on the proof of every element of the crimes charged." The prosecution responded that the Georgia Supreme Court had already decided that it's not prejudicial to use the term *victim* in court — even repeatedly over a defendant's objections. The motion was denied. • Politicians are increasingly invoking George Orwell's surname to inflame supporters, said the *New York Times*. After a congressman promoted false claims of voter fraud, his forthcoming book was canceled by the publisher. Blaming attempts by "the Left" to silence him, he declaimed: "This could not be more Orwellian." When Twitter permanently suspended

Donald Trump's account for egregious and continuing violations of its terms of service, his son declared, "we are living in Orwell's *1984*." Someone unfamiliar with the book may not realize that one of its main themes is party leaders' manipulating vocabulary to control the populace. So is this imprecise invocation of Orwell's name itself Orwellian? Maybe. Is it ironic? Doubleplustrue. • The White House used a novel means to recruit eagle-eyed applicants for jobs in the U.S. Digital Service, "a technology unit housed within the Executive Office of the President of the United States." It embedded a message in the English and Spanish versions of Whitehouse.gov that could be found only by careful readers of the comment tags in the website's backend: "If you're reading this, we need your help building back better" and a link for applications. The Service reported quickly receiving a great many applications.

FEBRUARY

The *Independent* (U.K.) reported that a typographical error in a research report contributed to the deaths of 72 people in a high-rise fire. Part of the insulation used in the construction of Grenfell Tower had been tested for flammability, and the original handwritten report showed that flames reached 4 meters high in 5 minutes. But when the official report was prepared, the 5 was mistakenly changed to 10, which led to a domino-effect of errors and suggested that the insulation met legal safety requirements. Nobody double-checked the original report against the official report until 15 years later, after the fire, which had burned much higher and faster than the report projected. • Some mistakes, however, are beneficial. The *Irish Examiner* reported that a spelling error led to the discovery of a massive bank fraud. A member of the Bank of Ireland's financial-crime unit noticed an odd pattern of activity in accounts held in six different names. On closer investigation, they discovered that utility bills from the same provider were posted to each account and all had the same peculiar spelling error. The misspelled word triggered an investigation that uncovered the theft of nearly €470,000 by two struck-off solicitors who'd manufactured the fake bills, as well as many other fake documents, to open accounts and obtain loans at multiple banks. Both were later sentenced to prison terms. • The *Mercury News* (Calif.) alerted readers to another benefit of misspelling: the chance to score free chicken sandwiches. To introduce a new menu offering, McDonald's offered early access to people who registered at a special website. Rival Popeyes recognized that the URL for that site could easily be misspelled. So it registered 50 variants that led to the Popeyes website, where the first 500 typos would win a free sandwich. On launch day, so many people spelled the URL correctly that McDonald's ran out of chicken sandwiches. But plenty remained at Popeyes. • During a

brief change in winter weather, when the gray skies lightened and the cold seemed less intense, the *Chicago Tribune* introduced readers to a word to describe it: *apricity*. Literally, it's "the warmth of sun in winter." The term first appeared in 1623 when, according to Merriam-Webster, Henry Cockeram "recorded (or possibly invented) it for his dictionary *The English Dictionary; or, An Interpreter of Hard English Words*." The *Tribune* lamented the word's obscurity and noted how useful it could be: "To fully appreciate apricity, you have to live in a place where the sunshine can vanish for weeks, where the air is far from warm for a good part of the year, where 39 degrees in February can feel so balmy you think, 'Hey, where are my shorts?'" • The *Mountaineer* (Waynesville, N.C.) sorrowfully reported that the pandemic had forced the local Kiwanis Club to cancel its annual charity fundraiser, the popular "No Sweat Spelling Bee." Normally, 40 or more teams would participate. Teams paid a $100 entry fee and reserved a $50 pot. If a team misspelled a word, they could dip into their pot, buy back the mistake, and stay in the competition. Between entry fees and word-buybacks for misspellings, the club often raised over $8,000. And nobody felt bad about misspelling a word because it was for a good cause. • Uncivil language has always been unwelcome in courtrooms and courthouses. The Supreme Court of Kansas suspended a county judge who dropped f-bombs and other curse words in the courtroom and chambers so often that a clerk kept a "swear journal." The judge also displayed bigotry by referring to Black litigants and witnesses as "boy" and frequently referred to women, including his own staff members, by anatomical vulgarities. The judge defended himself by saying that he had a lifelong habit of profanity due to his "salty" personality. Unimpressed, the Court found that he had "shown bias and the appearance of bias by his insulting and careless remarks, even while on the bench and presiding over hearings." His coarse language from the bench had "sullied the dignity and propriety of the judiciary." *Damn*. • The *New York Times* observed that a proposal to overhaul federal immigration law includes a directive to replace one word in the U.S. Code: *alien* would become *noncitizen*. President Biden had already instructed people working under him to use *noncitizen* where applicable until the law is changed. Advocates of the change have long argued that *alien* carries connotations of shame and dehumanization; critics object to the "euphemism . . . [as] intentionally designed to deceive the public and influence debate on emotion rather than fact." But since *alien* is defined as "a person who is not a citizen," the substitution of the less legalistic term can hardly be euphemistic or deceptive — and it's hard to imagine anyone reacting to the dry word *noncitizen* with half the emotion elicited by *alien*, which since the mid-'50s has reliably conjured, in the popular mind, images of little green men.

MARCH

The *ABA Journal* applauded Supreme Court Justice Thomas's adopting "cleaned up" citations. Because opinions and briefs often quote decisions that in turn quote and cite previous decisions, quotations can become morasses of nested quotations and citations that cause the quotation's point to sink out of sight. Jack Metzler suggested a solution on Twitter in 2017: omit the extraneous material that doesn't affect the text, cite the source used, and add the parenthetical "cleaned up." All the federal district courts and about three-fourths of the federal courts of appeals use cleaned-up citations, but Thomas is the first to use it in a SCOTUS opinion, *Brownback v. King* (25 February 2021). Metzler observed: "Lawyers are both resistant to change and risk-averse, especially when it comes to the minutiae of citations. Yet (cleaned-up) went from an idea in a tweet to a unanimous Supreme Court opinion in less than four years." • Why did lawyers traditionally draft documents on animal-skin parchment — particularly sheepskin — rather than on paper? The *Telegraph* (London) reported that researchers from Cambridge, Exeter, and York universities now have an answer. Sheepskin is high in fat, which might have made it easier to detect fraudulent changes to legal documents. Parchment must be scraped to erase writing on it, and because of the fat content, layers within a sheepskin parchment could separate more easily, leaving a visible mark on the document where the change was made. If the researchers are right, using sheepskin was perhaps the first means to deter fraudsters from fleecing victims. • People commonly misspell *restaurateur* as "restauranteur," notes *Mental Floss*. So what's the story behind the *n* in restaurant and its absence from restaurateur? Both words are rooted in the French verb *restaurer* ("to restore"). *Restaurant* is the verb's present participle ("restoring") as well as a noun; a *restaurateur* is the noun for a person who restores something. The nouns originally had no close relationship. A *restaurateur* fixed broken things generally, or specialized, as with a doctor's assistant who set broken bones. A *restaurant* originally meant food and drink believed to have curative qualities, especially meat-based broths. The owners of shops serving these restorative dishes came to be called *restaurateurs* (essentially, "fixers of what ails you"); later, the shops were called by their product, *restaurants*. Most English speakers don't know that the root is *restaur-* and that the suffixes are *-ant* and *-ateur*. Instead they mistake *-eur* for a suffix and tack it on to *restaurant*. Even the educated make the error: in 1837, future U.K. prime minister Benjamin Disraeli used *restauranteur* in a letter — the first recorded misuse. • An English judge declared that using too many question marks in text messages was "unnecessarily aggressive," reported the *Telegraph*. A university lecturer was removed as a residence-hall warden for unprofessional behavior

toward his subordinates, who had complained that his insertion of "multiple punctuation marks" made his texts "intimidating" to them in both tone and manner. His behavior persisted despite warnings about the punctuation, which the judge agreed was "unhelpfully emotive." The removal was upheld. • The Garamond typeface is widely used for books and advertising logos. But the U.S. Court of Appeals for the District of Columbia discourages using Garamond for briefs because "the typeface can be more difficult to read." Why? The *ABA Journal* reported that Garamond is hard to read when enlarged on a computer screen, its italics are difficult to read, and its section symbol is "ugly." • Two judges on a panel of the U.S. Court of Appeals for the Fifth Circuit exchanged dueling quotations in dissenting and concurring opinions that may have contributed to the decision to grant an en banc rehearing. The dispute concerned whether a salaried employee was entitled to overtime pay under federal law. In the final part of his dissent, Judge Jacques L. Wiener wrote: "Finally, with utmost respect for my friend and colleague who authored the special concurrence, my only response is to quote Macbeth: 'full of sound and fury, signifying nothing.'" (The full quotation reads: "It is a tale / Told by an idiot, full of sound and fury, / Signifying nothing.") He added a footnote: "To be sure, the harshness of the full quotation is unwarranted, and, thus, I only quote what is appropriate." Judge James Ho, who also authored the majority opinion, responded in a special concurrence: "The dissent begins by expressing 'due respect' to the majority — and then ends with a well-known literary quote about idiots. . . . It concludes that my opinion in this case is worth 'nothing.' To some, statements like these may be reminiscent of the wisdom of Ricky Bobby. See *Talladega Nights: The Ballad of Ricky Bobby* (2006) ('What? I said "with all due respect!"'). To others, it may call to mind a recent observation by one of our respected colleagues: 'More often than not, any writing's persuasive value is inversely proportional to its use of hyperbole and invective.' . . . As the adage goes, the loudest voice in the room is usually the weakest." A petition for rehearing was granted per curiam. • After a Harrisburg, Pennsylvania restaurant defaulted on a nearly $375,000 small-business loan and failed to persuade a federal district court to void the loan, it filed an appeal with the U.S. Court of Appeals for the Third Circuit. *PennLive* reported that the court dismissed the appeal because the restaurant's lawyer had cut and pasted part of the original complaint, left it mostly unedited, and filed it as a brief. In addition, when the appellees filed a motion for sanctions, the lawyer filed a cut-and-paste response. The court commented: "[E]ven the best lawyers make mistakes from time to time. So, we err on the side of leniency toward the bar in close cases. But the copy-and-paste jobs before us reflect a dereliction of duty, not an honest mistake."

April

The *Sydney Morning Herald* marked the 40th birthday of the *Macquarie Dictionary* with a look back at its creation. The first edition, the product of a decade's hard work, noted that an elk is not closely related to a mouse (*moose*) and that a bufflehead duck has white underpants (instead of *underparts*). Those typos were minor nuisances compared to the serious problems of representing Australian English: which pronunciations, broad or cultivated, should take precedence? Must *bushbaby* be hyphenated like *bush-bash*? Should a word such as *bushfire* precede or follow *bush lawyer*? Even in the third edition, tough questions were addressed, and the solutions drew criticism. Former prime minister Sue Butler wrote to the editor, "I am shocked to notice your plural for platypus. If you and your masters find platypodes, as in antipodes, too pedantic they should use platypuses as in syllabuses." But despite those difficulties, the *Macquarie* has inspired dozens of new books recording Aboriginal terms, and compiling Australian thesauruses, spelling guides, slang collections, and other linguistic tomes. • Katherine Barber, Canada's preeminent lexicographer (affectionately called the "Word Lady"), died aged 61. Many sources recounted her leadership in creating the first *Canadian Oxford Dictionary*, now considered the authority on Canadian English. In compiling the dictionary, Ms. Barber partly relied on the classic use of readers, who scoured everything from classical dictionaries to "trashy novels" and supermarket flyers for Canadianisms, and on hosting a radio segment in which she invited listeners to submit words for the dictionary. The project took six years and added more than 2,000 words and phrases used only in Canada. Some are used nationwide, such as *keener* for a particularly enthusiastic or zealous student. And some are regional, such as *parkade* for a parking garage in western Canada, or *bunny hug* for a hoodie in Saskatchewan. One of her associates noted: "When the dictionary came out, for some people it established for the first time that there was such a thing as a unique variety of English we can call Canadian." Thanks to her efforts, effused the *National Post* (Canada), the world can now understand that if you "find a man lounging on a chesterfield in his rented bachelor wearing only his gotchies while fortifying his Molson muscle with a jambuster washed down with slugs from a stubby," he's "on a sofa in a studio apartment wearing only underwear while expanding his beer belly with a jelly doughnut and a squat, brown bottle of beer." • The *New York Times* examined how a single, one-letter word divided the Supreme Court: *a*. Under a 1996 immigration statute, immigrants subject to deportation may apply to stay in the U.S. if, among other criteria, they can show they've been continuously present in the country for at least 10 years. But that continuous-

presence period ends when an immigrant receives "a notice to appear" for a deportation hearing that lists certain additional information. The issue was whether a notice had to contain all the information or whether the information could be provided piecemeal over time, in more than one notice. Writing for the majority, Justice Neil Gorsuch explained, "To an ordinary reader . . . 'a' notice would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required. . . . Someone who agrees to buy 'a car' would hardly expect to receive the chassis today, wheels next week, and an engine to follow." Justice Brett Kavanaugh dissented, saying the majority opinion "spawns a litany of absurdities." He opined: "Ordinary meaning and literal meaning are two different things. And judges interpreting statutes should follow ordinary meaning, not literal meaning." Although he conceded that the car dealership would not meet its obligation by shipping a car in pieces over time, "The word 'a' is not a one-size-fits-all word. . . . [I]t is common to submit 'a job application' by sending a résumé first and then references as they are available. When the final reference arrives, the applicant has submitted 'a job application.' Similarly, an author might submit chapters of a novel to an editor one at a time, as they are ready. Upon submission of the final chapter, the author undoubtedly has submitted 'a manuscript.'" But Justice Gorsuch responded: "If, in the process of discerning [statutory] meaning, we happen to consult grammar and dictionary definitions — along with statutory structure and history — we do so because the rules that govern language often inform how ordinary people understand the rules that govern them. . . . At one level, today's dispute may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power." • Across the Pond, *BBC News* reported that another errant vowel (this time, an *e*) stirred up strife over a battle in the Wars of the Roses. The Royal Mail issued stamps featuring scenes from the Wars, including one from the Battle of Edgecote Moor. But according to the Northhamptonshire Battlefields Society, there's no such place as Edgecote Moor; it's Edgcote. The Society said: "In the last two years, we have done a lot to raise its profile and correct these errors." The Royal Mail defended its choice: "The settlement of Edgcote is spelt without the 'e,' but references to the historic battle are split between the two spellings. On this occasion, we followed the advice of the experts we worked with." • An Ohio appellate court handed down a six-month suspension to a lawyer who filed a brief that was "inadequate, incoherent and unintelligible." Although the lawyer claimed it was an inadvertently filed draft and that the final version had accidentally not been saved, the court rejected the excuse. One judge observed that it was "52 pages of the most difficult reading I've ever probably

done in 12 years" with citations and abbreviations that made no sense, incomplete sentences, a confusing statement of facts, and unclear legal arguments.

MAY

The *Telegraph* (London) reported that the tweet "A FAMILECT is the distinct dialect you develop with your family, the pet names, the inside jokes, the deliberately mispronounced words" caused the word *familect* to trend. People shared coinages unique to their households, such as *disrevelled* (how one looks after a wild night on the town), *testiculating* (waving your hands around while talking bollocks), and *chish and fips* (fish and chips). Linguists explained that a domestic dialect is a delightful insider language that deepens one's sense of belonging. Words or phrases might even transcend a family and enter the language. At least the *Hobart Mercury* hopes so, describing the familect portmanteau *quanjutae* (quantity of juicy tastings) to describe a fancy party platter of mixed foods, such as vegetables, cheeses, charcuterie, pickles, quince paste, etc. It has reportedly spread throughout Tasmania. • In the *Philadelphia Inquirer*, the resident Angry Grammarian (AG) examined two questions placed on an upcoming ballot. The first question opened with *shall* and contained 69 words, extraneous adverbs, nested-adverb phrases, dangling participles, and unclear modifiers. As AG said, "Woe unto anyone who tries diagramming that monster." The second question was worse: "Shall the Pennsylvania Constitution be amended to change existing law so that: a disaster emergency declaration will expire automatically after 21 days, regardless of the severity of the emergency, unless the General Assembly takes action to extend the disaster emergency; the Governor may not declare a new disaster emergency to respond to the dangers facing the Commonwealth unless the General Assembly passes a concurrent resolution; the General Assembly enacts new laws for disaster management?" Besides the length (74 words), the poor use of semicolons, the nightmare thicket of adverbs, and the gallimaufry of subjects covered, it appears to be missing an *and* after the last semicolon, and never clearly states a question. But "research shows people are more likely to agree to any default option — regardless of whether they actually want or understand it." The voters said "yes" to both questions. Whether voters read or understood the questions remains unknown. • In the *New York Times*, John McWhorter reviewed the history of the N-word and its evolution from "neutral descriptor" to racial slur and ultimately an "unspeakable obscenity." He covered the etymology and changing uses and meanings from its first appearance in 16th-century written English to the present day, when the phrase *N-word* first appears. McWhorter uncovered other "polite substi-

tutes" over time, depicted how the slur was ingrained in colloquial speech yet veiled or unseen in early 20th-century literature and film, discussed its usage in casual speech and in the media by the 21st century, and explained the moment when *the N-word* entered the English language. McWhorter himself never shied from using the real word rather than the euphemism in this writing. • The Associated Press made a small yet substantial change in its stylebook. It eliminated a hyphen to change the spelling of *anti-Semite* and *anti-Semitism* to *antisemite* and *antisemitism*, which are closer to the original forms. In linguistics, the term *semitic* denotes a family of North African and Middle Eastern languages, including Aramaic, Hebrew, and Arabic. People who speak those languages are never called Semites, just as people who speak Romance languages such as French, Spanish, or Italian are never called Romantics. But in the 19th century, an anti-Jewish bigot invented the notion that Jews belonged to a racial group he dubbed "Semites," from which he coined the pseudoscientific term *Antisemitismus* as a "sophisticated" equivalent of *Judenhass* ("Jew-hatred"). When the term entered the English language in 1893, it somehow acquired a hyphen: *anti-Semitism*. By changing *anti-* into a prefix, it promoted the false notion that it means hostility toward "Semitism" and "Semites," thus sanitizing its meaning: hatred of Jews. Deleting the hyphen doesn't change the word's etymology or the racism it reflects. But it might make it easier to recognize the meaning of *antisemitism* as what it has always been. • The *Australian Magazine* reviewed last words, both memorable and disappointingly otherwise. On his deathbed, Voltaire is reputed to have been asked to denounce the devil, to which he replied, "This is no time to make new enemies." Humphrey Bogart, who predeceased Lauren Bacall, told her, "Goodbye, kid. Hurry back." Some people meet death with a joke or a smile. Groucho Marx said, "This is no way to live." A murderer facing a firing squad in 1960 asked for a bulletproof vest. And Margaret Sanger burst out, "A party! Let's have a party!" Some express relief, as did Churchill: "I am bored with it all." But sadly, just before he left the building, Elvis's last words were, "I'm going to the bathroom to read."

JUNE

The *Times* (London) reported that more than 30% of Brits correct their friends' and relatives' mispronunciations, and 10% correct total strangers'. Oliver Kamm suggested that readers who aren't parents or teachers correcting a child should stop. He argued: "There is an inevitable intolerant undercurrent to correcting people's pronunciation. There are many English dialects and many accents of the same dialect. None is more correct, pure, expressive,

grammatical or even aesthetically pleasing than any other. And linguistic fashions change." After all, no one today insists on pronouncing the initial *k* in *knee* or *knight* (except in a Monty Python film), although it was the norm in Chaucer's day. But Kamm's optimism that "nu-cu-lar" will become the predominant pronunciation of *nuclear* because "at least three US presidents have spoken the word this way" and it replaces a sequence of sounds that is unusual in English with one that's more common (on the pattern of *particular* or *secular*), is countered by the fact that the great majority of both Brits and Americans dislike it and are unlikely to adopt it anytime soon. • Syntax was key in the U.S. Supreme Court's interpretation of a phrase in a 1975 law that defines Indian tribes. In 2020, Congress allocated funds for COVID-relief to "tribal governments." When a portion was earmarked for Alaska Native corporations and for-profit businesses that serve tribal villages in Alaska, tribal governments in the lower 48 states sued, arguing that a phrase in the 1975 law limited the definition of Indian tribes to federally recognized groups. Justice Sonia Sotomayor disagreed with the interpretation and gave "an example with the same syntax" as the 1975 law. "A restaurant advertises '50 percent off any meat, vegetable or seafood dish, including ceviche, which is cooked.' Say a customer orders ceviche, a Peruvian specialty of raw fish marinated in citrus juice. Would she expect it to be cooked? No. Would she expect to pay full price for it? Again, no." Justice Gorsuch dissented, calling the ceviche example "a bit underdone." He quoted cookery articles while explaining: "Maybe the restaurant uses heat to cook its ceviche — many chefs 'lightly poach lobster, shrimp, octopus or mussels before using them in ceviche.' Maybe the restaurant meant to speak of ceviche as 'cooked' in the sense of 'fish . . . "cooked" by marinating it in an acidic dressing' like lime juice." Perhaps a gazpacho analogy would have been more defensible. • Bed-time stories aren't just for children anymore, said the *Sunday Times* (London). Millions of adults are subscribing to "nodcasts" designed to help adults unwind and fall asleep while listening to a calming story-based stream spoken in a pleasant voice. The stories range from excerpts of childhood favorite books such as *The Secret Garden* and *The Wind in the Willows* to recollections of long-ago and far-away childhoods to strange stories, such as one about a llama, a cat, and a dog negotiating a rent agreement. Some podcasts strive to be boring and avoid anything resembling a plot or characterization so the listener doesn't care about how it ends. One of the best in the genre, the *Times* noted, combines gentle music with excerpts from oceanic-shipping forecasts. • The Australian Senate began an inquiry into how alternative-protein products, such as "meat-free mince," "sausage made with plants," and "vegan bacon," should be labeled. The *Weekly Times* (Melbourne) noted that

the *Macquarie Dictionary*'s definition of *meat* includes "the flesh of animals used for food," "food in general," and "the edible part of anything, as a fruit or nut." And *milk* means the liquid from "the mammary glands of female mammals," as well as "any liquid resembling this," such as coconut milk. A linguistics professor said, "The point is, who gets to say what is the true nature of a word's meaning?" But a representative of the meat industry pointed out that Australian law defines red-meat products. For example, a sausage must contain "no less than 500g/kg of fat-free meat flesh." But "while our industry is bound to the definitions in the food code, plant-based proteins can label their products whatever they wish." It's a new twist on the old ad line "Where's the beef?" • The *Daily Mail* recounted the exposure of a literary fraud and its lingering consequences. T.J. Wise, a rare-book collector and dealer in the early 1900s, was considered an expert on authenticating rare books and detecting fraud. He was also a skilled forger of first editions that never existed, purportedly by Dickens, Tennyson, George Eliot, and Wordsworth, among others. His method was ingeniously simple: he printed a copy of a genuine work but changed the publication date, which implied it was a limited private edition made before the main printing. At first sight, it was very hard to prove as fake, as any other copies could be presumed to be hidden in private collections. But two other rare-book dealers began to ask questions when they noticed anachronisms in an 1868 George Eliot poem, such as a single letter in a font that appeared after 1880, an errant hyphen, and a misplaced comma. They spent years analyzing "rare books" authenticated by Wise and, in 1934, exposed dozens of 19th-century editions as fakes. Since then, nearly 100 of the forgeries have been found in major public and private collections, including in the British Museum. • Apostrophes made the news in two industries and in two hemispheres. The *Australian* summarized a "well-acted, amusingly-scripted, poorly-plotted, violent, vulgar and profane bit of fun, for those who like that sort of thing." The film was titled *The Hitman's Bodyguard's Wife*. Noting that the wife wants to have a baby, the reviewer mused: "It does make one wonder if there'll be an apostrophe in the third film . . . . The Hitman's Wife's Toddler's Bodyguard perhaps." And *Newsday* (N.Y.) said of Burger King's newly introduced sandwich, "The first interesting thing about the Ch'King is its name. Never in the history of punctuation has an apostrophe been forced to labor on, standing in for no fewer than five letters by my count, and that may well be a conservative estimate."

JULY

Many style guides advise that when referring to a physical or mental disability, person-first language is preferred (e.g., *a person with autism*; *a person who is*

blind). But that's not desirable, reports *Buzzfeed*, when a particular person prefers an identity-first term (e.g., *an autistic person*; *a blind person*). Disabled activists explained that although person-first phrasings are meant to and do separate the person from their condition, the perception may be that "if you have to put the word 'person' first to remind yourself that we're people, . . . you already didn't believe we were people." Identity-first terms are often preferred by disabled communities because "disability and personhood are not mutually exclusive." So which should the able-bodied use? "There's not necessarily a right answer to person-first versus identity-first. Individuals will feel strongly one way or another," said one advocate for the disabled. She added that "the divide might also be a generational one; an older person is more likely to use person-first language than a teenager or young adult is." • Pronouns and statutes were debated in Australia. The *Age* (Melbourne) described a law student's campaign to have the state of Victoria's statutes rewritten to eliminate *he* and replaced with *the person* or *they*. The student explained, "We can't expect to shift attitudes and beliefs if one of the most important texts within our society is gender-specific. It is important to recognise the power of language." Numerous senior legal, human-rights, and gender-equality figures in the state support inclusive language. After all, "a jurisdiction like Canada did it in 1985. They brought in new drafting legislation provisions, but they also said let's start revising our complete legislation and now it's all gender-neutral." Despite that, The *Australian* opposed the campaign: "We should be careful. One thing we should not do is enshrine bad English in the language of the law and that is what would happen if we were to substitute 'they' for 'he.' It's true that it's becoming more common for people to use 'they,' the plural form of the third person pronoun, as a substitute for 'he' or 'she,' but that doesn't mean it is appropriate. It should be a rough rule of thumb that if it ain't good English it ain't good law." • Nor is the language of the law entirely inclusive in the Great White North, said the *Toronto Star*. In some courts, judges are addressed as *My Lord* or *My Lady*, raising issues of classism and excluding nonbinary people on the bench. Some lawyers began asking to make *Your Honour* or *Judge* or *Justice* uniform nationwide, without gendered honorifics such as *Mister* or *Madame*. But courts are making more efforts to ask counsel, litigants, and other trial participants to identify their preferred pronouns at the start of proceedings, a change that few have criticized. Courtroom language is also beginning to remove other barriers. For example, announcements such as "all rise" are being modified to "All rise, if you're able to," so mobility-impaired people don't seem disrespected. A Toronto lawyer noted, "It's not just change for change's sake. This is about making the justice system accessible. The more you do away with these

unnecessary practices, the more the average person entering the justice system . . . . feels like this is the people's court." • In Scotland, the government asked its civil servants if they'd be willing to list their preferred pronouns with their email signatures to increase awareness of "gender identities and pronoun use across the organisation to create and foster an open culture that is supportive of the LGBTI+ community." Nearly 60% refused. The *Times* (London) reported that most opponents argued that it "could impact women's rights and result in sex discrimination." And the *Herald* (Glasgow) derided the proposal as a smokescreen for the government's avoidance and coverup of disproportionate COVID deaths in poor neighborhoods and care homes: "'Sir Farquhar, they're all dying of the Covid in there.' 'Let them use pronouns.'" Despite that, reported the *Daily Telegraph*, the government decided to encourage the addition of pronouns on a voluntary basis. • The *Press* (Christchurch) reported that New Zealand has produced a substantial number of notable and world-famous lexicographers. H.W. Williams published the earliest dictionary of the New Zealand language — Maori — in 1844, which is now in its 7th edition. Bruce Biggs, Sir Apirana Ngata, Patrick Ryan, and John Macalister have also contributed to recording Maori vocabulary, including terms now used in English. Dianne Bardsley has produced many dictionaries and thesauruses for use in New Zealand schools. Eric Partridge was born in New Zealand, although his family emigrated to Australia. His many books on slang, especially his *Dictionary of Slang and Unconventional English*, achieved widespread fame. Sidney J. Baker was also New Zealand-born and Australia-raised but published his seminal book *New Zealand Slang* before publishing about Australian usage. H.W. Orson spent his entire life and career in New Zealand, where he wrote three dictionaries of New Zealand English. R.W. Burchfield was also born and educated in New Zealand before winning a Rhodes scholarship to Oxford, where he studied under C.T. Onions and J.R.R. Tolkien, eventually becoming chief editor of the *Oxford English Dictionary*. The *Press* commented: "I doubt there's anything relevant in the water here, but we certainly have produced a notable set of people who have made words a large part of their lives." • In the *ABA Journal*, a law professor warned that some technological tools are being touted as something like lawyer-replacements. The maker of one such tool claims that it uses "natural language processing, machine learning, and artificial intelligence" to produce superior writing. Another says it will provide "all the arguments, legal standards and prepackaged research you need to get things done, faster than ever." Software may soon be able to research and write legal documents with minimal or no input. The professor urged teaching students to work constantly on strengthening their research, analysis, and writing abilities rather than delegat-

ing them to machines: "A computer program cannot solve a legal problem or persuade a judge; nor dictate how to effectively represent a client. In legal writing and analysis, the magic and power of our combined words come in their variation, style and strategy — and most importantly, from our own minds. No computer can emulate that." • The *Detroit Free Press* reported that many institutions, public and private, are making progress in adopting gender-neutral language and supporting self-identification. American automakers and a major U.S. bank have updated their bylaws, such as replacing "chairman" with *chair* and removing gender-specific pronouns. The U.S. House of Representatives modified wordings in its Code of Official Conduct to be less gender-specific by changing *chairman* to *chair*, *seaman* to *seafarer*, *father* and *mother* to *parent*, and *daughter* and *son* to *child*. The White House added gender-neutral pronouns to its website for users to select when contacting government agencies. Networking sites for professionals also made it possible for members to add pronouns to their profiles.

AUGUST

The *South China Morning Post* reported on an appeal that hinged on a missing comma in both the English and Chinese versions of a criminal statute. The Summary-Offences Ordinance prescribes the penalties for "any person who has in his possession any wrist restraint or other instrument or article manufactured for the purpose of physically restraining a person, any handcuffs or thumbcuffs, any offensive weapon, or any crowbar, picklock, skeleton-key or other instrument fit for unlawful purposes, with intent to use the same for any unlawful purposes." The defendant was arrested with 48 zip ties in his pockets while near a protest in Hong Kong. The defense pointed out the lack of punctuation, especially a serial comma after *skeleton-key*. Noting that the statute covered three categories of items — restraints, offensive weapons, and instruments for illegal entry — the defense argued that the missing comma suggested that *other instrument fit for unlawful purpose* fell within the offensive-weapons category, which doesn't include zip ties. (Those also couldn't be restraints because the definition specifically applied only to objects manufactured for that purpose.) The prosecution responded that *other instrument fit for unlawful purposes* was an additional, separate category unrelated to the items for break-ins, and could therefore include zip ties. The appeal was denied. • How do you pronounce *scone*? asked the *Dominion Post* (Wellington, N.Z.). Are you "Scone with the Wind" or in a "Game of Scones"? Some insist the latter is the posh way to say it; others urge the former is correct. Dr. Simon Overall, a linguist, says there's no "correct" pronunciation; it's just a

matter of preference. New Zealanders use both the *gone* and *cone* rhymes. A Cambridge University dialect study found that in Scotland and England, *gone* predominates, but in Ireland, it's *cone*. So when you're in a place where one pronunciation is preferred, how can you remember it? The *Dominion Post* declared: "You just have to attain a higher level of sconsciousness." • Workplace language can be a minefield. "With all due respect" is heard by 68% of men as respectful and 51% of women as disrespectful according to a survey by TollFreeForwarding.com. "Bless your heart" may not be sweet either, although 77% of men would take it that way. Women, especially in the South, understand it with a certain intonation as meaning "you're dumb." And in the workplace, when a woman says something needs "a few amends," 74% mean "it has a few typos" — but 44% of men hear "this is awful and needs redoing." The survey also found that 27% of men believe that flirtatious language at work is acceptable, but 93% of women said it's objectionable. • The *Sydney Morning Herald* reviewed Australia's first dictionary, complied by James Hardy Vaux, a.k.a. "Flash Jim," during a 7-year stay in the Newcastle penal settlement. He collected "flash" or "cant" language from his fellow inmates, as well as other terms, and presented a copy of his collection to the settlement's commandant. After returning to England in 1819, he published a fictionalized memoir that included his dictionary as an appendix. In that time, one could *cop the halter for kitten-rigging* (hang for stealing a pewter mug), engage in *pear-making* (joining the military to get an enlistment bounty and then absconding with it), *play the letter-racket* (use a forged reference to defraud charitable funds), or *pick up a flat* (rob someone). Many terms are still used in modern Aussie slang, including *cadge*, *snitch*, *ring-in*, *yarn*, *racket*, and *kid*. And people still *take a snooze*, wear *togs*, and go on a *lark*, just as they did 200 years ago. Flash Jim's biographer commented, "The Australian language appears to have begun as it intended to go on: as an inventive, informal, cheeky branch of English." Many might agree with the novelist who said, "I'd rather be shipwrecked with a good dictionary of Australian slang than with any other reference work." • A cellphone's emoji design and font size and style were factors in determining that a plaintiff had manufactured harassing text messages she claimed to have received. The *Cybersecurity Law & Strategy* newsletter described how experts examined an image purportedly showing the screen of an iPhone. Based on the types of operating system (OS) available for her particular model of phone, the experts determined that the OS couldn't display the fonts or emoji shown in the image, in addition to other indicators of fraud. The court dismissed the case with prejudice and imposed sanctions on the plaintiff.

September

Yes, SCOTUS Justices make writing mistakes, declared the *National Law Journal*. And they've been publicly corrected on the Court's website since 2015. Many have been typos ("lassez faire" instead of *laissez faire*), some incorrect homophones ("palate" instead of *palette*), a few eyebrow-raising grammatical mistakes (pronoun errors), and occasionally even factual errors. In a dissent to *Brnovich v. Democratic National Committee*, Justice Elena Kagan covered the history of voting rights, specifically mentioning the 1965 protest at Selma, Alabama. But she mistakenly wrote that the protestors marched from Selma to Birmingham, Alabama, instead of to Montgomery. David Garrow, whose *Protest at Selma* was cited, noted that despite the surprising error, "whichever clerk wrote this must have read the entire shelf of books on the Voting Rights Act." • Linguists know that a pidgin language is substantially different from the standard language. But the U.S. Court of Appeals for the Third Circuit had to teach that to immigration officials who violated an asylum applicant's due-process rights by refusing to provide an interpreter for removal proceedings. The court noted that "despite persistent clues that he was less than fluent in 'standard' English, he was left to fend for himself in that language without an interpreter." The differences between pidgin and standard English are stark, as the court illustrated: The standard English sentence "If it were me, I would not let him come and visit the children" becomes in pidgin "If na mi, a no go gri meik I kam visit dat pikin dem." Oddly enough, language was a factor in the asylum request: the applicant feared persecution in part as a speaker of pidgin English because of discrimination against so-called Anglophones, his membership in a pro-Anglophone group, and government-directed violence against pro-Anglophones. • A study of misunderstood text messages, as described in the *Independent* (London), identified common problems with them. Nearly half of the respondents misunderstood jokes, didn't detect sarcasm, or spent "hours" puzzling over a text's wording or perceived tone because they couldn't tell whether the sender was annoyed or joking. Overanalyzers are typically young — half of adults under 25 experienced frustration, stress, or anxiety over text messages, compared to only one in ten adults over 55. Most respondents (80%) preferred face-to-face talks over written communications such as text messages because of better cues about meaning. • Writing in the *Boston Globe*, Barbara Wallraff mused on recreational neologizing to fill needs in the language. Why, for instance, doesn't American English have a simple way to refer to plastic bags caught in the branches of trees? (The Irish call them *witches' knickers*.) What do you call your child who's now an adult? Wallraff's readers favored *offsprung*.

How do you describe the moment just before you do something incredibly stupid, like drop a stack of mail — as well as the checks you were taking to the bank — into the mailbox? Reader suggestions were fitting: *déjà rue*, *dunderstruck*, and *instant regretification*. Perhaps sadly, none have ever made into mainstream usage. • It was once unquestionably prestigious to be a *white-shoe lawyer*. But the *American Lawyer* and the *ABA Journal* reported that the term is losing currency. Advocates for keeping it argue for its traditionally identifying top firms as an "evocative, meaningful phrase." Opponents of the term declare that it's antiquated, implies white-male privilege, and implies the exclusion of women and minorities. There's support for that viewpoint. In 1997, William Safire noted that the term originated from the shoes traditionally worn by men at Ivy League schools (which did not admit women), and was defined as applying to "the WASP upper-class elite" who "are thought of as being cautious and conservative." At least one white-shoe firm is consciously changing its image: "We now cover white shoes, cowboy boots, and high heels." Fittingly so. • Whistled languages have been recorded on every inhabited continent but were not recognized as more than just signals until the mid-20th century. The *Observer* (London) commented that they're used in rural areas and in places where the terrain makes long-distance communication both difficult and necessary, such as in forestland or mountains. Linguists describe the whistled languages as conveying short sentences having distinct words and syllables articulated as in speech. They believe that whistling could have been a precursor to vocalization while human vocal cords were still evolving. • Sources in Japan, Northern Ireland, Australia, and the U.S. reported on developments in defamation laws. Japan's justice minister was considering an amendment to the penal code to make criminal insult (the use of abusive language against a victim in a public setting, including the internet) punishable with a prison term. Noting that cyberbullying has led to suicides, the *Japan News* urged social-media providers to devise effective measures to deal with the problem. The *Belfast Telegraph* pointed out that Northern Ireland's defamation laws are inadequate for the internet and demanded reform to protect cyberbullying victims and to enable them to identify and prosecute perpetrators. But a proposed bill diminished existing protections because of Belfast's reputation as too plaintiff-friendly in defamation cases. In the U.S., the *Philadelphia Inquirer* observed that the Supreme Court was signaling a change in defamation laws, particularly the actual-malice standard, suggesting that it allows "the publication of falsehoods by means and on a scale previously unimaginable" and "allows grievous reputational injury to occur without monetary compensation or any other effective remedy."

OCTOBER

The linguist Michael Hoey, who developed the "lexical priming" theory of language, died aged 73. He posited that people acquire language by long-term exposure to it because they mentally note and store word associations, and then reproduce them. They repeat the cycle by priming others. The principles of his work led computer scientists to use lexical priming in developing AI-based language-learning programs for machines. • It's a bird! It's a plane! It's a lawsuit? The *Texas Bar Journal* described the most unusual brief (probably ever) filed in a Texas court. The plaintiff, a comic-book shop, was suing a neighboring hotel from which hotel guests and visitors frequently launched projectiles ranging from bottles and cinder blocks to luggage racks and fire extinguishers at the shop, resulting in fires and other property damage. When the hotel claimed it didn't sufficiently understand the complaints filed against it even after the pleading was amended twice, the comic-book shop amended its pleading again in the form of a comic book. The complaint included cover art of the shop's owner facing a barrage of silverware and fire extinguishers. The illustrated panels of the book — complete with dialogue bubbles and sound effects — graphically showed the backstory and bases of the complaints. Perhaps foreseeing an appeal, it concluded: "To be continued!" • Dozens of Korean loanwords have entered English and are now included in the *Oxford English Dictionary*. New terms mentioned in the *Independent* (London) and the *Guardian* (London) included the prefix *K-*, denoting a noun related to South Korea and its pop culture, *hallyu* (literally "Korean wave"), *mukbang* (videos of people eating massive dishes of food), *aegyo* (cuteness or charm), and *skinship* (the affectionate emotional bond arising from close physical contact with another person). Although English is welcoming the influx of Korean terms, the *Times* (London) reported that the reverse isn't well received, at least not by older generations of Koreans. Although the young embrace Konglish (the intermixture of English and Korean) as slang, the government has pledged to reduce foreign words and idioms. The Korean Language Society, which promotes preserving linguistic culture, declared, "Hangul has been part of national pride and language and is a tool that distinguishes one culture from another. If people use more English loanwords, they naturally result in the use of less Korean vocabulary. If such a trend continues, it can pose a grave threat to our cultural identity and Korean language may be relegated to an inferior status." • As you'll recall, in January a Georgia state court refused to bar the word *victim* as prejudicial. But a Wisconsin state court accepted a similar argument and ruled that the people shot and killed or wounded by the defendant could be called *rioters*,

looters, or *arsonists*, but not *victims*. A commentator suggested that the judge was trying to strike a balance because the defendant claimed self-defense, and if the jury believed that the dead and wounded were engaged in rioting, looting, or arson, the jury might be swayed to accept the defense, while calling them *victims* could evoke too much sympathy for them. But he added that not allowing them to be called *victims* was also prejudicial because the criminal labels could sway the jury to decide they were bad people "somehow less deserving of protection from the law." The defendant was ultimately acquitted. • An anti-plagiarism statute that would ban essay mills was proposed in the U.K. Parliament. The *Financial Times* and the *Telegraph* explained that "essay mills" are businesses that advertise or in any way provide paid essay-writing services for high-school and university students, enabling students to cheat because plagiarism-detecting software may fail to detect the ghost-written materials. (The bill passed in 2022.) In Australia, legislation made it a federal offense "to provide or advertise cheating services in higher education." Penalties there included up to two years in jail and a fine up to $100,000. The *Australian Financial Review* reported that a federal regulator for educational quality and standards won an order enabling it to order telecommunications companies to block access to academic-cheating sites and essay mills. The *Straits Times* (Singapore) found that a growing percentage of students are paying services or fellow students to write papers or take exams for them. Most of the cheaters felt no guilt or felt that the cheating made no difference after they'd graduated. Multiple sources reported that the prime minister of Luxembourg was under fire for academic dishonesty after his 56-page master's-level thesis (submitted in 1999) was exposed as containing only 2 pages of original material; the rest was copied off the internet. Plagiarism was also reported in a nonacademic case involving a cookbook. A Michelin-star chef of Singaporean-Chinese descent published a cookbook of recipes and personal stories of her childhood in Singapore and her heritage. But another Singaporean chef identified at least 15 recipes and stories that were copied or paraphrased from her own out-of-print 2012 cookbook. The publisher of the new book quickly withdrew it. • The U.K.'s justice secretary appeared to fumble the meaning of *misogyny* when the BBC asked him about the drive to make misogyny a hate crime. He replied, "So I think insults, and of course misogyny, is absolutely wrong — whether it's a man against a woman or a woman against a man." Jeers were swiftly posted online. An MP said "Happy to lend you a dictionary #misogyny." One biting wit coined a new term: "misterogyny." The secretary tried to clarify: "Just criminalising insulting language — even if it's misogynistic — does not deal with the intimidation, the violence and the much higher level of offence and damage and harm that

we really ought to be laser-like focused in on." But because the secretary has said he's not a feminist and complained about the "raw deal" that men get, a (male) professional writer was having none of it: "I think what we're missing about the . . . #misogyny clip is that while he might well be genuinely ignorant, he's also trying to gaslight women and 'both sides' the issue. It's a proper Trump move — both in its bone-headed stupidity and in its malice."

NOVEMBER

The *New York Times* reported that makers of word games, especially crosswords, are increasingly using slang, vogue words, and colloquialisms collected from internet sources. Some standard English words and definitions are being dropped because of "more sophisticated conversation" around words that constructors might use in puzzles. For instance, *wife* was traditionally used with *husband*, which one puzzle creator said puts "the idea of same-sex spouses outside of the norm of puzzles." • Exceptional spelling mistakes in a texted letter led a forensic linguist to identify a murderer, reported *The Australian*. At first, the linguist doubted that her analysis could support an identification: "People tend to misspell words in pretty much the same way. So [it's] not really a very good way of distinguishing one author from other authors." But the letter's language was truly unusual, "written with visceral hatred." Using 58 pages of text messages sent between the suspect and the victim, some habitual but highly peculiar misspellings emerged. These could be tested against large corpora. Using the Birmingham Blog Corpus, a collection of about 630 million words extracted from the informal language of blogs, the linguist found, for example, that *ather* for *other* appeared just once, *gowing* for *going* seven times, and *meany* for *many* never appeared. Taken collectively, the consistent mistakes positively identified the suspect. "A lot of the time you just have to say to the court, I'm sorry, but it's just not possible to know for certain one way or the other. In this case, I was able to say I was extremely confident." The lesson here? Spell-check might help somone get away with murder. • Murder, she wrote. Or did she? mused the *New York Times* in recounting a long-standing real-life murder mystery in France. In 1991, a socialite was found dead with a nearby message written in her blood that appeared to accuse her gardener. But the message contained a grammatical error and misspelling that raised questions about who actually wrote it. In the original, it was "Omar m'a tuer" — not the correct "m'a tuée." Some have argued that a socialite wouldn't make such an elementary mistake. But investigators found other examples of similar grammatical errors in the victim's writings. And as a relative of the victim observed, "I'm not sure that in the moment

she was writing, she bore in mind all her grammar and French syntax." • The *Times* (London) suggested a curious book about Old English, *The Wordhord*, for the historical-word lover on your Christmas list. Some Anglo-Saxon words are easily recognized in modern English: *wulf* means "wolf," *befer* means "beaver," *butere* is "butter," and *cat* is, well, "cat." Many terms are unfamiliar yet poetic: *wafer-gange* ("weaver-walker") means a spider. A *hreathemus* ("adorned mouse") is a bat. When you drink too much, you might experience *heafod-swimme* ("head swimming"). You might have a *feond-scip* ("fiend-ship") with an enemy. But even if the Anglo-Saxon vocab is a bit esoteric, the rude 10th-century riddles are still sure to amuse: One refers to "a wondrous thing 'erect and tall' but 'shaggy underneath' brings 'joy to women' who 'grab hold of me' but which can also make them cry." The answer — obviously — is an onion. • The *Times* (London) also advised literary detectives of a cash prize offered to anyone who could decode Charles Dickens's antiquated shorthand and messy handwriting. When he died in 1870, he left ten manuscripts written in a modified 18th-century shorthand called brachygraphy, which resembles modern texting in using symbols, abbreviations, and acronyms to convey a message. An expert commented, "It looks simple but really is not. You read back the consonants and fill in the gaps. It is a little like playing Scrabble in your head." Dickens substituted for some symbols, tracking the changes in a notebook. But his poor handwriting carried over into poor shorthand, making it extraordinarily difficult to decipher. So far, only one of his coded works, "Sydney Smith," has been decoded — and only because a source for the story was found. • Writing in the *New York Times*, John McWhorter observed how languages spoken by immigrants begin to change with each generation, to the consternation of the elders. Spanglish, for instance, is Spanish sprinkled with English words and phrases and Spanish words with meanings influenced or altered by English. McWhorter notes that this is a natural process, as when the Normans infused the English language with French and Latin words. Other languages spoken in New York — including Ukrainian, Russian, and Chinese — are also fusing with English to produce generational dialects. McWhorter said, "The myriad ways people talk, and how these ways change, kaleidoscope-style, over time, as often as not while colliding and mixing and working it all out, is part of why people become linguists. It's exhilarating." Look at that sentence again: *ways* is the subject, and the verb, 25 words later, is . . . *is*. Not exhilarating. • Australian schools are reviving phonics for teaching children to read. To avoid pressure that can interfere with skill acquisition, the *Daily Telegraph* (Sydney) reported, students will not be required to reach a certain reading level each year but progress at their own pace. Previously, schools had used

the whole-word approach by which children learn words by sight. Phonics matches the sounds of spoken English with the letter or letters that symbolize the sound. In addition, more emphasis on handwriting will be added to the curriculum. The changes will initially be made to kindergarten through grade two, and then a higher grade will be added each year. • The *Washington Post* reported on John Koenig's *Dictionary of Obscure Sorrows*. The new lexicon is the product of 12 years' work, beginning as a website in 2009, and comprises nearly 300 pages of previously unnamed varieties of melancholy. In fact, you may already have heard one of Koenig's neologisms, *sonder*, defined as "the realization that each random passerby is living a life as vivid and complex as your own." Since that term's coinage in 2012, it has become "the namesake for, among other things, several studio albums, a hospitality company and eateries in California, Wisconsin and Kosovo." Many of the new words are amalgams of phonemes from various European languages, some wholly the products of Koenig's imagination. Others are existing words creatively repurposed, like *idlewild*, the original name of JFK International Airport, which Koenig appropriately defines as "feeling grateful to be stranded in a place where you can't do much of anything." Other entries describe once-rare experiences that have become all but universal since 2020: *kenopsia*, "the eerie, forlorn atmosphere of a place that's usually bustling with people but is now abandoned and quiet," or *solysium*, "a kind of delirium arising from spending too much time by yourself." Koenig writes in his prologue: "Words for obscure emotions remind us we have company in our most private moments."

December

In the midst of a new coronavirus variant, orthoepists agreed that there's no single correct English pronunciation of *omicron*. The *New York Times* offered /OH-muh-kron/ (from *Webster's Dictionary*), /AH-muh-kron/ (heard in America), /OH-mee-kron/ (as Prime Minister Boris Johnson of the U.K. pronounced it), and /OH-my-kron/. The *Oxford English Dictionary* records a variant that sounds like /oh-MIKE-ron/. The *Guardian* (London) noted that *omnicron* has appeared in both speech and writing, and pronunciations with the first syllable OH or AH are followed by /MY-kron/, /MEE-kron/, or even /MIK-ron/. And pronunciations that merge the first two syllables are heard: /OM-i-kron/. The *Herald* (Glasgow) declared that "I think most of us forget how stonkingly weird, random and eccentric English orthography can be." And never mind what the "correct" pronunciation should be: "The disease, after all, does not discriminate." However divided we may be over

pronouncing *omicron*, we can at least be grateful that the WHO sagely skipped the Greek letter *N*, saving us all from confusing discussions of the "new *nu* variant." • The *Times* (London) reported that the Supreme Court of the United Kingdom has decided to make style changes such as replacing Times New Roman with sans-serif Calibri for its published decisions to improve readability and make the Court's rulings more accessible to ordinary citizens. Lawyers were quick to express objections to what they regard a violation of their human "writes." A Queen's Counsel tweeted: "I have always regarded a serif font as easier to read than a sans font." And "a serif font is still regarded as more serious." Another barrister agreed and lodged further objections to the Court's aligning only to the left margin. A few welcomed the changes because they found opinions "much easier to read." One commented, "If you think your font will make your arguments appear serious, you're wrong." • A California appellate court described a petition for rehearing as "nine pages of text that more closely resembled a rant than a petition." The petition repeatedly insinuated that the appellate court's decision was politically motivated, that the court had consciously ignored the appellee's bad actions, and that the judicial system as a whole was unfair. When the lawyer was ordered to explain why he shouldn't be held in contempt, he "'doubled down' on his original position" both in his written response and at the hearing. The court held him in contempt and levied a fine. In lieu of jail time, the court decided to publish an opinion to address the appalling behavior of "a member of the bar who, after 52 years of practice, believes this is legitimate argument. We do not." In holding up the offender as an example to other lawyers who stoop to incivility, the court spoke bluntly: "This kind of over-the-top, anything-goes, devil-take-the-hindmost rhetoric has to stop." • Your handwriting, your message, and where you express it allowed people to analyze who you are, reported *The Press* (Christchurch, New Zealand). Despite a traffic tunnel having razor wire to bar climbers and a roof 12 meters above the ground, a lovestruck person managed to paint above the rim in crude black capitals: "I love u. Will u marry me. . . ." Presumably the writer was a young man because "the stunt sings of male bravado, the oldest story of romantic love, a young man seeking the hand of his beloved by performing a feat of daring." This led *The Press* to ask in return, "Should she accept? Is Mr. Graffito Mr. Right?" It analyzed his form and character, concluding he must have been physically fit and quite brave, though also foolhardy enough to hang head-down 12 meters over a busy road, and a vandal by night, yet also an old-fashioned romantic. His handwriting got top marks, as the letters were uniform and his spelling accurate, if one ignored the phonetic pronouns. He used the full stop correctly for one sentence but omitted the question mark and

added a superfluous ellipsis. "So should she marry him? Yes." • Multiple sources reported on the virulent objections to the addition, in the famous French dictionary *Le Petit Robert*'s online edition, of a gender-neutral pronoun: *iel*, a portmanteau of the masculine *il* ("he") and the feminine *elle* ("she"). The French education minister lashed out, "You must not manipulate the French language, whatever the cause." He blamed American "wokisme." The dictionary responded: "The mission of the *Robert* is to observe the evolution of a French language that is in motion and diverse, and take account of that. To define the words that describe the world is to aid better comprehension of it." A lawmaker disagreed: "These *Robert* lexicographers are introducing a word that barely exists in our country. That is militancy, that is not doing their jobs." • The *Toronto Star* described how an immigration official's typo caused trouble a year after an applicant first applied for permanent residence. He was given forms to file that misspelled his name and was told that the error couldn't be fixed in the computer. After nearly a year of repeatedly asking for it to be corrected and submitting the necessary document for correction, the applicant's permanent-residence card arrived — with his name misspelled. • As another year of the pandemic came to an end, the *New York Times* recorded new pandemic-related terms for weary workers returning to physical workplaces or settling in for the long remote winter and projected the effects on them. *Zoombies* would continue to propagate as overlong virtual meetings become "almost enough to make you wish the office would come back from the dead." Lunch would be *al desko dining* on meals dropped off outside office doors. Some would have to deal with *mask-issist* colleagues who lower their masks to cough. And everyone would remain concerned with *bookcase credibility*, making sure they had impressive tomes in the background for Zoom calls. • Among other solsticetide traditions, December heralds the word-of-the-year season — an attempt by various lexicographical bodies to sum up the year's collective human experience in a single word. This year, Dictionary.com chose a word few people have ever encountered: *allyship*, defined as "the status or role of a person who advocates and actively works for the inclusion of a marginalized or politicized group in all areas of society, not as a member of that group but in solidarity with its struggle and point of view and under its leadership." This choice marks the first time the site's annual pick was a new entry added that same year. Merriam-Webster chose *vaccine*. After choosing *pandemic* in 2020, the publisher said of this year's choice: "For many, the word symbolized a possible return to the lives we led before the pandemic. But it was also at the center of debates about personal choice, political affiliation, professional regulations, school safety, healthcare inequality, and so much more." And though *vaccine* was, of

course, not a new term, the editors did revise the definition to include the new way in which mRNA vaccines trigger the immune system. Among Merriam-Webster's ten also-rans for the annual distinction was *perseverance*, which happened to be Cambridge Dictionary's choice. While that might seem to be a nod to a quality we all cultivated in response to the pandemic and its prolonged exigencies, Cambridge's editors said that it had at least as much to do with NASA's Perseverance Rover, which landed on Mars February 18. "It made sense that lookups of 'perseverance' spiked at this time," said Wendalyn Nichols, the dictionary's publishing manager. "Cambridge Dictionary is the top website in the world for learners of English, and *perseverance* is not a common word for students of English to have in their vocabulary." As the dictionary summed up on its website, "This word captures the undaunted will of people across the world to never give up, despite the many challenges of 2021." Highlighting a wholly unrelated 2021 phenomenon, Collins Dictionary gave the nod to *NFT* ("nonfungible token"). And in a somewhat surprising move, the Oxford Dictionary Department chose the clipped form *vax*. "It goes back at least to the 1980s, but according to our corpus it was rarely used until this year," said Fiona McPherson, a senior editor. According to the *Oxford English Dictionary*, both three- and four-letter spellings are accepted (though the single-*x* spelling is more common). Functioning as both a noun and a verb, as well as an adjective (in such compounds as *anti-vax* and *double-vaxxed*), the word proved to be about as versatile as certain other four-letter words.

> An idealist is one who, on noticing that a rose smells better than a cabbage, concludes that it is also more nourishing.
>
> H.L. Mencken
> *A Little Book in C Major* (1916)

Rakesh Kilaru, Kendall Turner & Sarah L. Nash[†]

THE YEAR IN LAW

2020-2021

NOVEMBER 2020

November 2: Movie star Johnny Depp loses his libel lawsuit against *The Sun*, a British tabloid, for an article calling him a "wife beater" based on his treatment of Amber Heard, his former wife. Judge Andrew Nicol finds that "the great majority of alleged assaults of Ms. Heard by Mr. Depp have been proved to the civil standard."

November 3: Millions of Americans cast their votes for the President of the United States. While no victor is announced on election night, Joe Biden eventually is declared the winner of the election, winning the popular vote by roughly 7 million, but carrying the key states of Arizona, Georgia, and Wisconsin by fewer than 45,000 votes. • The Democratic Party also obtains control of the Senate by securing 50 overall Senate seats. Democrats retain control of the House of Representatives, but lose 13 seats off their previous total. • Oregon votes to decriminalize the possession of all illegal drugs and also legalizes the use of psilocybin (the active ingredient in psychedelic mushrooms) for mental-health treatment. • The U.S. Supreme Court grants review in *Fulton v. City of Philadelphia*, a case involving Catholic Social Services' challenge to a Philadelphia policy prohibiting CSS from participating

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as a foster program contractor because it refuses to place children with same-sex couples.

November 4: Donald Trump's presidential campaign organization files lawsuits in Pennsylvania, Michigan, and Georgia to try to flip the results of the 2020 election.

November 10: The Supreme Court hears oral argument in *California v. Texas*, the third major challenge to the constitutionality of the Affordable Care Act. For the third time (but his first time not as Solicitor General), Donald Verrilli argues in support of the Act.

November 12: The U.S. Court of Appeals for the First Circuit issues its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, upholding Harvard's undergraduate admissions program against a challenge that the school improperly accounted for race in making admissions decisions. • The Office of Professional Responsibility at the U.S. Department of Justice finds that former Secretary of Labor Alex Acosta used poor judgment, but did not commit misconduct, in handling a sexual-abuse investigation involving Jeffrey Epstein. Acosta approved a non-prosecution agreement, and then hid the agreement from Epstein's victims, when serving as U.S. Attorney for the Southern District of Florida.

November 15: Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York invalidates several Trump Administration rules narrowing the Deferred Action for Childhood Arrivals (DACA) program. The court finds that Acting Homeland Security Secretary Chad Wolf, who issued the memorandum narrowing the program, was not legally appointed to his role — the fifth court to so find.

November 17: Judge Robert Drain of the U.S. Bankruptcy Court for the Southern District of New York approves an $8.34 billion settlement between Purdue Pharma LP and the Department of Justice, in which Purdue agrees to plead guilty to several felonies regarding the marketing and distribution of OxyContin. Two dozen states had opposed the settlement.

November 23: Shortly after presiding over the confirmation hearings for Justice Amy Coney Barrett, Senator Dianne Feinstein (D-CA) announces she will step down as the lead Democrat on the Senate Judiciary Committee. Feinstein had faced public criticism for calling the controversial hearings "the best set of hearings that I've participated in."

November 25: Purdue Pharma LP formally pleads guilty to three federal felonies regarding the marketing and distribution of OxyContin. As part of the settlement, the Department of Justice agrees to treat billions of dollars in fines

and penalties as junior debt, effectively devaluing the previously-announced $8.34 billion settlement, but with the stated goal of leaving more money available for states and local governments who have also sued Purdue (see Nov. 17 entry).

November 26: President Trump announces he has pardoned former National Security Adviser Michael Flynn, who had previously pleaded guilty on several occasions to making false statements to the FBI before recanting those statements and having the Department of Justice move to dismiss the indictment against him. • In a 5-4 vote, the Supreme Court blocks New York from imposing strict COVID-19-related limits on attendance at religious services. The decision marks a departure from previous cases that deferred to state authorities in similar situations, with new Justice Amy Coney Barrett casting the deciding swing vote.

November 29: In an interview on Fox News, President Trump criticizes the FBI and Department of Justice for ignoring his claims of mass election fraud in the recent presidential election.

DECEMBER 2020

December 1: Attorney General William Barr notifies Congress that he previously named John Durham, the U.S. Attorney for the District of Connecticut, as special counsel to investigate the origins of the FBI's 2016 probe into ties between the Trump campaign and Russia as well as Russian interference in the 2016 election. Barr made the appointment on October 19 but claimed the need to delay notice "given the proximity to the presidential election." • The U.S. Women's National Team and the U.S. Soccer Federation agree to a settlement of the working conditions portion of the players' 2019 gender-discrimination lawsuit, permitting the players to appeal the disposition of their pay discrimination claim. As part of the settlement, U.S. Soccer agrees to implement various policies related to travel and accommodations.

December 3: The Civil Rights Division of the Department of Justice sues Facebook Inc. for improperly hiring foreign professionals on H1-B visas for jobs that could have been filled by qualified American workers.

December 4: By a 228-164 vote, the U.S. House of Representatives votes to decriminalize marijuana at the federal level, leaving it to states to determine its legality. The vote is largely along party lines, with five Republicans joining the Democratic majority to pass the bill. • Pat Corcoran, the former manager for Chance the Rapper, sues Chance after being fired in the wake of a disappointing album release and concert tour. Corcoran claims he is owed mil-

lions in management commissions and unreimbursed expenses. The firing follows the release and promotion of "The Big Day," the first-ever official studio album released by Chance (his previous albums were either mixtapes or released on streaming services).

December 6: News breaks that President Biden plans to nominate California Attorney General Xavier Becerra to serve as Secretary of Health and Human Services. Becerra led a coalition of states and Washington DC seeking to defend the Affordable Care Act in the latest challenge to its constitutionality (see Nov. 10 entry).

December 8: Judge Emmet Sullivan of the U.S. District Court for the District of Columbia issues his opinion in *United States v. Flynn*, granting the government's motion to dismiss the indictment against Flynn but noting that the government's handling of the case was highly irregular. The opinion followed months of legal proceedings in which: (1) the government filed a motion to dismiss the indictment after Flynn had twice pleaded guilty; (2) Judge Sullivan appointed an amicus to help him decide whether he had the authority to deny that motion; (3) Flynn filed a mandamus petition seeking to have the U.S. Court of Appeals for the D.C. Circuit order Sullivan to grant the motion; (4) a D.C. Circuit panel granted mandamus; and (5) the en banc D.C. Circuit then denied mandamus, allowing Sullivan to consider the motion to dismiss. The opinion followed President Trump's pardon of Flynn several weeks earlier (see Nov. 26 entry).

December 9: The Federal Trade Commission and 46 states sue Facebook Inc., seeking to unwind its acquisitions of WhatsApp and Instagram, based on claims that the social media company has bought out any competitors that might challenge its monopoly. In public statements following the lawsuit, Facebook officials note that the FTC did not act to stop these acquisitions when reviewing them years earlier. • The Civil Rights Division of the Department of Justice sues the State of Alabama for failing to protect male prisoners from violence and sexual abuse, including assaults by staff. Alabama's prisons have one of the highest homicide rates of any U.S. correctional system.

December 12: The Supreme Court issues a short per curiam order rejecting Texas's effort to void millions of votes cast in the 2020 presidential election in Georgia, Michigan, Pennsylvania, and Wisconsin, on the theory that those states violated their own laws and thus the U.S. Constitution by altering voting procedures shortly before the election. President Trump had tried to intervene in the case. The Court's order states that Texas lacks legal standing to contest the manner in which other states carry out their elections. Justices

Clarence Thomas and Samuel Alito separately note that they believe states are allowed to file such suits, but take no position on the merits.

December 14: In a 4-3 vote, the Wisconsin Supreme Court rejects the Trump campaign's effort to invalidate 220,000 votes in the 2020 Presidential election, including votes cast by people who are "indefinitely confined." The majority opinion, written by Justice Brian Hagedorn — former legal counsel to Republican Governor Scott Walker — calls the confinement challenge "meritless on its face," and rejects other challenges as untimely.

December 16: The Supreme Court grants review in *NCAA v. Alston*, presenting the question whether the NCAA's limits on institutional compensation for student-athletes violate federal antitrust laws. The rulings below granted a limited injunction allowing football and basketball players to receive certain additional education-related benefits, including in-kind items like laptops and musical instruments, and cash payments tied to education. • A coalition of ten states, led by Texas Attorney General Ken Paxton, files a lawsuit against Google, accusing it of enlisting Facebook in a scheme to dominate online advertising. Google's code name for the program is allegedly "Jedi Blue."

December 17: Thirty-eight attorneys general from states, territories, and Washington, DC file an antitrust lawsuit against Google in the U.S. District Court for the District of Columbia, arguing that the company maintains monopoly power over internet searches by precluding customers from using competing search engines and forcing businesses to use its search engine rather than others. • In a 7-2 vote, the Supreme Court denies Danville Christian Academy's request for an exemption from a public-health order closing all K-12 campuses across Kentucky, but notes that the order is about to expire and that Danville can sue again if restrictions persist. Justices Alito and Neil Gorsuch dissent from the order.

December 21: Days before leaving office, Attorney General Barr announces that he will not appoint a special counsel to investigate allegations of criminal conduct by Hunter Biden, or of election fraud in the 2020 presidential election. Barr notes that any investigations into those matters are being conducted professionally and responsibly. • A group of nine states, led by Texas, files a lawsuit seeking to declare the DACA program unlawful. The program has been in litigation for almost a decade, including lawsuits successfully challenging President Trump's efforts to rescind the policy.

December 22: The Department of Justice files a lawsuit against Walmart for allegedly fueling the opioid epidemic by not sufficiently screening prescriptions despite warnings from pharmacists. • Sixteen Republican attorneys general join

an amicus brief supporting the National Rifle Association's lawsuit against New York Attorney General Letitia James, who filed her own lawsuit seeking to have the NRA dissolved. The NRA's lawsuit claims that James's actions are politically motivated and violate the First Amendment. • President Trump issues 15 pardons and five commutations. The pardons include George Papadopoulos, his former campaign adviser who helped trigger Robert Mueller's investigation, as well as four military contractors accused of killing over a dozen Iraqi civilians while working for Blackwater USA.

December 24: President Trump issues 26 more pardons, including ones for his former campaign chairman Paul Manafort, his longtime advisor Robert Stone, and his son-in-law's father Charles Kushner. • Jeffrey Rosen, the former Deputy Attorney General, takes over as Acting Attorney General in the wake of William Barr's departure from the Department of Justice.

December 29: Federal prosecutors announce they will not bring charges against two police officers involved in the shooting of Tamir Rice, a 12-year-old Cleveland boy killed in 2014 while playing with a toy gun. The City of Cleveland had previously agreed to pay $6 million to Rice's family, and one of the officers was fired (though not for the shooting) and the other suspended for ten days. • The Trump campaign announces that it is going to ask the Supreme Court to overturn President-Elect Biden's victory in the State of Wisconsin, claiming that Wisconsin presided over a "failed" election and that the state legislature should independently appoint presidential electors.

December 30: Samuel Little, viewed by some as the most prolific serial killer in U.S. history, dies. Little, 80, had nearly 60 confirmed victims at the time of his death, and had confessed to killing a total of 93 between 1970 and 2005.

December 31: In his year-end report on the federal judiciary, Chief Justice John Roberts chronicles the judiciary's efforts to respond to the COVID-19 pandemic, drawing a parallel to the influenza outbreaks that marked the first Supreme Court Term in 1790. The report also shows a marked drop in district court caseloads, but a relatively stable number of federal appellate filings. • Richard Thornburg, who served as U.S. Attorney General during both the Reagan and George H.W. Bush Administrations — and as Governor of Pennsylvania in the intervening years — dies at 88.

JANUARY 2021

January 6: A mob of rioters protesting Joe Biden's election as President — and Congress's certification thereof — storms the U.S. Capitol, overcoming the minimal police presence. Rioters destroy property, climb the Capitol's

facades, and assault police officers, all while claiming that the election is being stolen from President Trump.

January 7: In the aftermath of the violent attack on the Capitol, Facebook indefinitely blocks President Trump from posting. Facebook CEO Mark Zuckerberg criticizes Trump for "[h]is decision to use his platform to condone rather than condemn the actions of his supporters at the Capitol building" (see preceding entry). • President-elect Biden announces that he will nominate Judge Merrick Garland to serve as Attorney General, Lisa Monaco to serve as Deputy Attorney General, Vanita Gupta to serve as Associate Attorney General, and Kristen Clarke to serve as the head of the Civil Rights Division.

January 8: In further response to the Capitol attack, Google suspends Parler, a right-wing social media network, from its app store. Apple threatens to do the same. • Twitter also permanently bans President Trump's personal account, citing the risk of further incitement of violence (see preceding entry).

January 9: Federal prosecutors unseal charges against several individuals who stormed the Capitol, including a man named Richard "Bigo" Barnett, who bragged in an interview that he got blood on Nancy Pelosi's desk and left her a note saying, "Nancy, Bigo was here, you Bitch" (see preceding entry).

January 11: The Supreme Court rejects requests to expedite consideration of various challenges to the 2020 presidential election — including cases seeking to overturn President-elect Biden's victories in Georgia, Michigan, Pennsylvania, and Wisconsin — ensuring that the Court will not hear the cases before the presidential inauguration on January 20. • Parler sues Amazon for cutting off web services to the company, arguing the decision is motivated by political animus (see Jan. 8 entry) . • Facebook announces it will remove all content mentioning the phrase "stop the steal," a commonly-used phrase by supporters of President Trump's effort to overturn the 2020 presidential election (see Jan. 7 entry).

January 12: Judge Peter A. Cahill in Hennepin County, Minnesota, rules that Derek Chauvin will stand trial alone. Chauvin is one of several officers charged with murder in the killing of George Floyd, who died after officers kneeled on his neck despite Floyd's pleas that he could not breathe.

January 13: For the second time during his presidency, the House votes to impeach President Trump for encouraging a mob to storm the Capitol on January 6. Ten Republicans join the Democratic majority, including Liz Cheney (R-WY), the third-ranking Republican in the House.

January 15: The Supreme Court denies a last-minute appeal by Corey Johnson to stay his execution. Among other claims, Johnson alleged that he has COVID-19 and that the infection could lead to exceptional pain based on the use of pentobarbital in the execution. Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissent from the ruling. • The NRA files for bankruptcy in response to a suit by New York Attorney General James seeking to dissolve the organization. The NRA announces it will attempt to restructure itself as a Texas nonprofit (see Dec. 22 entry).

January 17: Phil Spector, a music producer, songwriter, and musician, dies at 81. Spector was famous both for his many hit songs and for his conviction for murdering actress Lana Clarkson at his home in 2003.

January 20: Joe Biden is inaugurated as the 46th President of the United States. • On President Trump's last day in office, the Department of Justice issues a memo seeking to curtail the impact of the Supreme Court's ruling that Title VII prohibits discrimination against LGBT people. • President Trump also issues 143 pardons and commutations, including ones for his former chief strategist, Steve Bannon, and rapper Lil Wayne. • Tyson Foods Inc. announces it will pay $221.5 million to settle price-fixing claims in the chicken industry.

January 21: The White House confirms that President Biden will retain Christopher Wray as the Director of the FBI.

January 22: The Senate confirms Lloyd Austin as Secretary of Defense. Austin is a retired Army general who is the first-ever Black man to occupy that post. The vote is 93-2 in favor of confirmation. • The State of Texas sues the Biden Administration to try to enjoin the Administration's decision to pause most deportations for 100 days.

January 25: The Supreme Court orders the dismissal of a pair of cases alleging that President Trump was violating the Constitution's emoluments clauses by enriching himself while in office. • Dominion Voting Systems sues Rudy Giuliani for defamation based on his claims that Dominion rigged the 2020 election for President Biden. The complaint, filed in the U.S. District Court for the District of Columbia, seeks over $1.3 billion in damages.

January 26: In closed-door testimony at a Congressional hearing, U.S. Capitol Police Chief Yogananda D. Pittman states that her organization knew the January 6 Capitol rally had a "strong potential for violence," but nevertheless failed to sufficiently prepare (see Jan. 6 entry).

January 27: Ty Garbin, one of six men charged with a plot to kidnap Michigan governor Gretchen Whitmer, pleads guilty to conspiracy. Among the details

in the plea agreement is that Garbin and five others built a "shoot house" to resemble Whitmer's home to prepare to assault it with firearms.

FEBRUARY 2021

February 1: The Department of Justice asks the Supreme Court to cancel oral arguments in cases challenging former President Trump's effort to build a wall along the southern U.S. border and the "Remain in Mexico" asylum program, in light of first-day policies announced by the Biden Administration.

February 3: Bayer AG announces a $2 billion proposal to try to resolve litigation over whether its popular herbicide Roundup causes Non-Hodgkin's Lymphoma. The company had previously paid a reported $9.6 billion to settle existing Roundup cases and attempted to resolve future claims by establishing a panel of independent experts whose conclusions would bind future litigants. • The Supreme Court issues its decision in *Germany v. Philipp*, holding that Holocaust victims and their descendants cannot seek compensation in U.S. courts for property seized by Nazi Germany and Hungary, because international law does not support claims by citizens against their own government. Chief Justice Roberts writes the Court's unanimous opinion. • Consulting company McKinsey & Co. announces a $573 million settlement with 47 states and the District of Columbia over its advice to Purdue Pharma LP and other drug manufacturers regarding opioid sales and marketing. It is the first nationwide settlement in the sprawling litigation over the opioid epidemic.

February 4: Smartmatic USA Corp, a manufacturer of voting machines, sues Fox News, Lou Dobbs, Maria Bartiromo, and Jeanine Pirro (among others), arguing they all made misleading statements about the company's products in the aftermath of the 2020 presidential election.

February 5: Fox announces it will cancel "Lou Dobbs Tonight" after the host is named as one of several defendants in a $2.7 billion defamation lawsuit by Smartmatic USA Corp. (see preceding entry).

February 9: The second impeachment trial of former President Trump begins in the Senate. Much of the day's proceedings focus on the question whether a former President can be tried by the Senate, and in a 56-44 vote, the Senate votes that a President can so be tried.

February 10: Chinese corporation Huawei Technologies Co. files a challenge to its designation by the Federal Communication Commission (FCC) as a national security threat, which jeopardizes the company's ability to do business in the United States. • The Department of Justice sends a letter to the Supreme Court announcing a change of position in the latest challenge to the

constitutionality of the Affordable Care Act. Unsurprisingly, the new Administration takes the position that the law as a whole is constitutional (see Nov. 7 entry). • The second day of former President Trump's impeachment trial involves testimony about the events of January 6, as well as evidence allegedly showing that President Trump planned the attack over the preceding weeks.

February 11: The third day of former President Trump's impeachment trial focuses on commentary by the rioters themselves, who cited his support as a reason for the attack. The Democratic managers also attempt to make the case that former President Trump should be precluded from holding office again.

February 12: Lou Dobbs, joined by Maria Bartiromo and Jeanine Pirro, file a motion to dismiss Smartmatic USA's defamation lawsuit, arguing they were simply relaying newsworthy statements by President Trump — an activity claimed to be protected by the First Amendment (see Feb. 5 entry). • The fourth day of former President Trump's impeachment trial involves the defense presentation, which involves claims that the impeachment trial is a "witch hunt," that President Trump's use of terms like "fight" were standard political discourse, and that he disdains political violence.

February 13: The Senate hears closing arguments in the impeachment trial of former President Trump, and shortly thereafter votes to acquit. The final vote is 57 guilty, 43 not guilty — ten votes short of the 67 required to convict.

February 17: Epic Games Inc., the developer of the popular game "Fortnite," sues Apple in the European Union — the latest front in its legal fight against the app store policies of Apple and Google. • As part of its efforts to combat COVID-19 fraud, the Department of Homeland Security announces that federal agents have seized approximately 10 million counterfeit N95 masks made in China.

February 19: Gordon Caplan, the former co-chair of Willkie Farr & Gallagher LLP, avoids disbarment following his conviction for paying $75,000 to rig his daughter's college-admissions test score. Caplan instead receives a two-year license suspension.

February 22: Dominion Voting Systems sues Mike Lindell, CEO of MyPillow, for defamation in the U.S. District Court for the District of Columbia. Dominion alleges that Lindell, a prominent supporter of former President Trump, made false claims about the integrity of Dominion's voting machines (see Jan. 25 entry). • In unsigned orders, the Supreme Court rejects several challenges by former President Trump. The Court denies review of appeals seeking to challenge election procedures in states President Biden won, as well as Trump's latest effort to preclude the Manhattan District Attorney from enforcing a subpoena for his tax returns and financial records. • At his

confirmation hearing to serve as Attorney General, Judge Garland states that his first priority will be to pursue the investigation of the January 6 Capitol riots (see Jan. 6 entry).

February 23: Emma Coronel, the wife of imprisoned drug kingpin Joaquin "El Chapo" Guzman, is arrested for allegedly helping her husband both to run his drug empire and to attempt to escape from prison in Mexico.

February 24: A judge in France files preliminary charges of rape and sexual assault against actor Gerard Depardieu. The ruling amounts to a finding that there is enough evidence to continue to investigate Depardieu for an alleged rape in 2018. • Judge Drew B. Tipton of the U.S. District Court for the Southern District of Texas enters a preliminary injunction against the Biden Administration's 100-day pause on deportations, concluding that it amounts to a "pause on government functions" rather than a lawful exercise of prosecutorial discretion.

February 25: ByteDance Ltd. agrees to pay $92 million to settle a class action lawsuit alleging it unlawfully harvested personal information of minors from the popular video sharing app TikTok. • The House of Representatives passes the Equality Act by a 224-206 vote. The bill formally bans discrimination on the basis of sexual orientation or gender identity. Three Republicans support the bill.

February 28: New York Governor Andrew Cuomo apologizes for some interactions with staffers, saying that he acknowledges "some of the things I said have been misinterpreted as an unwanted flirtation." The statement follows the second allegation of sexual harassment from one of his former aides.

MARCH 2021

March 1: Brazos Electric Power Cooperative, the largest power company in Texas, files for bankruptcy following an historic cold snap that caused week-long blackouts and left at least 4.3 million people without power across the state.

March 8: Twelve states file a lawsuit against President Biden alleging that the executive branch attempted to assume legislative power when it issued an executive order defining the social costs of greenhouse gases.

March 11: President Biden signs the American Rescue Plan Act of 2021 (ARPA). Providing for approximately $1.9 trillion in federal spending, ARPA contains a number of economic assistance programs, including continued direct payments to Americans, extended jobless benefits, funding for coronavirus testing and vaccine distribution, and infusions of cash to state and local

governments. It is one of the largest economic stimulus plans in U.S. history.

March 16: Utah signs HB 308 into law, which blocks the government from requiring COVID-19 vaccination.

March 17: Twenty-one states file a lawsuit against President Biden and his administration alleging that the permit revocation of the Keystone XL pipeline was a regulation of interstate and international commerce and, therefore, subject to congressional, not executive, authority.

March 18: A state court judge rules that former Michigan Governor Rick Snyder will face a criminal trial in Flint, Michigan, where his decisions allegedly contributed to the lead exposure of approximately 100,000 residents.

March 19: Spain legalizes euthanasia for persons with serious and incurable or debilitating diseases.

March 24: Virginia passes a law abolishing capital punishment, making it the 23rd state to do so and the first southern state to do so in U.S. history. The bill reduces the commonwealth's two death sentences to life without parole.

March 25: Georgia enacts SB 202, which criminalizes passing out water to voters waiting in line at the polls. The law also grants the State Board of Elections new powers to remove professional election officials and take over election administration in specific jurisdictions.

March 26: Dominion Voting Systems files a $1.6 billion defamation lawsuit against Fox News, alleging that Fox, in an effort to boost faltering ratings, falsely claimed that Dominion had rigged the 2020 election (see Jan. 25 and Feb. 22 entries).

March 31: New York legalizes recreational use of marijuana, making it the 15th state to fully legalize the drug.

APRIL 2021

April 1: The Supreme Court issues its opinion in *Florida v. Georgia*, dismissing Florida's claim that Georgia was unreasonably consuming water for irrigation, agriculture and development. According to the Court's unanimous opinion, "Considering the record as a whole, Florida has not shown that it is 'highly probable' that Georgia's alleged overconsumption played more than a trivial role in the collapse of Florida's oyster fisheries." • The Supreme Court also issues its unanimous decision in *Facebook, Inc. v. Duguid*, holding that text messages are distinct from phone calls and thus Facebook's texts did not violate the Telephone Consumer Protection Act of 1991. • In an unexpected per curiam opinion, the Supreme Court rules, 9-0, that regardless what the

Constitution permits as to the use of race in college admissions, it affirmatively requires "significant" representation of social media influencers in each incoming class. The Court expresses its expectation that such policies will not be needed in 25 years, whether because social media becomes ubiquitous or its increasing frequency of use prompts the end of the world. In response, the CEO of Twitter announces a "student rate" of $5/month to get a verified blue check mark.[1]

April 5: In *Biden v. Knight First Amendment Institute*, the Supreme Court dismisses as moot claims against former President Donald Trump for blocking critics from following his Twitter account. Justice Thomas concurs, writing that the Court "will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms." • The National Rifle Association attempts to intervene in lawsuits filed in a California federal court alleging that environmental groups failed to show harm from the Trump Administration's decision to strip endangered species protections from gray wolves.

April 6: Arkansas passes a law banning gender-affirming treatments and surgery for transgender youth, after lawmakers override Governor Asa Hutchinson's veto.

April 7: A lawsuit is filed in California federal court alleging that the U.S. Environmental Protection Agency (EPA) is failing to protect people and the environment from ozone air pollution generated by oil and natural gas industries in Los Angeles and Chicago, among other localities.

April 8: New Mexico enacts a new requirement for employers to provide workers with paid sick leave, with the mandate set to go into effect in July 2022.

April 9: President Biden issues an executive order forming the Presidential Commission on the Supreme Court of the United States, a bipartisan group of experts on the Court and the Court reform debate. • Amazon workers in Bessemer, Alabama vote against unionization. Ten days later the union leading the recognition campaign challenges the election results, claiming that Amazon intimidated workers leading up to the election.

April 10: Maryland lawmakers override Governor Larry Hogan's veto of the Juvenile Restoration Act, making Maryland the 25th state to eliminate juvenile life without parole as a sentencing option.

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[1] April Fools!

April 11: Kentucky enacts a new law restricting no-knock warrants, approximately one year after Breonna Taylor was fatally shot in her Louisville, Kentucky apartment. Several of Taylor's family members stand behind Governor Andy Beshear during the bill signing ceremony.

April 21: Oklahoma passes HB 1674, etablishing that a driver who "unintentionally" causes injury or death by hitting a protester with their car will not be criminally or civilly liable if they reasonably believe they are "fleeing from a riot."

April 20: Former Minneapolis police officer Derek Chauvin is found guilty of murder and manslaughter in the death of George Floyd (see Jan. 12 entry). • Florida passes a new law, HB 1, defining a "riot" as when someone "willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in injury to another person; damage to property; or imminent danger of injury to another person or damage to property." Governor Ron DeSantis celebrates the law as the broadest and toughest anti-riot bill in the country and promises to have "a ton of bricks rain down on" those who violate it.

April 22: The Supreme Court issues its decision in *Jones v. Mississippi*, holding that judges do not have to uphold the prior standard — showing that a young person is "permanently incorrigible" — before sentencing them to life in prison. The Court's decision is 6-3 and reverses a trend towards prison reform.

April 22-23: The United States hosts a virtual climate summit and President Biden pledges to halve emissions of greenhouse gases by 2030 and double climate aid to developing nations. Attendees of the virtual event include corporate executives, union leaders, Pope Francis, and Bill Gates.

April 27: President Biden issues an executive order announcing he will require federal contractors to pay workers at least a $15 minimum wage in the near term.

April 29: Montana approves a bill to bar private and public employers from requiring workers to be vaccinated against COVID-19 as a condition of employment.

April 30: Florida enacts SB 90, which makes several changes to Florida election law, including making voter registration more difficult, modifying rules for observers in ways that could disrupt election administration, and restricting the ability to provide snacks and water to voters waiting in line.

MAY 2021

May 14: President Biden rescinds several executive actions put in place by his predecessor, including one targeting social media companies that former President Trump ordered after Twitter fact-checked his tweets.

May 17: The Supreme Court grants certiorari in *Dobbs v. Jackson Women's Health Organization*, a case involving Mississippi's ban on abortions after the 15th week of pregnancy. The grant foreshadowed a threat to the Court's 1973 decision in *Roe v. Wade*.

May 18: During a Senate committee hearing, Republicans raise concerns about paying for a national paid leave mandate, while Democrats predict it would boost the economy and women's workforce participation.

May 19: Tennessee passes a law requiring businesses to post signs stating: "This facility maintains a policy of allowing the use of restrooms by either biological sex, regardless of the designation on the restroom." • SB 8 (aka the "Heartbeat Act") is signed into law by Texas Governor Greg Abbott. The law bans abortions once cardiac activity has been detected and makes no exceptions for rape or incest. The law's effective date is September 1, 2021.

May 20: Iowa passes a law that forbids public and private schools from requiring face coverings for students, staff or visitors.

May 24: The Supreme Court issues its opinion in *Guam v. United States*, holding that Guam is free to pursue claims against the U.S. Navy for environmental damage due to the Navy's alleged dumping of hazardous waste.

May 25: Amy Cooper, the woman at the center of the viral confrontation between Cooper and a Black birdwatcher in Central Park, files a lawsuit against her former employer alleging she was wrongfully terminated following the incident.

May 26: Kim Kardashian West is sued in Los Angeles Superior Court by seven workers accusing her of wage theft, retaliation, and violation of child labor laws.

May 28: The Equal Employment Opportunity Commission (EEOC) announces that employers may offer bonuses and other incentives to encourage employees to get the COVID-19 vaccine.

JUNE 2021

June 1: A California judge orders Bank of America to change its practices after thousands of unemployed California customers receiving public benefits

complain that when their prepaid debit cards were hacked, the bank made matters worse by treating them like "criminals."

June 2: The Vatican updates the criminal section of its Code of Canon Law, changing Catholic Church law to explicitly criminalize the sexual abuse of adults by priests who abuse their authority. • In an attempt to curb unrealistic beauty standards, Norway passes new regulations requiring influencers and advertisers to label retouched photos on social media.

June 7: The Supreme Court issues its unanimous decision in *Sanchez v. Mayorkas*, holding that immigrants who enter the country illegally cannot obtain green cards, even if they already hold temporary protected status. • Texas forbids businesses from requiring customers to produce a COVID-19 vaccine passport proving they have been vaccinated.

June 8: A Simmons University graduate student who sued her professor after a video of her using the bathroom during a Zoom class went viral agrees to drop the case. • The New Jersey Supreme Court rules that the state's Attorney General had the authority to adopt two directives requiring the release of the names of law enforcement officers who receives major discipline for their own misconduct.

June 9: El Salvador becomes first country to accept Bitcoin as national currency.

June 12: Missouri passes the "Second Amendment Preservation Act," which provides that law enforcement officers will face fines if they infringe citizens' Second Amendment rights. The law fines law enforcement agencies $50,000 every time an officer deprives a citizen of the right to bear arms.

June 16: Texas passes the "Star Spangled Banner Protection Act," which requires professional sports teams with contracts with the State of Texas to play the national anthem before every game.

June 17: The Supreme Court decides *Nestlé USA, Inc. v. Doe*, holding 8-1 that the Alien Tort Statute — a law giving federal courts jurisdiction to hear suits filed by non-U.S. citizens for torts committed in violation of international law — does not confer jurisdiction over claims against U.S. corporations stemming from overseas injury if the only domestic conduct consists of "general corporate activity." The case was brought by individuals in Mali who alleged they had been trafficked into slavery as children to work on cocoa farms. Justice Alito dissents. • In *California v. Texas*, the Supreme Court rejects a challenge to the Affordable Care Act, preserving the healthcare law for the third time since its 2010 enactment. The Court rules 7-2 that the states and individuals bringing the case lacked the authority to do so (see Nov. 10 and Feb. 10 entries).

June 18: Maine lawmakers approve a bill similar to the controversial California labor law known as the Private Attorneys General Act. The bill is vetoed by Governor Janet Mills less than a month later (July 12). The bill would have allowed an allegedly aggrieved employee to file a private lawsuit for alleged employment violations on behalf of the Maine Attorney General.

June 21: The Supreme Court issues its opinion in *National Collegiate Athletic Association v. Alston*, unanimously holding that the NCAA may not prohibit student athletes from being paid moderate education-related expenses (see Dec 16 entry). • A consumer advocacy group files suit against Smithfield Foods Inc. for allegedly fueling fears of a meat shortage during the pandemic to boost demand and prices for its products.

June 23: The Supreme Court issues its opinion in *Mahanoy Area School District v. B.L.*, holding that a public school violated a student's First Amendment rights when it suspended her from the cheerleading team after she posted a Snapchat criticizing her coaches' decision not to add her to the team's varsity squad. "Sometimes it is necessary to protect the superfluous in order to preserve the necessary," writes the Court. The decision is 8-1, with Justice Thomas dissenting. • A new Connecticut law requires employers to provide workers with two hours of unpaid time off to vote.

June 24: The Supreme Court issues its decision in *Cedar Point Nursery v. Hassid*, holding, by a 6-3 vote, unconstitutional a California regulation that allowed unions to recruit, protest, and organize on farm property. • An appeals court suspends Rudy Giuliani from practicing law in New York due to false statements he made while trying to overturn former President Trump's loss in the 2020 presidential election.

June 28: Judge James Boasberg of the U.S. District Court for the District of Columbia dismisses antitrust suits against Facebook by the FTC and several state attorneys general. Judge Boasberg finds that the FTC failed to explain what social networking is or how it determined that Facebook monopolizes that market. Boasberg allows the FTC to re-plead its case, but dismisses outright the claims by state attorneys general (see Dec. 9 entry).

June 29: New Mexico legalizes recreational marijuana.

June 30: Bill Cosby's sexual assault conviction is overturned on due process grounds by the Supreme Court of Pennsylvania and he is released from prison after serving three years of a three-to-ten-year sentence.

JULY 2021

July 1: The Supreme Court releases its last two opinions from October Term 2020, *Brnovich v. Democratic National Committee* and *Americans for Prosperity Foundation v. Bonta*. This is the first time in 25 years that the Court has issued a merits opinion in July; the last time was the 1996 decision *Winstar v. United States*. In *Brnovich*, the Court votes 6-3 to uphold Arizona's voting law. In *Americans for Prosperity*, the Court votes 5-4 to strike down California's donor-disclosure rule. • The Department of Justice issues a moratorium on scheduling federal executions. Attorney General Garland explains that "serious concerns have been raised about the continued use of the death penalty across the country, including arbitrariness in its application, disparate impact on people of color, and the troubling number of exonerations in capital and other serious cases." • The Anti-Police-Terror Project uploads a video to YouTube showing an Oakland California police officer playing a Taylor Swift song on his phone in a bid to prevent activists who were filming him from uploading the video to YouTube. The video platform regularly removes videos that break music copyright rules.

July 2: Boy Scouts of America reaches a $850 million settlement with more than 60,000 men who sued the institution for sexual abuse.

July 7: More than 30 states sue Google for allegedly engaging in anticompetitive practices in the Google Play Store.

July 8: Washington, DC suspends Rudy Giuliani's law license, four weeks after New York took a similar action against him.

July 19: The Supreme Court issues an order ending its COVID-era automatic extensions of time to file certain documents, and its suspension of its usual requirement to file hard-copy versions of most documents. • Paul Hodgkins, a Florida crane operator who walked onto the Senate floor during the January 6 attack on the U.S. Capitol, is sentenced to eight months in federal prison, followed by two years of supervised release. His sentencing is the first felony case stemming from the January 6 attack. • President Biden transfers a detainee out of Guantánamo for the first time in his administration.

July 21: Harvey Weinstein pleads not guilty to rape and sexual assault charges in Los Angeles county court. He is already serving a 23-year prison sentence for rape and sexual abuse in New York. • A federal judge temporarily prevents Arkansas's ban on gender-confirming treatments for transgender youth from going into effect.

July 22: Mississippi files its opening brief in the Supreme Court in *Dobbs v. Jackson Women's Health Organization*. In it, the state tells the Court that *Roe v.*

Wade was "egregiously wrong" and should be overturned, allowing Mississippi's ban on abortion at 15 weeks to go into effect (see May 17 entry).

July 27: Britney Spears's lawyer files to have her father removed from controlling her finances. • The House select committee investigating the January 6 attack at the Capitol holds its first hearing. Members of the Capitol Police and DC's Metropolitan Police Department testify.

AUGUST 2021

August 5: Mexico sues U.S. gun manufacturers, alleging that their negligent and illegal commercial practices contribute to and facilitate the trafficking of guns to Mexico. • Plaintiffs opposed to the expansion of an oil pipeline across northern Minnesota file a complaint in tribal court seeking to stop the state from allowing the pipeline operator to use five billion gallons of water for its construction.

August 8: Nike announces that it has settled its trademark-infringement lawsuit against a Brooklyn company that made "Satan Shoes" in collaboration with the rapper Lil Nas X. The shoes were black and red, devil-themed, and sold out at $1,018 a pair. They purportedly contained a drop of human blood in the midsole and only 666 pairs were made.

August 9: Florida Governor Ron DeSantis, says the state's Board of Education may withhold pay from school leaders who implement mask mandates for students.

August 11: President Biden announces he is nominating Elizabeth Prelogar to serve as the U.S. Solicitor General. • Biden nominates Damian Williams to lead the U.S. Attorney's Office for the Southern District of New York. Upon confirmation, Williams will become the first Black man to lead the prestigious office.

August 12: Justice Barrett, who is Circuit Justice for the Seventh Circuit and therefore responsible in the first instance for dealing with emergency motions from Indiana, denies without comment a request from a group of Indiana University students to block the school's requirement that students be vaccinated against the COVID-19 virus in *Klaassen v. Trustees of Indiana University*. • In *Chrysafis v. Marks*, a divided Supreme Court grants a request from a group of New York landlords to lift part of a state moratorium on residential evictions put in place at the beginning of the COVID-19 pandemic.

August 18: R. Kelly's federal trial for sexual exploitation of a child, bribery, kidnapping, forced labor, and sexual trafficking across state lines begins.

August 20: An Alameda County, California judge strikes down Proposition 22

— the state's ballot measure that exempted Uber and other companies from a state law requiring that their drivers be classified as employees eligible for benefits and job protections. Uber, Lyft, and other app-based services had spent $200 million in their campaign for passage of Proposition 22, making it the most expensive ballot measure in California's history.

August 24: The Supreme Court refuses to block a lower-court order requiring the Biden Administration to reinstate the Trump Administration's "remain in Mexico" policy. Justices Breyer, Sotomayor, and Kagan dissent, indicating they would have granted the government's request and put the district court's order on hold. • New York Governor Andrew Cuomo steps down, and Lieutenant Governor Kathy Hochul assumes the top state post, becoming the state's first woman chief executive (see Feb. 28 entry).

August 25: The cover of a 1991 Nirvana album, *Nevermind*, depicts a four-month-old naked baby in a swimming pool. That baby, now a 30-year-old man, sues Nirvana for child exploitation and pornography.

August 26: The Supreme Court blocks the Biden Administration from enforcing the latest federal moratorium on evictions, imposed because of the COVID-19 pandemic. Justices Breyer, Sotomayor, and Kagan dissent from the unsigned, eight-page opinion.

August 30: The FBI reports that there were 7,759 reported hate crimes in the United States in 2020 — the most in 12 years.

August 31: The Supreme Court of Virginia upholds a lower-court ruling that ordered reinstatement of a northern Virginia gym teacher who refused to refer to transgender students by their pronouns, claiming that his religious beliefs precluded him from doing so. • Jury selection begins in the criminal fraud trial of Elizabeth Holmes. Federal prosecutors charged Holmes and her former business partner and ex-boyfriend, Ramesh "Sunny" Balwani, with defrauding investors and patients of their blood-testing company Theranos.

SEPTEMBER 2021

September 1: Roughly 24 hours after a Texas law that bans abortion starting around six weeks into a pregnancy goes into effect, the Supreme Court rejects a request to block enforcement of the law. The Court's ruling in the case, *Whole Woman's Health v. Jackson*, is 5-4, with Chief Justice Roberts joining Justices Breyer, Sotomayor, and Kagan in dissent.

September 3: Jacob Chansley, the "QAnon Shaman," pleads guilty to felony charges in connection with his participation in the January 6 attack on the Capitol.

September 7: Mexico's Supreme Court rules that it is unconstitutional to punish abortion as a crime.

September 8: The Supreme Court agrees to postpone the execution of John Ramirez, a Texas state prisoner who was sentenced to death for the murder of a convenience-store clerk. Ramirez had asked to have his pastor put his hands on Ramirez's body and pray aloud during the execution, and Texas refused to grant that request. Ramirez then sought relief in federal court, arguing (as he ultimately did before the Supreme Court) that denying his request would violate his constitutional rights and a federal law guaranteeing religious rights for inmates. • The Supreme Court announces it will return to in-person oral arguments for the October 2021 Term. The Court also announces that arguments will remain closed to the public, and that live audio will continue to be available via its website. • Virginia removes a 12-ton statute of Confederate General Robert E. Lee from display in the state's capital city of Richmond.

September 10: A woman who claims to have been sexually assaulted by the Prince Andrew serves him with legal papers in a U.S. civil suit.

September 15: The U.S. Senate holds a hearing on the FBI's investigation of Larry Nassar, a former Olympics team doctor convicted of multiple cases of sexual assault. Gymnasts testify that the FBI repeatedly failed to protect them from Nassar.

September 16: The International Criminal Court authorizes an investigation into Philippine President Rodrigo Duerte, whose anti-drug war is alleged to be a cover for his government to murder thousands of civilians.

September 21: The Supreme Court announces that the fall's in-person oral arguments — the return of which the Court announced on September 8 — will follow a different format than previous in-person oral arguments. In addition to the customary 30-minute free-for-all, the Court will leave time at the end of the 30 minutes for each Justice to ask questions in order of seniority. The ordered questioning was adopted for virtual arguments during the pandemic. • Dr. Alan Braid — a doctor in San Antonio, Texas, who said he performed abortions in deliberate defiance of a new Texas law banning abortion at the sixth week of pregnancy — is sued by two people in Texas state court.

September 23: A grand jury returns an indictment for a former Louisiana police trooper who beat a Black motorist 18 times with a flashlight. The indictment charges the trooper with one count of deprivation of rights under color of law.

September 24: The Kunsten Museum of Modern Art opens its exhibition, *Work It Out*, for which the artist Jens Haaning agreed to provide two works in exchange for $84,000. At the deadline for his submissions, he submitted two blank canvases, titled "Take the Money and Run." He conceded it was a breach of contract, but claimed that "breach of contract is part of the work" and the "work is that I have taken their money."

September 27: The Supreme Court holds its annual "long conference," during which it considers whether to grant review in over a thousand cases. This conference marks the unofficial end of the Court's summer recess. Cases scheduled to be considered at the long conference generally have the lowest chances of obtaining review by the Court. • After a seven-week trial, a jury finds R. Kelly guilty of multiple offenses — including sexual exploitation of a child, bribery, racketeering, and sex trafficking — involving five victims (see Aug. 18 entry). • John Hinckley, who shot President Ronald Reagan in 1981, wins unconditional release. A jury found Hinckley not guilty by reason of insanity in 1982, and he was committed to hospital care for more than three decades.

September 28: The Supreme Court refuses to block the execution of Rick Rhoades, a Texas inmate who was sentenced to death for stabbing two brothers to death in 1991. Shortly after the Court hands down its one-sentence ruling with no dissents, Texas executes Rhoades by lethal injection. • A Maryland judge sentences the gunman who killed five people in the *Capital Gazette* newsroom in 2018 to five life sentences without parole, along with other prison time. • The game maker Activision Blizzard — which makes popular games such as *Call of Duty*, *World of Warcraft*, and *Candy Crush* — reaches an $18 million settlement with the EEOC over allegations by female employees at the company of sexual harassment and discrimination.

September 29: The Senate Judiciary Committee holds a hearing on the Supreme Court's "shadow docket." This colloquial term is used to describe the Court's proceedings that occur outside its typical process for merits cases. The typical process is for a party to seek the Court's review after a final decision from a federal court of appeals or a state court of last resort; once the Court agrees to hear the case, the parties file lengthy briefs and present oral argument. Cases in the "shadow docket" come before the Court in an emergency posture — such as on a motion for a preliminary injunction. These cases are typically decided without full briefing or oral argument, and often result in short, unsigned orders from the Court.

September 30: Justice Alito gives a talk at the University of Notre Dame called "The Emergency Docket." In it, he criticizes the term "the shadow

docket" for giving a "sinister" cast for what he views as a standard part of the Supreme Court's process. • A judge grants Britney Spears's request to remove her father as her conservator. • After serving 15 years in prison for the fire-related deaths of five children in suburban Detroit, Juwan Deering is released and all charges against him are dismissed. Michigan state prosecutors admitted that they had not disclosed evidence favorable to the defense and there was insufficient evidence to tie Deering to the fire.

OCTOBER 2021

October 1: Justice Sotomayor turns down a request from some public-school employees to block New York City's mandate that all such employees be vaccinated. Sotomayor does not call for a response from the City or refer the case to the full Court before denying the request. • The Supreme Court holds an investiture ceremony for Justice Barrett. Although Barrett had been sworn in almost a year earlier, the investiture was postponed because of the pandemic. Justice Brett Kavanaugh is unable to attend the investiture because he tested positive for COVID-19.

October 4: The Supreme Court hears arguments in *Mississippi v. Tennessee* and *Wooden v. United States* on the first day of its new Term.

October 5: The Supreme Court refuses to block the execution of Ernest Johnson, a Missouri man who was convicted of killing three people in 1994. His attorneys had long argued that Johnson was intellectually disabled and that executing him was unconstitutional under the Supreme Court's 2002 ruling in *Atkins v. Virginia*. Shortly after the Court issued its two-sentence order declining to consider Johnson's claims, Missouri executes Johnson by lethal injection.

October 13: The Supreme Court hears oral argument in *United States v. Tsarnaev*, a case about the death-penalty verdict for one of the Boston Marathon bombers. After a federal court of appeals overturned Tsarnaev's death sentence, the Trump Administration asked the Supreme Court to hear the case. The Biden Administration continued to pursue it, even though the Biden Administration said it would work to abolish federal executions. • The estate of Henrietta Lacks sues Thermo Fisher Scientific, which sells a commercial line of tissue developed from Lacks's cancer cells in 1951. The suit accuses the company of unjust enrichment because the company continued to profit from the tissue, even after learning that Lacks never gave her permission for her cells to be taken or used.

October 16: The Department of Justice says it will ask the Supreme Court to bar enforcement of Texas's ban on abortion starting at the sixth week of pregnancy. The Department sued Texas over the law, SB8, in September (see May 19 entry). • More than a dozen women sue Liberty University, claiming that its code of conduct — which allegedly emphasizes sexual purity and punishes women for reporting sexual violence — put them at risk for being victims of sexual offenses.

October 18: Former President Trump sues the National Archives and the House select committee investigating the January 6 attack on the Capitol to try to stop documents related to the attack from being turned over to the committee. • The Supreme Court rules in favor of police officers in *Rivas-Villegas v. Cortesluna* and *City of Tahlequah, Oklahoma v. Bond*, two cases involving qualified immunity, a legal doctrine that protects government officials accused of violating constitutional rights.

October 19: Justice Breyer rebuffs a request from Maine healthcare workers to block the state's vaccine mandate in light of their religious objections. Breyer did not ask for a response to the workers' request or refer it to the full Court. • The House committee investigating the January 6 attack on the Capitol unanimously approves a criminal contempt report against Steve Bannon, for defying a subpoena from the committee.

October 20: Nikolas Cruz pleads guilty to killing 17 people in 2018 at Marjory Stoneman Douglas High School in Parkland, Florida. • A group of educators and civil rights groups file a legal challenge to Oklahoma House Bill 1775, a law limiting public-school teaching about race and gender.

October 21: The Supreme Court declines to halt the execution of Willie Smith III, an Alabama prisoner convicted of a 1991 kidnapping and murder. He had argued that Alabama prison officials were depriving him of any meaningful choice in his method of execution. After the Court denies review of Smith's case, Alabama executes him by lethal injection. • On a film set near Santa Fe, New Mexico, Alec Baldwin fires a prop gun that was loaded with live ammunition, killing cinematographer Halyna Hutchins.

October 22: The Supreme Court schedules argument for November 1 in two cases challenging the Texas law that bans abortion after the sixth week of pregnancy. This accelerates the usual review process. But the Court leaves the ban in place pending argument, over a dissent by Justice Sotomayor.

October 25: Jury selection begins in the civil trial against two defendants involved in the deadly Unite the Right rally in Charlottesville, Virginia in the summer of 2017. • Federal prosecutors charge a Georgia man with fraud for allegedly spending $57,789 in coronavirus relief aid on a Pokémon card.

• Amazon warehouse workers in New York take their first official step toward unionization, submitting signatures from thousands of workers to a local labor office, asking it to authorize a union vote.

October 26: A consumer sues Kellogg's, claiming that its strawberry Pop-Tarts are deceptively marketed because they contain just as much apple and pear as strawberry.

October 28: The Supreme Court allows Oklahoma to execute John Marion Grant by lethal injection. The Tenth Circuit had ordered a stay of execution, but the Supreme Court lifts the stay by a 5-3 vote, with Justices Breyer, Sotomayor, and Kagan dissenting and Justice Gorsuch recused. • The Senate votes 53-36 to confirm Elizabeth Prelogar to serve as the U.S. Solicitor General. She is the second woman to hold the job on a permanent basis. The first was Justice Kagan, for whom Prelogar clerked. • The families of nine people who died in a mass shooting at the Emanuel AME Church in Charleston, South Carolina, reach an $88 million settlement with the Department of Justice. The families had sued the Department, saying that the FBI's negligence allowed Dylann Roof to buy the gun he used in the attack even though federal law barred him from possessing a firearm.

October 29: The Albany, New York sheriff files a complaint charging Andrew Cuomo, New York's former governor, with a misdemeanor count of forcible touching. The complaint was subsequently dismissed.

> Letting a hundred flowers blossom and a hundred schools of thought contend is the policy for promoting progress in the arts and the sciences and a flourishing socialist culture in our land.
>
> Mao Tse-tung
> speech, Beijing (Feb. 27, 1957)

Tony Mauro[†]

A YEAR IN THE LIFE OF THE SUPREME COURT

2021

A summary of developments involving the Supreme Court of the United States in 2021, most of which are unlikely to be memorialized in the United States Reports.

Jim Duff Moves to Supreme Court Historical Society: James Duff has labored in the Third Branch of government for 45 years, working with two chief justices (Warren Burger and William Rehnquist) and serving twice as director of the Administrative Office of the U.S. Courts, from 2006 to 2011, and then from 2015 to 2020. Chief Justice John Roberts Jr., who appointed Duff to the administrative post twice, announced Duff's retirement on January 5 at age 67. "Jim Duff has provided invaluable service to the judiciary," Roberts said in a statement. "As much as I appreciate his many contributions, I understand his desire to begin a new phase of his life. On behalf of the judiciary, I thank Jim for his leadership." Soon after the announcement of his retirement, Duff took another Supreme Court-related position, this time as executive director of the Supreme Court Historical Society. He succeeded David Pride, who

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retired after serving as the society's executive director for 35 years. In a statement, Duff said, "I believe the society's mission of increasing public knowledge about the Supreme Court, its history, and the importance of its independence, as well as that of our entire Judicial Branch, is crucial to the future of our country."

How SCOTUS Got 'Cleaned Up': Jack Metzler, an attorney at the Federal Trade Commission, was very happy on February 25 when the Supreme Court handed down the unanimous decision in *Brownback v. King*, a Federal Tort Claims Act case. But it was not because he had any stake in the ruling one way or the other. Rather, he was happy to learn that the high court used the phrase "(cleaned up)" for the first time in its history. It was four years ago that Metzler coined the term as a way to make citations in briefs and opinions readable and tolerable, without the annoying underbrush of brackets, ellipses, parentheses and quotation marks that usually accompany citations that quote previous writings and the like. "The court's holding is the words that are used, not the punctuation," said Metzler, who promoted the phrase persistently on Twitter. His campaign to propagate the phrase eventually caught on, and it found its way into all federal circuit courts. "We should welcome any effort to make judicial opinions more readable and accessible to every American citizen," said Judge James Ho of the U.S. Court of Appeals for the Fifth Circuit, who has used the phrase. "To paraphrase my friends at the *Green Bag*, citations should not look like goulash." Metzler's latest tally found that the phrase was used more than 5,000 times by lawyers and judges alike. But until February, it never made it to the holy grail of the Supreme Court.

A Presidential Commission: On April 9, President Joe Biden issued an executive order forming the Presidential Commission on the Supreme Court of the United States, a bipartisan group of experts on the court and court reform. In addition to legal and other scholars, the 34-member commission included practitioners who have appeared before the court and former federal judges, as well as advocates for the reform of democratic institutions and of the administration of justice. The goal of the commission was to analyze "the principal arguments in the contemporary public debate for and against Supreme Court reform." The most controversial reforms under discussion were enlarging the court above the current nine justices, and limiting the tenure of justices to 18 years, instead of lifetime tenure "during good behavior," as the Constitution states it. The commission submitted its 288-page report in December, disappointing liberals and conservatives alike by sidestepping some of the biggest reform proposals. A group of lawyers who argue before the court wrote

to the commission, approving of some proposals, such as embracing live audio coverage of oral arguments and opinion announcements. But the letter, written by Mayer Brown partner Kenneth Geller, and Latham & Watkins retired partner Maureen Mahoney, stated that "we believe the Supreme Court itself is best situated to evaluate whether changes should be made to its internal rules or operations. Any changes imposed on the Court that would call into question or jeopardize the crucial protections of an independent judiciary, or subject the Court to an escalating or conflicting series of changes as political parties changed power, could gravely damage the Court to the detriment not only of practitioners but the nation as a whole."

Oyez! A new Marshal of the Court: On May 31, Gail Curley was appointed as the court's new marshal, succeeding Pamela Talkin, who retired in July 2020. Curley began her service on June 21 but wasn't seen in the courtroom until the First Monday in October. The position of marshal is best known for "crying the court," a quaint phrase that means in plain language that she announces the justices' arrival on the bench when the court is in session. But the marshal's job is much more than shouting, and crying the court was not even part of a marshal's job until 1962, when the longstanding position of court crier was phased out. By statute (28 U.S. Code § 672) the marshal has an array of duties, ranging from paying the salaries of the justices to attending all court sessions. The marshal directs the Supreme Court Police, whose 163 officers provide security for the justices, the Supreme Court building and grounds, and other court employees. (In May 2022, Curley was assigned the extraordinary task of investigating the source of a leak of a draft opinion that had not yet been made public.)

Hopwood Joins the Supreme Court bar: Shon Hopwood's storied legal career, from breaking the law to learning the law and then teaching the law, reached a new height in 2021: he became a member of the U.S. Supreme Court bar. Joined by veteran court advocate Kannon Shanmugam, Hopwood filed a cert petition in June in *Bryant v. United States*, a criminal case involving the "compassionate release" component of the amended First Step Act of 2018, an issue close to Hopwood's heart. "If it gets granted, I will probably argue the case," Hopwood said in an interview. (Ultimately, the petition was denied review.) That Hopwood is even considering arguing at the high court is remarkable. After bank robberies in Nebraska that he committed in the late 1990s, Hopwood was sentenced to 12 years in federal prison. He became a jailhouse lawyer, helping other inmates with appeals. Hopwood went on to earn a law degree at the University of Washington School of Law, and was a Gates Public Service Law Scholar. Hopwood clerked for Judge Janice Rogers

Brown of the U.S. Court of Appeals for the D.C. Circuit in 2014 and became a member of the Washington state bar. Most recently, Hopwood has been teaching at Georgetown University Law Center and advocating for the First Step Act. Former solicitor general Seth Waxman and Georgetown law professor Steven Goldblatt were sponsors for Hopwood's admission to the Supreme Court bar. As with other federal courts, the application for joining the bar included questions such as "have you been convicted of a crime, other than a minor traffic violation." He was admitted to the bar quickly nonetheless. The application was processed through the Supreme Court clerk's office, and Hopwood said he did not know whether justices signed off on it.

Thomas Speaks First: In early October, Justice Clarence Thomas asked the first question of 10 of the 11 lawyers who rose to the lectern for oral arguments. The new arrangement raised eyebrows, mainly because Thomas was notoriously silent during oral arguments for decades, until last term. That is when the court heard telephonic arguments because of the pandemic and allotted time to each justice to ask questions, rather than the previous custom of free-for-all interruption of lawyers and fellow justices. Thomas used that orderly space to ask a slew of questions, and he jumped in again for October arguments, this time going first. Whether Thomas asked his colleagues to give him first shots can't be known, but it does seem the justices concertedly stepped back from asking questions before Thomas. Thomas is also the most senior justice of the court, apart from Chief Justice Roberts.

Will Opinion Announcements Resume? Supreme Court justices have announced their opinions from the bench "since the first decision of the Supreme Court in 1792," according to Bernard Schwartz, the legendary late Supreme Court scholar. That long tradition indicated that the justices viewed announcements as one of their public roles. They are especially meaningful when justices announce their dissents from the bench. But that tradition fell away when the pandemic struck in 2020. The justices worked from home, and the public was not allowed into the court building, so an oration summarizing a court decision or separate opinion from the bench was obsolete. Instead, opinions were just posted on the court's website. But the justices returned to the courtroom when the current term began on October 4, as did the social-distanced lawyers involved in cases, credentialed journalists, law clerks and a few others. Arguably the justices could have resumed tradition and announced opinion summaries when opinions of the term were ready to be handed down. But that did not occur. Full opinions, not including opinion summaries, were again posted online, without announcements from the bench.

Supreme Court's Unofficial Barber: Diego D'Ambrosio, the longtime barber who for decades cut the hair of Supreme Court justices, judges, ambassadors, politicians, priests, journalists like me, and anyone else who came into his Dupont Circle salon, died on October 22 at age 87. Diego was a joyous Italian, a barber of civility, so to speak, who always welcomed his customers with a warm greeting. Justice Samuel Alito Jr. said of D'Ambrosio's passing, "I was a regular customer of Diego's for the past 15 years, and I always looked forward to seeing him. He was a cheerful, friendly, kind, and generous man and a true Washington institution … . Like many, many others, I will miss him. May he rest in peace." D'Ambrosio also cut the hair of Chief Justice William Rehnquist, and they became friends. D'Ambrosio once told me, "He would come every two weeks or three weeks for a haircut and greet me in Italian: 'Buon giorno, Diego. Come stai?' I'm not a lawyer, but sometimes he would ask me for advice. He would say, 'I'm in your chair now, Diego, but if you were in my chair, what would you do?'"

A Harlan Supreme Court? In an October 24 essay in *Politico*, Sarah Isgur wrote that it was time for naming the Supreme Court building. "The building's lack of identity can sometimes seem to mirror the opaqueness of the institution itself. Both the edifice, and the court it houses, need a story to help Americans make sense of them," said Isgur, a Harvard Law School grad who clerked on the U.S. Court of Appeals for the Fifth Circuit and was a Justice Department spokeswoman during the Trump administration. She wanted to name the building after Justice John Marshall Harlan, who served at the court from 1877 to 1911. (He is not to be confused with his grandson, John Marshall Harlan II, who was a justice from 1955 to 1971.) The pinnacle of Harlan's story was his role as the sole dissenter in *Plessy v. Ferguson*, the infamous 1896 race ruling that approved the infamous concept of separate but equal. But as Isgur acknowledged, Harlan did not always embrace racial equality. Harlan had opposed "both Lincoln's Emancipation Proclamation and the 13th Amendment before becoming the greatest defender of racial equality in court history," she wrote. But still, Isgur said, the court should be named after Harlan not in spite of those failings "but because of [them]. He, of all the justices in U.S. history, shows how an intense and unfaltering faith in the Constitution can chart a path to enlightenment."

General Prelogar Arrives: There was some suspense at the Supreme Court on November 1 when new Solicitor General Elizabeth Prelogar took to the lectern for her first appearance: Would she be called General Prelogar? The answer came swiftly, when Roberts began the oral argument: "We'll hear argument next in Case 21-588, *United States v. Texas*. General Prelogar."

Roberts had a slight emphasis on "General." Why was that an issue? After all, women can be generals just like men. But as University of Texas law professor Steve Vladeck put it in a tweet that day, "The Solicitor General is not a 'General.' The word 'General' in the title is an adjective, and adjectives aren't honorifics." That provoked some stern discussion. "Don't care. Going to call her GENERAL Prelogar 'til the wheels fall off," wrote Melissa Murray, professor at New York University School of Law. As with almost anything Supreme Court-related, there's a precedent for this. In May 2009, soon after Elena Kagan was confirmed as U.S. solicitor general, the first woman to hold that position, I interviewed her and asked her, "How do you like being addressed as "General Kagan"? Whimsically, she responded, "A few more weeks, and I'll be expecting everyone to salute me." More seriously, Kagan said she had the option of being called or not called "general." Kagan said, "I know, for example, that Attorney General [Janet] Reno disliked being called 'general.' But my thought basically was: The justices have been calling men SGs 'general' for years and years and years; the first woman SG should be called the same thing." Prelogar, the second female solicitor general in history, did the same.

Warren Burger's Biography in the Making: The late Chief Justice Warren Burger died in 1995 at the age of 87, after a consequential career as a conservative head of the nation's highest court and as the man who helped improve the modern-day judiciary — federal and state — during his 17 years as chief. When chief justices die, they tend to be honored with a biography chronicling their lives and legacies, and a law school library collection of their papers and memorabilia. But as reported by me and *The National Law Journal* in August, for Burger, both of those honorifics have been problematic, making him a less-known legal figure than might be expected. Burger's designated biographer, Tim Flanigan, has been working on the book sporadically for 25 years, with no end in sight. Meanwhile, Burger's papers won't be made public until 2031 at the earliest. The only outsider who can view the papers is Flanigan, and he says he has not visited the library in 10 years. Some of Burger's former clerks and admirers are not happy. "From our perspective, it's just appalling," says historian Clare Cushman, referring to the tardiness of the book project. "There have only been 17 chief justices, and they all have biographies" except for Burger, she said. Cushman is director of publications at the Supreme Court Historical Society, which Burger founded in 1974. (In September 2022, it was announced that Todd Peppers, a Supreme Court scholar, has joined Flanigan to undertake the project, with the goal of finishing the Burger biography in five years or so.)

Chief Justice's Year-End Assessment: As usual, Chief Justice Roberts issued his year-end report on the federal judiciary on December 31. This time he focused on needed improvements at a time when the federal judiciary was being criticized. "I would like to highlight three topics that have been flagged by Congress and the press over the past year. They will receive focused attention from the Judicial Conference and its committees in the coming months," Roberts wrote. With stern words, he expressed concern about a *Wall Street Journal* report indicating that between 2010 and 2018, 131 federal judges participated in 685 matters involving companies in which they or their families owned shares of stock. "Let me be crystal clear: the Judiciary takes this matter seriously. We expect judges to adhere to the highest standards, and those judges violated an ethics rule … . Individually, judges must be scrupulously attentive to both the letter and spirit of our rules, as most are." His second topic was "the continuing concern over inappropriate behavior in the judicial workplace." Roberts said, "inappropriate workplace conduct is not pervasive within the Judiciary. Nevertheless, new protections could help ensure that every court employee enjoys a workplace free from incivility and disrespect." His third topic of concern was "an arcane but important matter of judicial administration: judicial assignment and venue for patent cases in federal trial court. Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case."

The rose is red, the violet's blue,
The honey's sweet, and so are you.

Gammer Gurton's Garland (1784)

Catherine Gellis & Wendy Everette†

The Year in Law & Technology

2021

We're here live. We're not cats. Welcome to a review of the state of Law and Technology in 2021, the year we continued to rely on video conferencing and remote work technologies. Several of the changes our technical and legal world went through last year brought some delights — lawyers in cat filters! — but many brought sober reminders of the fragility of our institutions — legal, digital, and otherwise. Join us as we revisit a year we are probably very happy to have now reside in the past.

January

The year started off with a disclosure that the SolarWinds vulnerability[1] had affected the PACER court records system, potentially allowing malicious parties to access sealed court records.[2] In the wake of the disclosure, courts

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[1] https://www.cisecurity.org/solarwinds.

[2] https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

modified how they accepted certain highly sensitive files, stating "highly sensitive court documents (HSDs) filed with federal courts will be accepted for filing in paper form or via a secure electronic device, such as a thumb drive, and stored in a secure stand-alone computer system." • This month also brought MIT's 6th annual "Independent Activities Period" (a between-semesters period where mini courses are often offered) Computational Law Course,[3] with over 90 people completing the course this year.[4] The class offered lectures in topics like "Computational Law and Standards," "Computational Law and Property Ownership," and legal data analytics.

FEBRUARY

"I'm here live. I'm not a cat." A remote court session in Presidio County, Texas, delighted the Internet when an attorney appeared in the guise of a fluffy white kitten with sad eyes.[5] Before finding a way to disable the video filter, the attorney offered "I'm prepared to go forward with it," capturing the can-do spirit of attorneys and courts still working out how remote court sessions could be run. • Beyond video filters, remote court sessions brought changes in how attorneys attended and discussed, in real time, ongoing hearings. From Sean Marotta, an observation about remote hearings and lawyerly camaraderie: "One thing I will miss when appellate arguments return to the real world is the real-time IM commentary among the non-arguing attorneys on the case."[6] • When technology wasn't turning lawyers into cats, it got us back to Mars, with a new rover safely landing to run more tests on our neighboring planet.[7] Also back on Earth, all technology, including lights and basic HVAC technology, got stymied when the state of Texas ran out of electricity.[8] • Meanwhile, Laura Moy's *A Taxonomy of Police Technology's Racial Inequity Problems*[9] appeared in the *Illinois Law Review*. The article provides a new taxonomy for policy makers "that parses the ways in which police technology may aggravate inequity as five distinct problems: police technology may (1) replicate inequity in policing, (2) mask inequity in policing, (3) transfer inequity from elsewhere to policing, (4) exacerbate inequitable policing harms, and/or (5) compromise oversight of inequity in policing." • Then

[3] https://mitmedialab.github.io/2021-MIT-IAP-Computational-Law-Course/.
[4] https://twitter.com/bryangwilson/status/1347611522932072448.
[5] https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.
[6] https://twitter.com/smmarotta/status/1357437521622351872.
[7] https://www.techdirt.com/2021/02/22/what-landing-mars-again-can-teach-us-again/.
[8] https://en.wikipedia.org/wiki/2021_Texas_power_crisis.
[9] https://illinoislawreview.org/print/vol-2021-no-1/a-taxonomy-of-police-technologys-racial-inequity-problems/.

again, who needs police surveillance when people can do it themselves? Journalist Kashmir Hill wrote in the *New York Times* about what it was like to stalk her husband (with his permission, if not awareness) by stashing air tags and similar devices on his person.[10] • The Cl0p ransomware group broke into law firm Jones Day's systems and leaked stolen data, including confidential client communications.[11] The leak was met with observations that "effective cybersecurity [is] vital for law firms to fulfill their role as custodians of clients' legal information."[12]

MARCH

Oh the things we can no longer write
Thanks to the Ninth Circuit and copyright
In a case about Dr. Seuss
The plaintiff won, no more fair use!

In particular, the Ninth Circuit overturned a district court decision that a mash-up involving the Dr. Seuss and Star Trek imagery was not fair use.[13] • Digital Government agency 18F released a technical analysis of PACER and proposed replacement solutions.[14] It offered a blunt assessment of an aging system that is vital to the operations of our judicial system: "CM/ECF is not sustainable. System complexity is leading to long development and installation timelines, long training periods for new staff, a negatively impacted experience for users, high costs, and security risks. The foundational technology is dated and will be hard to maintain into the future." • Returning to Zoom Court, the downside of virtual court appearances that can be streamed online surfaced this month. A group of Internet users started collating and sharing "Crazy Zoom Court Videos" on Reddit[15], causing some of the most distressing moments of some peoples' lives to be streamed.[16] While some commentators likened the Zoom court sessions to broadcasting trials over television, others pointed out that live chats that often accompany the streaming can be toxic, and the phenomenon of videos being shared widely online could compound the trauma for some defendants. • In other law review news, the *Akron Law Review* released a symposium issue on *Covid &*

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[10] https://www.nytimes.com/2022/02/11/technology/airtags-gps-surveillance.html.
[11] https://www.databreaches.net/threat-actors-claim-to-have-stolen-jones-day-files-law-firm-remains-quiet/.
[12] https://www.advintel.io/post/breach-of-trust-how-threat-actors-leverage-confidential-information-against-law-firms.
[13] https://www.techdirt.com/2021/03/10/culture-youll-cancel-thanks-to-ninth-circuit-copyright/.
[14] https://aboutblaw.com/XFW.
[15] https://www.reddit.com/r/ZoomCourt/.
[16] https://www.vice.com/en/article/z3va9x/zoom-court-videos-are-making-peoples-darkest-hours-go-viral.

The Practice of Law: Impacts of Legal Tech.[17] The topics covered included artificial intelligence and the practice of law as well as remote/hybrid law clinics. • How well-supported are your claims in your legal writing? Clearbrief, which aims to give you an answer to that question by using software to analyze your claims and find supporting evidence in the record or in case law, raised a seed round this month.[18]

APRIL

April saw even more-high profile skirmishes about copyright fair use, with the Second Circuit finding that Andy Warhol's famous prints of Prince was not,[19] but the Supreme Court finding that Google's use of Java in Android was.[20] • The FBI and DOJ were involved in an effort this month to tamp down a large-scale attack against Microsoft Exchange Servers. These servers, which provide email and calendaring services to companies, are often hosted by companies "locally," that is, within their own office space or their own data centers instead of in a "cloud" run by Amazon Web Services or Microsoft directly. A vulnerability was discovered and exploited on a large scale by malicious parties, who automated their ability to detect unpatched Exchange servers connected to the Internet. The FBI took a previously unprecedented step of proactively connecting to the exploited servers and patching them remotely, rather than relying on the Exchange administrators to patch their own machines. The DOJ notes that this step was taken because, while many patched their infected servers, "others appeared unable to do so, and hundreds of such web shells persisted unmitigated."[21] The warrant[22] was partially unsealed when the FBI operation concluded. • It's not The Year in Law & Technology without a redaction fail, and this year Google provided. Documents filed by Google attorneys in an antitrust lawsuit were not properly redacted when first uploaded.[23] We remind our readers again to ensure that they use PDF software with a "redact" tool and to track which versions of documents should be uploaded to court systems under seal.

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[17] https://ideaexchange.uakron.edu/akronlawreview/vol54/iss4/.
[18] https://clearbrief.com/blog/press_release.
[19] https://www.techdirt.com/2021/04/12/look-heres-some-more-culture-being-canceled-now-thanks-to-second-circuit/.
[20] https://www.techdirt.com/2021/04/05/supreme-court-sides-with-google-decade-long-fight-over-api-copyright-googles-copying-java-api-is-fair-use/.
[21] https://www.justice.gov/opa/pr/justice-department-announces-court-authorized-effort-disrupt-exploitation-microsoft-exchange.
[22] https://www.justice.gov/opa/press-release/file/1386631/download.
[23] https://twitter.com/FreeLawProject/status/1381655337963425792.

MAY

What is "link rot" and why does it affect newspapers and Supreme Court opinions? Link rot is a term for web hypertext links that break over time, as archives move and publications go out of print. Court opinions and newspaper articles often include URLs in them, and over time, many of the sites that hosted those linked pages have gone offline. At Harvard, Jonathan Zittrain led a team that studied broken links in *New York Times* articles[24] and found that 6% of links from 2018 and 72% from 1998 were now broken. He noted that in 2014 he, Kendra Albert, and Laurence Lessig documented the number of broken links in Supreme Court opinions and found that 50% of the links embedded in the court's opinions since 1996 (the first year that a URL appeared in an opinion) had broken.[25] • A computer attack against the Alaska Court System this month caused the court system to take down its public website and electronic records system for a period of time.[26] The courts did not receive a ransom demand[27] but did hire security contractors to assist with an investigation. Systems were down for over a week, during which time many deadlines were extended.[28] • May also saw the Facebook Oversight Board return its verdict about suspending Donald Trump from Facebook. In general: probably ok, but with some caveats.[29] But unhappy that some platforms were removing some of his favorite politicians, in May Florida Governor Ron DeSantis signed into law SB7072, which sought to restrict social media platforms' ability to decide what user generated content could appear on their services,[30] unless, however — and we promise we are not making this up — the offending social media platform also happened to own a theme park somewhere in the state.[31] In fact, it was a tough month for social media, with the Ninth Circuit also ruling against Snap in *Lemmon v. Snap*, a decision that seemed to ignore Section 230, and the speech issues

[24] https://twitter.com/zittrain/status/1395750908349325315.
[25] https://twitter.com/zittrain/status/1395761678055260162.
[26] https://apnews.com/article/alaska-technology-courts-government-and-politics-e9094a1cf900effcbe6f64db7a7b8e66.
[27] https://apnews.com/article/alaska-courts-79195506ac19f12520cb28cd774e58b6.
[28] https://www.adn.com/alaska-news/crime-courts/2021/05/11/alaska-court-system-starts-bringing-back-some-online-services-after-cyberattack/.
[29] https://www.techdirt.com/2021/05/05/oversight-boards-decision-facebooks-trump-ban-is-just-not-that-important/.
[30] https://www.techdirt.com/2021/05/24/florida-man-signs-blatantly-corrupt-unconstitutional-social-media-bill-cementing-florida-as-tech-laughing-stock/.
[31] https://www.techdirt.com/2022/02/03/how-disney-got-that-theme-park-exemption-ron-desantis-unconstitutional-social-media-bill/.

implicated, by finding that Snap could potentially have liability for the harms resulting from users employing its speed filter.[32]

JUNE

In June we were told by the Supreme Court that we may "fuck this cheer" — or, rather, students could express such sentiments out of school without fear of being punished by their schools.[33] Also this month the Supreme Court spoke to the reach of the Computer Fraud and Abuse Act, finding that it did not support charges as aggressively as the government wanted.[34] • Meanwhile, if you were wondering what happened to that SB7072 "theme park" law that Florida passed in May, it was enjoined by a federal district court in June for being an unconstitutional violation of the First Amendment in NetChoice v. Moody.[35] Also on the social media regulation front, the GAO came out with a report that the 2018 Amendments to Section 230 of the Fight Online Sex Trafficking Act (FOSTA) had not met any of the objectives supporters of the law had originally touted, which matters especially given the chilling cost to online speech FOSTA has led to, with apparently no upside.[36] • When should defendants be forced to unlock digital devices? Orin Kerr highlighted a case this month out of Florida, *State v. Garcia*.[37] In the defense's brief, attorneys highlighted the extensive amount of data available through unlocked phones, arguing that "expansion of governmental powers to compel disclosures of personally-held information" such as passwords leads to "endless stores of personal information on a person's smartphone" and an "unlimited digital record of the intricate details of a person's life."[38] • Legal automation is a topic we've visited several times over the years, and we're here this month with an interesting outcome of one firm's automation work. Keller Lenkner built their own computer system to recruit and work with members of the public who might have arbitration

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[32] https://www.techdirt.com/2021/06/08/why-ninth-circuits-decision-lemmon-v-snap-is-wrong-section-230-bad-online-speech/.

[33] https://www.techdirt.com/2021/06/24/fuck-this-cheer-particular-says-supreme-court-decision-upholding-students-free-speech-rights/.

[34] https://www.techdirt.com/2021/06/04/supreme-court-finally-limits-widely-abused-computer-hacking-law-just-bit/.

[35] https://www.techdirt.com/2021/06/30/as-expected-judge-grants-injunction-blocking-floridas-unconstitutional-social-media-law/.

[36] https://www.techdirt.com/2021/06/23/as-everyone-rushes-to-change-section-230-new-gao-report-points-out-that-fosta-hasnt-lived-up-to-any-promises/.

[37] https://twitter.com/OrinKerr/status/1405021455218188291.

[38] https://efactssc-public.flcourts.org/casedocuments/2020/1419/2020-1419_brief_141036_answer20brief2dmerits.pdf.

claims against companies like DoorDash or Amazon. As a result of the thousands of arbitration claims filed through these automated systems, Amazon reversed course on mandatory arbitration and allowed individual or class action lawsuits again, likely in large part due to stating that they would pay any arbitration filing fees.[39] • Returning to Zoom in the courtroom, a *Seattle Times* opinion piece called out the struggles of remote hearings.[40] The author highlighted "maddening technical glitches," and the inability of a remote jury to observe "physical cues and a rapport between parties that a juror can only fully observe and appreciate in person." At the same time, remote juries have opened up jury service to people physically unable to travel to a courthouse, and as such may be more democratic.

JULY

We've previously learned that animals cannot hold copyrights. But can robots and AI be creators? Ed Walters highlighted an "[i]nteresting ruling in Australia — court holds that AI/machines may be an inventor (not just a creative instrument) in patent law."[41] The Australian federal court found that "an inventor as recognised under the act can be an artificial intelligence system or device."[42] • This month also featured Fastcase's 11th Annual Fastcase 50. Congratulations to the honorees, the "smartest, most courageous, innovators, techies, visionaries, and leaders" of law & technology in 2021.[43] Among the honorees are Haley Altman, who created "Doxly, a tech startup built to organize attorneys' legal transactions," and Miriam Childs, Director, Law Library of Louisiana, Louisiana Supreme Court and developer of programs for Black Law Librarians Special Interest Section of the American Association of Law Librarians (AALL). • Returning again to Zoom court, how do courts protect the identity of confidential informants when the court is in remote session? An Illinois court explored how one might be able to mask a person's identity using video filters, finding, "In an age where an attorney can appear in a Zoom court hearing as a cat, the State and defendants can certainly work together to provide the information necessary for a

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[39] https://arstechnica.com/tech-policy/2021/06/after-75000-echo-arbitration-demands-amazon-now-lets-you-sue-it/.

[40] https://www.seattletimes.com/opinion/what-gets-lost-when-zoom-takes-over-the-courtroom/.

[41] https://www.theguardian.com/technology/2021/jul/30/im-sorry-dave-im-afraid-i-invented-that-australian-court-finds-ai-systems-can-be-recognised-under-patent-law.

[42] Id.

[43] https://www.fastcase.com/fastcase50/?class=2021.

full defense without revealing a CI's physical appearance and, thus, identity" through the use of video filters or other masking technologies.[44]

AUGUST

Have you noticed that emojis look different after software updates? Apple and other software providers often subtly update the look of their emojis over time. This shift has been used in a court case, where emoji version variations helped to flag fabricated evidence.[45] In *Rossbach v. Montefiore Medical Center*, the heart eyes face emoji was used to date a screenshot of a supposed text messaging exchange. The court's conclusion? "This image is a fabrication."[46] • Also in the courts: the gig economy, and this month a state appeals court in California took a look at a challenge to Proposition 22. The underlying issue in this case was that a law earlier passed by the state legislature, AB5 effectively would have ended gig workers (and others) ever being considered independent contractors, regardless of whether deeming them regular employees actually made sense or helped them. Proposition 22 was intended to return to the previous status quo, and passed. But then the appeals court, in a ruling that half made sense and half seemed to take a few leaps of logic, decided that it violated the California constitution and some of its provisions about labor law and what parts of the government get to speak to its parameters.[47]

SEPTEMBER

Would your AI like to get a patent? Tough luck, said a US judge this month. Also, tough luck, said another US judge at the very end of August, for anyone who doesn't have cable and who would like to use the non-profit Locast service to essentially rent rabbit ears to pick up the over-the-air programming they were otherwise entitled to watch. Despite the copyright statute authorizing such services, this judge decided that Locast did not qualify, which led to it shutting down completely in September, shortly after the ruling.[48] • In March 2020, a Wisconsin teenager came down with a res-

[44] https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=Z12TJ9_kD4AkzzvkJN7dmeOmYtxc_DofT1nAdJaB_Z80OOphLzsU_V4-UzdCD6ip0.

[45] https://blog.ericgoldman.org/archives/2021/08/emoji-version-variations-help-identify-fabricated-evidence-rossbach-v-montefiore-medical.htm.

[46] https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3502&context=historical.

[47] https://www.techdirt.com/2021/08/23/understanding-california-ruling-that-said-prop-22-gig-worker-ballot-initiative-was-unconstitutional/.

[48] https://www.techdirt.com/2021/10/08/locast-shuts-down-as-yet-again-bad-interpretation-copyright-law-makes-world-worse/.

piratory illness and posted on her Instagram that she had contracted Covid-19. The County Health Department became alarmed and sought to force her to remove the Instagram post, sending the local sheriff to threaten the teenager with a disorderly conduct charge. The teenager sued for declaratory judgment that her First Amendment rights had been violated.[49] This month, the U.S. District Court for the Eastern District of Wisconsin found for the teenager. • Meanwhile, Texas Governor Greg Abbott decided that Florida Governor DeSantis shouldn't have all the fun trying to regulate Internet platforms, so he signed his own Texas version (and used social media to stream his signing).[50] This was after he had already signed SB8, a bill that this month led to a sea change at the United States Supreme Court when it elected to use the shadow docket to abandon precedent and refuse to enjoin a law that at that point clearly violated it.[51] • Do you click and file, or does it take your firm a long time to assemble and sign off on legal documents? Legal innovation has so far focused primarily on two areas, improving research and providing aids for the content of legal filings, and automation of the related workflows. This update came to us from the workflow automation side, as Lawyaw was acquired by Clio this month.[52] Lawyaw's team joined Clio to work on automation around document flows like collecting digital signatures and generating standardized documents to "streamlin[e] the creation of important court forms and legal documents."

OCTOBER

Legal analytics firm Trellis Research[53] completed a Series A funding round this month.[54] The firm offers state trial court data in a searchable database, as well as extensive analytics and research tools for litigators. • If you press the control key and the "u" key on your keyboard while reading a webpage to view the HTML source of the page, have you committed a Computer Fraud and Abuse Act ("CFAA") violation? A reporter found Social Security Numbers of some educators in the page source of a state department of education webpage.[55] When he reported it, the Missouri state government threatened

[49] https://blog.ericgoldman.org/archives/2021/09/law-enforcements-efforts-to-scrub-covid-misinformation-online-violated-the-first-amendment-cohoon-v-konrath.htm.
[50] https://www.techdirt.com/2021/09/09/texas-gov-greg-abbott-announces-twitter-livestreaming-facebook-his-signing-bill-that-removes-1st-amendment-rights-both/.
[51] https://www.techdirt.com/2021/09/22/night-united-states-supreme-court-cancelled-law/.
[52] https://www.clio.com/about/press/lawyawacquisition/.
[53] https://trellis.law/.
[54] https://www.crunchbase.com/funding_round/trellis-research-series-a--46ccec03.
[55] https://techcrunch.com/2021/10/15/f12-isnt-hacking-missouri-governor-threatens-to-prosecute-local-journalist-for-finding-exposed-state-data/.

the reporter and his newspaper with a CFAA charge.[56] The newspaper defended viewing the HTML page source as a non-malicious activity, stating, "A hacker is someone who subverts computer security with malicious or criminal intent. Here, there was no breach of any firewall or security and certainly no malicious intent." The local prosecutor declined to press charges.[57]

NOVEMBER

Yet more activity in legal tech fundraising this month, as Everlaw closed a Series D fundraising round.[58] Everlaw is an eDiscovery platform for ingestion of discovery material, search, classification, and investigations that had recently expanded their legal holds technology. • Heading back to remote court hearings, Sarah Sherman-Stokes (@sshermanstokes) shares another instance where a video conferencing software hiccup interfered with a hearing, "in case anyone was curious how virtual #immigration court for #immigrant #detainees is going, this week i saw a judge threaten to order someone deported b/c he was being "noncooperative" & "extremely difficult" by "refusing to answer" her questions. [R]eader: HIS VIDEO FROZE."[59] Her students noticed that the detainee hadn't blinked in more than 2 minutes, indicating that the video was suffering from lag, and brought this to the attention of the judge, who had not noticed due to the small size of the video display.[60]

DECEMBER

Northwestern's *Journal of Technology and Intellectual Property* put out a symposium issue this month on a favorite topic for us, "Law + Computation: An Algorithm for the Rule of Law and Justice."[61] The issue featured articles on Artificial Intelligence as Evidence, Syntax for Machine Readable Legislation, and Law, Inventorship, and Artificial Intelligence. • Is change in the legal industry brought by technology and software slow and steady, or are big jumps more common? Richard Tromans wrote in *Artificial Lawyer* this month that change can be "variegated and asynchronous" with large leaps in particular areas when "the right conditions and drivers come along."[62] He

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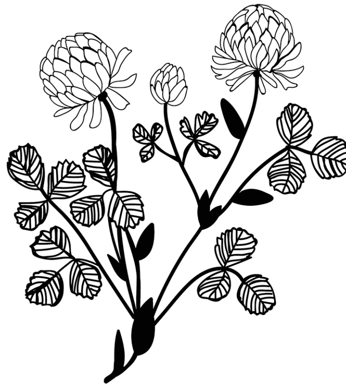
[56] https://futurism.com/the-byte/governor-journalist-hacker-html.
[57] https://www.malwarebytes.com/blog/news/2022/02/journalist-wont-be-indicted-for-hacking-for-viewing-a-state-websites-html.
[58] https://www.everlaw.com/blog/2021/11/02/everlaw-secures-202-million-series-d-round-of-funding/.
[59] https://twitter.com/sshermanstokes/status/1461344803749339137.
[60] https://twitter.com/sshermanstokes/status/1461344805280260100.
[61] https://jtip.law.northwestern.edu/issues/?vol=vol%2019%20-%20issue%201.
[62] https://www.artificiallawyer.com/2021/12/13/legal-market-change-isnt-always-incremental/.

pointed to advances in natural language processing ("NLP") which have drastically improved legal research tools in the last five years. While the technical changes are more under the hood for most users of legal research tools, users might have noticed that software had improved to "just find[] stuff that we need." • But if the stuff you want to find is in an ebook — a form in which books are increasingly found — it's iffy whether you'll be able to find it at a library. So the state of Maryland this month tried passing a law requiring them to be licensed to libraries on reasonable terms, although the legislation was since blocked by a court.[63] • And what else could better close out the year than the viral story of Jeans and Jorts, two cats whose workplace saga told on Reddit has taught us that, yes, we can all get along, and, no, you should not put butter on your cat.[64]



Ring-a-ring o' roses,
A pocket full of posies,
A-tishoo! A-tishoo!
We all fall down.

Kate Greenaway
Mother Goose (1881)

[63] https://www.techdirt.com/2022/03/03/unfortunate-not-surprising-court-blocks-marylands-library-ebook-law/.
[64] https://www.upworthy.com/the-epic-saga-of-workplace-cats-jean-and-jorts.

Image 1: The Courtroom of the Supreme Court of the United States. Fred Schilling, Collection of the Supreme Court of the United States.

FLOWERS IN THE ARCHITECTURE

FLORAL MOTIFS IN THE SUPREME COURT BUILDING

Matthew Hofstedt†

Many a spectator waiting for oral argument to begin in the Courtroom of the United States Supreme Court has gazed up at the coffered ceiling and noticed the decorative rosettes — some people may even count them to pass the time (hint: there are 100 in the main grid, not counting the smaller ones). (Image 1) An astute observer will have already noticed similar rosettes in the ceiling of the monumental Great Hall that leads to the Courtroom. In both instances, and elsewhere in the building, the use of floral designs within the coffers is part of the architectural detail that evokes the classical buildings of ancient Greece and Rome. In addition to these more generic rosettes, a few sculpted flowers convey specific meanings within a larger sculptural group.

The Supreme Court Building's architect, Cass Gilbert, was well versed in a wide range of architectural styles, and his drafting team created rosettes based on classical designs for each ceiling. The architectural modeling firm of John Donnelly & Sons turned the approved drawings into three-dimensional models to create molds to produce multiple plaster rosettes of the same pattern. In each room with a coffered ceiling, therefore, a fixed number of rosettes repeat. In the Courtroom ceiling, for example, there are only four unique designs that appear in the main section. While some rosettes found in the building do represent specific types of flora, there is not any documentation suggesting the Courtroom rosettes represent any specific flowers.

The rosettes do serve a practical purpose by providing texture to the ceiling to absorb sound, but what draws attention to them and brings the ceiling of each room alive is the decorative painting and gilding applied to the beams and coffers. The Bid Specifications for the Court's Decorative Painting, issued in January 1934, gave these instructions,

> Careful study should be made of the marble work, the woodwork and the lighting (both natural and artificial) of the rooms and spaces to be decorated to the end that harmonious effects be produced and violent

† Associate Curator, Supreme Court of the United States.

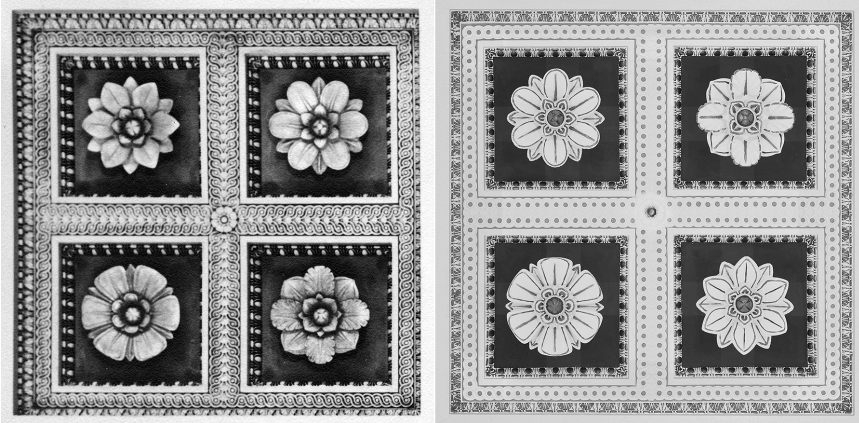


Image 2: Comparison of original Paris & Wiley rosettes (left) with those in the current Courtroom. Collection of the Supreme Court of the United States.

> contrasts avoided. Especially is this desired in the Supreme Court Room where excessive coloration may well be avoided. In the Main Hall, the two Conference Rooms, the Reading Room and the Alcoves of the Main Library richer coloration in the style of the 16th Century Italian Renaissance would not be inappropriate, and the moldings, arrises, capitals and carvings could be treated with dulled gilding in the manner of that style. In short, quiet, rich harmony and dignity rather than gaiety and brilliancy should be the basis of the designs.[1]

The competition awarded four separate contracts, with the New York decorative painting firm of Paris & Wiley winning the bids for the Great Hall and Courtroom ceilings. Their winning designs used darker hues and burnished gilding that were in keeping with the direction outlined in the specifications, bringing a patina of age to the ceilings. (Image 2) The other contracts went to the more colorful designs of Angelo Magnanti (the East Conference Room); Mack, Jenney and Tyler (the West Conference Room); and Ezra Winter (the Library Main Reading Room).

Within weeks of the building's opening in October 1935, however, the Justices were complaining about poor lighting on the Bench. The original Courtroom featured one large pendant light fixture that proved inadequate (Image 3), and the Architect of the Capitol, David Lynn, immediately

[1] January 20, 1934, Specifications for Decorative Painting, Supreme Court Building, Office of the Curator, Supreme Court of the United States.

Image 3: The original pendant light hangs over the Courtroom, late 1935. Leet Brothers, Papers of John R. Rockart, Office of the Curator, Collection of the Supreme Court of the United States.

sought solutions. After undertaking several studies, including covering the original ceiling with white cloth hiding all the rosettes, Lynn decided to repaint the ceiling to a lighter scheme to reflect more light.[2] In late spring 1936, he contacted Paris & Wiley to discuss the plan but the firm disagreed with his recommendation,

> We would advise discarding the scheme of new decoration as shown in the old ivory panels hanging on the ceiling. Without offering any criticism, the execution of such a scheme would prove ineffectual and at variance with the decoration of the room originally conceived by Cass Gilbert. In addition, it would entail an unnecessary expense and prove a costly piece of work. Various members of this organization have visited the courtroom and have reached an accord as to the proper decoration of the room, details of which we would be pleased to submit at a conference. Our fee for such a conference would be $500.00.[3]

Gilbert had died during the summer of 1934, but Paris & Wiley believed they could alter their design to remain true to the architect's vision for the Courtroom. Lynn was consulting with the other two architects who had completed the Supreme Court Building project, Cass Gilbert, Jr., and John R. Rockart. Not only were the two at odds over how to improve the Courtroom lighting, they were also battling over control of the Gilbert architectural firm. (Rockart ultimately brought a lawsuit that settled out of court and he departed the firm.)

Without the late Gilbert's strong direction that may have convinced Lynn to retain a modified Paris & Wiley scheme, the Architect of the Capitol went ahead with the plans to repaint the ceiling. Over the summer of 1936, Ezra Winter and his team painted a lighter scheme as captured by a newspaper account,

> In the court room proper it looks like a cross-word puzzle. The place is full of scaffolding. The beautiful columns are draped in canvas and every piece of valuable decoration has been shrouded except the ceiling. High up on these scaffolds, Mr. Ezra Winter, an eminent New York artist, is at work painting it over.
>
> When the $10,000,000 edifice was completed in the name of Justice to house nine men who came nearer smacking the New Deal flat

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[2] "Supreme Court Decides for Light Against Beauty", *New York Herald Tribune*, February 3, 1936.

[3] Paris & Wiley to David Lynn, June 16, 1936, Copy from Records of the Architect of the Capitol, Office of the Curator, Supreme Court of the United States.

> than any other group of persons in the United States, it was found the lighting was not up to snuff.
>
> The Justices and the lawyers couldn't see. As a temporary measure a false ceiling was put in and painted over. It was discovered in the first instance that the dark blues and browns absorbed the light and kept it from reaching the bench.
>
> Capitol Architect David Lynn conducted a series of experiments with colors and different lights until he reached the right tone. The new specifications have been completed and Mr. Winter is redecorating in gold leaf, ivory and light colors to reflect the light to its proper place.[4]

This new ceiling paint scheme certainly changed the appearance of the room from the darker Paris & Wiley version in keeping with Gilbert's original design intent. Winter tried to keep some beauty in the ceiling, reporting to Lynn it was 80% lighter but "I do not see how it is possible to make a still lighter scheme and have anything left at all in the way of decorated ceiling."[5]

The *Washington Star* described Winter's completed work on October 31, 1936, under the headline "Beauty and Perfect Light Give Rays for High Court,"

> The ceiling design is made up of a series of blocks that contain a central floral motif. That is, there are 25 squares that cover the ceiling and each of these squares is divided into four smaller squares. In the center of each of these four smaller squares is an open blossom, conventional in form and each differing slightly from the others in the details of petal arrangement or the flower's center. The large block made up of these four small squares is outlined in a band of lemon color, the color of the blossoms themselves, while the background throwing the blossoms in relief is painted a soft grayish blue.
>
> At the corners of these large blocks are small squares containing a central design painted in a rich terra cotta. It is these terra cotta medallions, incidentally, that are the secret of the richness of the ceiling's effect, adding the depth of color necessary, and used, ingeniously enough, where no reflecting power is necessary — an office performed by the lighter gray-blue background.
>
> From the center of the terra cotta medallions hang the chandeliers, and there are 16 of these lights in the forward part of the chamber.

[4] Unidentified newspaper, possibly "The Greatest Show on Earth" column, *The Washington Times*, August 26, 1936.

[5] Ezra Winter to David Lynn, August 15, 1936, noted in "Ezra Winter" research file, Office of the Curator. Supreme Court of the United States.

Image 4: A section of the light-blue color scheme on the Courtroom ceiling and one of the old pendant lights, seen through scaffolding during repainting, early 1970s. Collection of the Supreme Court of the United States.

> No lights hang from the terra cotta medallions at the rear of the chamber. It is interesting that the first row of lights contains bulbs of 1,500 watts, and this is graduated until the last row contains bulbs of 750 watts, so that the greatest illumination falls above the desks of the justices and, the chamber is not too strongly lighted in other parts.
>
> The entire ceiling is outlined by a narrow border of 20 panels, 5 to each wall, painted in a paler tint of terra cotta than the medallions, and decorated with a palm leaf motif."[6]

Over the next few years, Lynn and the Court staff continued to tinker with ways to improve the poor lighting. Additional light fixtures were hung and for a time the red drapes behind the Bench were covered with white sateen to reflect more light. It seems Winter's revised paint scheme survived until the early 1970s when the Architect of the Capitol's staff removed the pendant chandeliers and painted the ceiling to its present appearance, with red behind the rosettes. (Image 4)

[6] "Beauty and Perfect Light Give Rays for High Court," Washington Star, October 31, 1936.

Image 5: Detail showing carved flowers forming part of the decoration along the West Pediment frieze. Collection of the Supreme Court of the United States.

As noted, similar rosettes appear throughout the building in the more decorative rooms: the East and West Conference Rooms, the Library's Main Reading Room, and above some of the staircases. Over time, Paris & Wiley's other ceiling in the Great Hall was also painted over with a lighter scheme, and Mack, Jenney & Tyler's West Conference Room was modified. The work of the other decorative painters survived largely unscathed and restoration in the early 2000s returned them to their original appearance.

Ceiling rosettes, however, are not the only floral decorations to appear in the building's architecture. On the exterior of the building, carved festoons, garlands, and swags appear in the marble, and some interior bronze work features floral motifs. For example, most people looking at the West Pediment sculpture above the main entrance with its famous inscription EQUAL JUSTICE UNDER LAW miss the decorative swags that run to either side along the frieze. (Image 5) Various classically inspired leaves, vines, and blossoms form decorative borders, flow behind recognizable legal symbols on bronze doorframes, or appear carved in the marble.

Aside from the rosettes and decorative flowers, symbolic floral elements do appear within the larger sculptural program, most notably in the Courtroom frieze sculpted by Adolph Weinman. In the west panel, an allegory Weinman referred to as "The Triumph of Justice," a figure representing *Peace* holds a dove in one hand and a bouquet of flowers in the other, while a crown of flowers rests upon her head. (Image 6) At the center of the same

Image 6: Wearing a crown of flowers, *Peace* holds a bouquet in the west panel of the Courtroom frieze. Collection of the Supreme Court of the United States.

panel, beside the looming figure of *Justice*, sits *Truth* depicted as a female figure holding a rose, likely symbolizing purity, and a mirror, a traditional symbol associated with revealing veracity in its reflection. (Image 7)

On the opposite wall, above the Bench, oak trees form part of the backdrop for the central grouping depicting *The Majesty of the Law* and *The Power of Government*. To the right among the group of figures stands *Liberty*, wearing the traditional cap, and releasing a bird in one hand and holding a flower in the other. (Image 8) Unlike the clearly carved rose held by *Truth*, this floral depiction does not appear to represent an actual flower but perhaps is a reference to the 1861 poem "The Flower of Liberty" by Oliver Wendell Holmes, Sr., father of Justice Holmes. The first stanza reads,

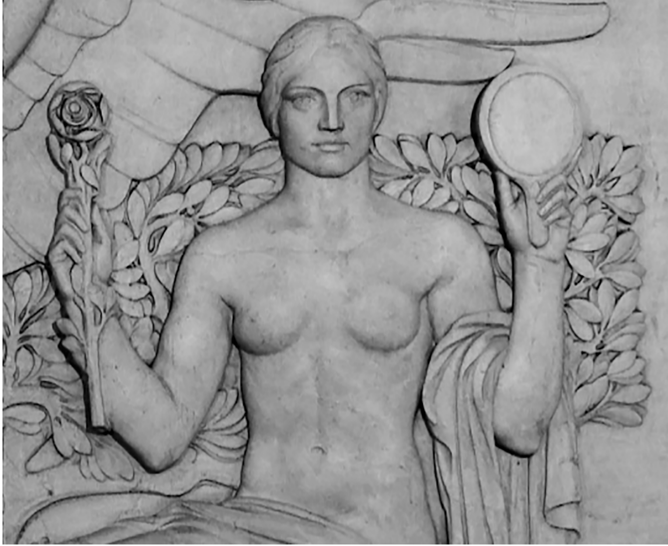


Image 7: A figure representing *Truth* with rose and mirror in
the west panel of the Courtroom frieze. Collection
of the Supreme Court of the United States.

> What flower is this that greets the morn,
> Its hues from heaven so freshly born?
> With burning star and flaming band
> It kindles all the sunset land; —
> O, tell us what its name may be!
> Is this the Flower of Liberty?
> It is the banner of the free,
> The starry Flower of Liberty![7]

Another symbolic use of flowers appears in Hermon A. MacNeil's East Pediment sculpture, located on the less visible eastern side of the building's exterior. Like other works in the building's sculptural program, this one seeks to represent the Court's role in administering justice but also to symbolize its authority as the highest court in the land. To either side of the central group of lawgivers (Confucius, Moses, and Solon), MacNeil places supporting groups, each bearing a symbolic offering. To the left, a male figure with a

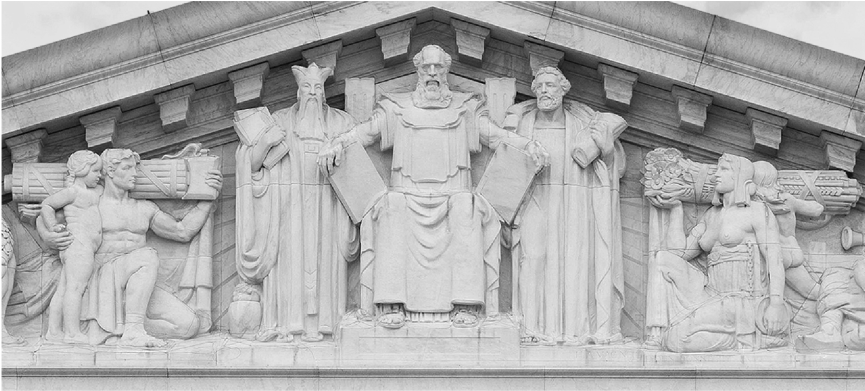
[7] For the rest of the poem, see *The Atlantic*, November 1861.

Image 8: Detail of Liberty with flower and eagle as depicted in the east panel of the Courtroom frieze. Collection of the Supreme Court of the United States.

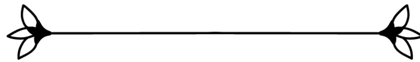
child holds the fasces, an ancient Roman symbol of authority, or as MacNeil described it, "the means of enforcing the law." For balance on the opposite side, he depicts a woman and child bearing a similar load, a bundle of flowers. MacNeil described this group as "tempering justice with mercy" and included an important, often overlooked detail.[8] At the woman's side is a set of scales, a traditional symbol of law, which she has put aside to offer up the flowers instead. Perhaps MacNeil's message is that administering justice should not be a matter of only weighing the sides with an unsympathetic scale, but recognizing, as did Thomas Aquinas, that "justice without mercy is cruelty." (Images 9 and 10)

In summary, most flowers in the architecture of the Supreme Court Building are purely decorative, used to connect to the classical structures of ancient Greece and Rome, and adding beauty to the various spaces they adorn. In a few places, however, the use of flowers is more symbolic, conveying the specific ideas of peace, truth, liberty, and mercy that the sculptors hoped might inspire the Court's deliberations.

[8] Quotes from "Description of Eastern Pediment," submitted by Hermon MacNeil, 1934, Office of the Curator, Supreme Court of the United States.



Images 9 and 10: The central section of the East Pediment by Hermon A. MacNeil, with detail of figure described as "tempering justice with mercy" offering a floral tribute. Steve Petteway, Collection of the Supreme Court of the United States.



I hate flowers — I paint them because they're cheaper than models and they don't move.

Georgia O'Keefe
N.Y. Herald Tribune, April 18, 1954

FIVE RECOMMENDATIONS

Lee Epstein†

Terri Jennings Peretti
Partisan Supremacy: How the GOP Enlisted Courts to Rig Election Rules
(University Press of Kansas 2020)

"There is no such thing as a Republican judge or a Democratic judge." Well, yes, Justice Gorsuch, there is. Peretti demonstrates as much in this tour de force on the role of party identity (distinct from ideology) in judging.

Peretti's basic argument is that the GOP, determined to win elections in the face of a Democratic-leaning electorate, not only rigged the rules of the game; it also packed the courts with Republican judges all too willing to play along. With a focus on four areas of election law (the Voting Rights Act, voter id laws, redistricting, and campaign finance) Perretti validates her argument against qualitative and quantitative data. But, along the way, the data sorta belie the book's title, showing that there aren't just Republican judges; there are Democratic judges too. To provide one example: Democratic federal judges are nearly as likely to oppose voter ID laws (only 28 percent of their votes were favorable) as Republicans are to support them (81 percent).

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† University Professor of Law & Political Science and Hilliard Distinguished Professor of Law, University of Southern California. Copyright 2022 Lee Epstein.

This is just a sample of the many noteworthy findings that make *Partisan Supremacy* a great read for anyone interested in (learning more about) election law. But Peretti's work should also interest scholars of judicial behavior. For far too long, the field has elevated ideology over partisanship; indeed, if party identity makes an appearance in our studies, it's almost always as a proxy for ideology. Peretti offers strong theoretical arguments and empirical evidence for treating partisanship as an important driver of judicial behavior in its own right.

Brandon L. Bartels and Christopher D. Johnston
Curbing the Court: Why the Public Constrains Judicial Independence
(Cambridge University Press 2020)

Political scientists have long told a story about the relationship between the public and the U.S. Supreme Court, and it goes something like this: Because the Court enjoys such wide and deep public support, politicians avoid attacking it out of fear of electoral reprisal.

These days, this story seems almost quaint if not downright suspect. After the Court's same-sex marriage decision (*Obergefell v. Hodges*), Republicans hardly felt constrained in calling for the Court's head. As Bartels and Johnston recount it, Bobby Jindal, Republican governor of Louisiana, asserted that the "Court is completely out of control" and recommended its abolition to "save some money"; Ted Cruz proposed constitutional amendments to overturn the Court's decision and to strip its authority to hear same-sex marriage cases.

Democrats are no less shy about proposing Court "reform" measures. In the wake of the failed Garland nomination, Kavanaugh's confirmation amid charges of sexual assault, and Barrett's breakneck proceedings — all of which pushed the Court to the right — proposals for packing the Court have gained traction among Democratic politicians. Writing in the *Boston Globe*, Senator Elizabeth Warren suggested that the Court is extremist, partisan, and even lawless. Only by adding four or more seats, she declared, could Congress "restore balance and integrity to a broken institution."

Because none of this squares with the conventional (political science) "legitimacy" story, the question naturally emerges: What's going on? Bartels and Johnston offer a sensible, even intuitive, answer. The public acts far less as a veto on politicians' Court-curbing calls than as a cheerleader for reform proposals when it disagrees with the Court's decisions. To quote the authors, "citizens care more about policy outcomes than protecting the Court's long-term integrity."

Being the good political scientists that they are, Bartels and Johnston do more than make this claim; they verify it using a range of survey and experimental data. The results are clear. There is no "wide and deep" reservoir of goodwill toward the Court as was long thought.

For political scientists, *Curbing the Court* is an eye-opener, upending decades of conventional thinking. For other Court-watchers, the implications of the findings are worth considering. Should the Court follow its Republican benefactors' game plan (see Peretti) and veer *sharply* to the right, its support will plummet among a less conservative-leaning public. Only by charting a different path (see Zilis below) can the justices save their Court from losing the legitimacy so crucial for its efficacy.

Michael A. Zilis
The Rights Paradox: How Group Attitudes Shape US Supreme Court Legitimacy
(Cambridge University Press 2021)

Losing legitimacy is also a theme of *The Rights Paradox.* The idea is that citizens evaluate the Supreme Court based on the set of interests they think the justices support — specifically, when Americans believe that the Court is allied with groups they dislike, their evaluations of the Court take a nosedive. After its high-profile rulings advancing gay rights, for example, the Court's legitimacy ratings declined markedly among citizens expressing antipathy toward gays.

To the extent that these and similar findings (re: immigrants, labor unions, political protestors, business, et al.) raise questions about the durability of the Court's legitimacy, they parallel results in *Curbing the Court.* No readers can leave either book without rethinking everything they thought they knew about how institutions gain, maintain, and most pointedly lose legitimacy.

The Rights Paradox, though, offers a path forward for justices interested in saving their institution — though it isn't one that all readers will find attractive. In Zilis's words, "One important implication of my findings is that they offer a clear incentive for Supreme Court justices to deemphasize their traditional role as a guardian of minority rights. When Americans penalize the modern Court for protecting the rights of unpopular groups, and these penalties come in the form of institutional illegitimacy … the institution may be forced to abandon this crucial role."

James L. Gibson and Michael J. Nelson
Judging Inequality: State Supreme Courts and the Inequality Crisis
(Russell Sage Foundation 2021)

Taking Zilis's advice shouldn't be a heavy lift for state supreme courts. Because the electorate in most states has some say on who serves as judges, you'd think the state courts would be squarely majoritarian institutions, issuing decisions that further entrench political, social, and economic inequities. And yet Gibson and Nelson's exceptional book shows that the particulars of the states' selection and retention systems aren't especially good predictors of whether judges will favor greater (in)equality.

What does matter? The "simple truth," Gibson and Nelson write, is that "conservative and Republican judges tend to vote in favor of inequality, while liberal and Democratic judges tend to vote in favor of greater equality." Both tendencies, it turns out, are amplified when well-resourced litigants (the "haves") advance claims of (in)equality.

Well, this may be the simple truth of the matter. But getting there was no simple matter. Executing the study required the authors to develop "an ocean's worth of data" on the courts' decisions implicating equality, the judges' characteristics, and the states' systems of judicial selection and retention. The resulting database is nothing short of a treasure trove for scholars interested in exploring *Judging Inequality's* many striking results (and non-results) or testing hypotheses of their own devising.

Adam Chilton and Mila Versteeg
How Constitutional Rights Matter
(Oxford University Press 2020)

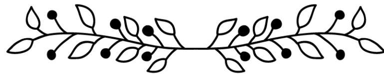
We may live in an age of data (see the books above) and ever more powerful microcomputers but scholars of con law — and especially *comparative* con law — are still using quill pens. They seem unaware of the role that data and statistical methods have played in transforming entire fields of legal inquiry, reshaping what we ask and what we know (again, see the books above).

Within this scholarly backwater, *How Constitutional Rights Matter* is downright cosmopolitan.

In the first place, the authors actually provide a testable answer to the question posed in the book's title: Constitutionalizing freedom of religion, the ability to unionize, and the right to form political parties can lead to better "rights outcomes." That's because these rights are designed to be practiced (and ultimately protected) by organizations, making it harder for governments to violate them.

The second place is even more important: Like the other authors featured in this review, Chilton and Versteeg don't stop with mere speculation and claims; they rigorously test them. Sometimes their tests take the form of "case studies" (the typical modus operandi in comparative constitutionalism and so perhaps an effort to appeal to traditionalists). But the book's real bite comes in a stunningly powerful statistical analysis of constitutional rights in 194 countries over six decades. Not only does the analysis support the thesis about the impact of organizational rights; it also shows the converse: that constitutionalizing rights primarily granted to and practiced by *individuals* (*e.g.*, the right to healthcare) are *not* associated with improved outcomes.

In a blurb for *How Constitutional Rights Matter*, Ran Hirschl called it "a game-changer." I sure hope so. The book is nothing short of a model on how to use data to advance a field of study *and* to develop important implications for democracy and the rule of law.



> When you take a flower in your hand and really look at it, it's your whole world for a moment. I want to give that world to someone else. Most people in the city rush around so, they have no time to look at a flower. I want them to see it whether they want to or not.
>
> Georgia O'Keefe
> *New York Post*, May 16, 1946

FOUR RECOMMENDATIONS

Charmiane G. Claxton†

National Collegiate Athletic Association v. Alston et al.
141 S.Ct. 2141 (2021)
opinion for the court by Associate Justice Neil Gorsuch

It is remarkable how much energy was expended by an entity that takes in billions of dollars a year to restrict the amount that could be paid to the very individuals that make those billions of dollars possible. In an excellent opinion, Justice Gorsuch addresses the history of collegiate athletics in America, the tension between amateurism and compensation, and the interplay with antitrust law.

A group of current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball filed the instant class action case against the National Collegiate Athletic Association (NCAA) and the 11 Division I conferences (the Southeastern Conference and the remaining conferences that wish that they were the SEC) alleging violations of the Sherman Act by establishing rules that limit the compensation that the student-athletes may receive for their athletic services. The district court held a ten-day bench trial and issued a 50-page opinion finding that the NCAA's compensation limits "produce significant anticompetitive effects in

† Magistrate Judge, U.S. District Court for the Western District of Tennessee.

the relevant market."[1] NCAA was enjoined from limiting education-related compensation that conferences and schools may provide to the student-athletes playing Division I football and basketball. However, the district court did not enjoin the defendants from fixing compensation and benefits unrelated to education. This left both sides unhappy.

On appeal to the Ninth Circuit, the student-athletes argued that the district court did not go far enough and that it should have enjoined all compensation limits set by the NCAA. The defendants argued that the district court went too far by weakening the NCAA's ability to restrict education-related compensation and benefits. The Ninth Circuit held that the district court was just right and affirmed in full. The appeal to the Supreme Court was made only by the NCAA as to the issue that was raised and rejected at the Ninth Circuit. The student-athletes chose not to appeal.

Justice Gorsuch begins his opinion with an interesting and educational history of the role of money in college athletics and the origin story of the NCAA. The evolution from protector of amateur athletics to college sports juggernaut is accomplished by resorting to the anti-competitive mechanisms that this litigation targets. This very balanced opinion resolves the issues presented by reminding the parties that the place to look for the answers sought is not 1 First Street NE but the building just across First Street — the U.S. Capitol:

> For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task is simply to review the district court judgment through the appropriate lens of antitrust law.'"[2]

U.S. v. Trevino
7 F.4th 414 (6th Cir. 2021)
opinion for the court by Judge Joan L. Larsen

The expression "ignorance of the law is no excuse" is said so much and so often that people believe it as an absolute truth. Daniel Trevino thought he would put it to the test with the appeal of his conviction to the Sixth Circuit. In 2018, Trevino and his codefendants were charged with conspiracy to manufacture, distribute, and possess with the intent to distribute marijuana and other related charges.

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[1] In re National Collegiate Athletic Association Grant-in-aid Cap Antitrust Litigation, 375 F.Supp. 3d 1058, 1067 (N.D. Cal. 2019)

[2] Citing In re National Collegiate Athletic Association Grant-in-aid Cap Antitrust Litigation, 958 F.3d 1239, 1265 (9th Cir. 2020).

In fact, in *Landen v. United States*,[3] the Sixth Circuit has recognized a narrow application of this exception in situations where "highly technical statutes, such as tax or banking statutes, require a 'willful' violation of the law."[4] Anticipating this potential defense, the United States filed a motion *in limine* to preclude Trevino's deployment of the defense. Trevino's operating theory was that he did not possess the requisite *mens rea* to be found guilty of the conspiracy count. The district court granted the motion and upon conviction Trevino appealed that decision among other rulings.

Landen is a Prohibition-era case that held that sometimes conspiracy does require proof that the defendant knew that his conduct was unlawful. Ignorance or mistake of law is only available as a defense to conspiracy "[1] where the contemplated act is not inherently wrongful, [2] where the prohibitory statute is ambiguous, [3] where there is a good reason for both lawyers and laymen to think that the act planned is not prohibited, and [4] where the respondent plans and does the act in the actual belief, supported by good-faith advice of counsel, that it is a lawful act."[5] The Sixth Circuit held that the exception did not apply here. There are no ambiguities in the Controlled Substances Act conspiracy provision or in the substantive offenses that were the object of Trevino's conspiracy.

Certainly a valiant try on Trevino's part but his ignorance was not a good enough excuse.

Glennborough Homeowners Association v. U.S. Postal Svc.
21 F.4th 410 (6th Cir. 2021)
opinion for the court by Judge Chad A. Readler

How often do you consider the humble Zone Improvement Plan ("ZIP") Code? Introduced in 1963, the purpose of the ZIP code was to ensure that mail travels efficiently and quickly. But the residents of the Glennbourough Homeowners Association placed even more stock in their ZIP Code and decided to make not one but two federal cases out of it.

The first was in 1997 when the developers of the Glennbourough subdivision filed suit seeking a court order to require the Postal Service to recognize "Ann Arbor, MI 48105" as the last line of addresses in the subdivision instead of "Ypsilanti, MI 48198". After a couple of years of litigation, the parties agreed to resolve the matter by settling on "Superior Township, MI 48198". This agreement was enshrined in a consent order.

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[3] 299 F. 75 (1924).
[4] United States v. Roth, 628 F.3d 827, 835-36 (6th Cir. 2011).
[5] Landen, 299 F. at 79.

Alas, the issue reared its head again in 2015. The homeowners association took up the cause and again asked the Postal Service to change the third line to "Ann Arbor, MI 48105". After the Postal Service declined, the homeowners association asked again in 2016. The next rejection came with an admonition not to ask again for another decade. Not to be outdone, the homeowners association filed the lawsuit at issue in this appeal.

You may be asking "what could possibly be the cause or causes of action here?" The complaint alleged violations of the First Amendment, the Freedom of Information act and breach of the 1999 consent judgment. The Postal Service filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The motion was granted in its entirety. The homeowners association appealed only the issue of the 1999 consent judgment.

The Sixth Circuit opinion, delivered by Judge Readler, provides a detailed discussion of constitutional standing and why the homeowners association fails on each of the three elements to establish Article III standing. The complaint fails to identify what "concrete injury resulted from the Postal Service's willingness to deliver mail addressed to 'Ypsilanti' to Glennborough." There is a failure to establish traceability between the injury and the breach. The court found that none of the alleged injuries were caused by the alleged breach of the consent judgment. Finally, the homeowners association could not show that it was fairly likely that their alleged injury would be redressed by the relief sought. In this case, the relief sought — changing the ZIP Code — would not remedy any alleged breach of the consent judgment as the agreement only requires the Postal Service to recognize Superior Township or Ann Arbor, MI 48198 as an appropriate last line instead of Ypsilanti, MI 48198.

In the future, have a care for the humble ZIP Code. Just not as much as the Glennborough Homeowners Association.

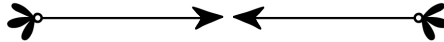
Taylor v. City of Saginaw, et al.
11 F.4th 483 (6th Cir. 2021)
opinion for the court by Judge Richard A. Griffin

Allison Patricia Taylor's name will go down in history as a groundbreaking civil rights warrior, for she has rescued the people of Saginaw, Michigan from the unconstitutional intrusion of warrantless tire chalking.

The City of Saginaw maintained the policy and practice of marking tires with chalk to determine whether the car was parked in excess of the time allowed by city ordinance. After receiving several parking tickets, Ms. Taylor filed a 42 U.S.C. § 1983 class action suit alleging that tire chalking was a Fourth Amendment violation. The first trip to the Sixth Circuit resulted in

a ruling that tire chalking is a search for Fourth Amendment purposes. On remand, Taylor moved for class certification and the City moved for summary judgment. Summary judgment was granted in favor of the City and the instant appeal ensued.

This opinion discusses the intricacies of the administrative-search exception to the warrant requirement and why it is not applicable in this case. It also analyzes the mistakes that the district court made by relying on this exception in its decision to grant summary judgment. The real joy of this decision is that it guarantees that yet a third entry in the annals of tire chalking jurisprudence is in the offing. On remand, the district court will still have to resolve the issues of class certification and the City's liability under § 1983.



Kimberly Robinson remains one of our favorites on Twitter.[6] Consider this exchange from July 2, 2021:

> @KimberlyRobinsn: #SCOTUS will hear civil rights case asking if plaintiffs can seek compassion for emotional distress. No. 20-219 Cummings v. Premier Rehab.
>
> @FrankMacniven: Do you mean compensation for emotional distress?
>
> @KimberlyRobinsn: lol, yes. Compensation for emotional distress, not compassion for emotional distress. That's not something courts usually sort out.

[6] *See, e.g., Preface*, 2016 Green Bag Alm. 4.

THE FLOWER AND THE FEVER

JUDGES' POSIES AT THE OLD BAILEY

Aaron S. Kirschenfeld[†]

On the dates of the formal opening of court — should those dates fall between the months of May and September — visitors to the Central Criminal Court, or Old Bailey, in the City of London will see the Lord Mayor of London, a number of both High Court and circuit judges,[1] and other participants carry small bouquets of English garden flowers[2] into the courtroom.[3] The Old Bailey, as the court is known,[4] has existed in one form or another since the mid-16th century, and has hosted this ritual since 1750, save a few years during the Second World War when flowers were rationed.[5]

[†] Digital Initiatives Law Librarian and Clinical Associate Professor of Law, University of North Carolina at Chapel Hill. Copyright 2022 Aaron S. Kirschenfeld.

[1] Email from Adam Rout, Head of Operations, The Mansion House & Central Criminal Court, City of London Corporation, to the author, *Dates When Posies Will Be Carried: May-September 2022* (Jan. 31, 2022, 8:58 AM EST) (copy on file with the author). Formal openings of court are usually in January, April, July, and October. The January 2022 ceremony was canceled due to COVID restrictions.

[2] In 1908, the compact bouquets were described as being carried in the right hands of the judges, the Lord Mayor, the sheriff, and the aldermen, and as containing "red and pink roses or sweet peas" and being "bound up in long white paper holders embroidered and perforated in imitation of lace[.]" Cassilly Cook, *A Famous Murder Trial in "Old Bailey,"* 4 AM. L. SCH. REV. 556, 558. In this essay, posies, nosegays, and bouquets are used interchangeably. *See Posy*, 22 ENCYCLOPEDIA BRITANNICA 197 (11th ed. 1911) ("a verse of poetry or a motto, either with a moral or religious sentiment or message of love, often inscribed in a ring or sent with a present, such as a bouquet of flowers, which may be the origin of the common use of the word for a nosegay or bouquet.").

[3] John Morecroft et al., *The Old Bailey: London's Seat of Criminal Justice*, 57 ABA J. 1104, 1110 (1971). This article is excerpted from a forty-page booklet, John Morecroft et al., THE OLD BAILEY (1969), but I am choosing to cite from the former since it is considerably easier to locate and use. For a recent, general account of the court's tradition with posies, *see* Ludmila B. Herbst, *Flowers for the Judge*, 79 ADVOCATE 627 (2021). A more dated account can be found at William R. Riddell, *The Judge's Nosegay at the Old Bailey*, 15 ABA J. 49 (1929).

[4] "The Old Bailey evidently takes its name from the *Ballium*, or external wall of defence which existed between Ludgate and Newgate, which ran along the east side of that somewhat narrow and crooked street known as the Old Bailey." CHARLES GORDON, THE OLD BAILEY AND NEWGATE 1 (1902).

[5] *Lavender Scents Old Bailey Again, Bath-Night or No,* WASH. POST, Aug. 18, 1946, at B5.

Showing posies before the judges at the Old Bailey in 1750.
Charles Gordon, The Old Bailey and Newgate 166 (1902).

Through the years, many have seen this parade of flowers into a storied English court as a "seemingly meaningless"[6] but "charming tradition,"[7] though its origins have long been known to be anything but meaningless, and now, after two years of contagious and capriciously fatal pandemic, anything but charming.

[6] *Id*.
[7] Morecroft, *supra* note 3, at 1110.

On Thursday, April 26, 1750,[8] the Old Bailey was unseasonably hot; it was also very crowded, with many thronging for the sensational trial of Captain Edward Clarke.[9] Clarke had been indicted for killing a fellow officer in a duel.[10] The trial was like a set piece from one of Patrick O'Brian's Aubrey-Maturin books, with the conflict stemming from an earlier court martial, leading to a stream of naval captains, admirals, and other grandees as witnesses to the provocative insults given and the root of the quarrel.[11] Clarke was convicted of murder, but the jury asked the court for mercy, and he was spared.[12] Unfortunately, many others there that day were not.

The court, at that time, was adjacent to the notorious Newgate Prison, which, like many English prisons, was dirty, overcrowded, and suffocating.[13] While there had been several outbreaks of "gaol fever" at Newgate and at other prisons, the aftermath of the Clarke trial was tragic. Several judges, the Lord Mayor, and somewhere between 40 and 60 attorneys, functionaries, and spectators sickened and died during this Black Session.

The Lord Chief Justice, William Lee, was stricken but survived. *The Gentleman's Magazine* reported that "[a] messenger from Ld C. Justice *Lee*, attended the court of alderman, to acquaint them of the necessity of some new regulations for the Newgate Goal [sic], or that, it would be dangerous for persons to attend the business of the sessions at the Old Baily. To the message was annex'd a list of above 20 persons … that were at the last

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[8] THE PROCEEDINGS OF THE OLD BAILEY, 1674-1913, an online resource available at www.oldbailey online.org/, contains searchable records of nearly 200,000 criminal trials. Further details on the trial of Edward Clarke can be found in the pamphlet THE TRIAL OF CAPT. EDWARD CLARK, COMMANDER OF HIS MAJESTY'S SHIP THE *CANTERBURY*, FOR THE MURDER OF CAPT. THO. INNES, COMMANDER OF HIS MAJESTY'S SHIP THE *WARWICK*; IN A DUEL IN HYDE-PARK, MARCH 12, 1749. AT JUSTICE-HALL IN THE OLD BAILEY; ON THURSDAY THE 26TH OF APRIL 1750. BEING THE FOURTH SESSIONS IN THE MAYORALTY OF THE RT HON. SIR SAMUEL PENNANT, KNT. LORD-MAYOR OF THE CITY OF LONDON (1750) (hereinafter THE TRIAL OF CAPT. CLARK).

[9] Judge Foster wrote a contemporary account of the case. "At the Old Bayly Sessions in April 1750, one Mr. Clarke was brought to his Trial, and it being a Case of great Expectation, the Court and all the Passages to it were extreamly crowded; the Weather too was hotter than is usual at that time of the Year." Michael Foster, REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GAOL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES (1762).

[10] THE TRIAL OF CAPT. CLARK 4.

[11] *Id.* at 10-15.

[12] *Id.* at 17. Clarke was later pardoned and continued his naval service. Edward Clarke (c. 1708-1799), THREE DECKS, threedecks.org/index.php?display_type=show_crewman&id=2135 (last visited Jan. 28, 2022).

[13] ARTHUR GRIFFITHS, THE CHRONICLES OF NEWGATE 149-152 (1896). For a shorter account of Newgate's history, see *The Demolition of Newgate*, 11 GREEN BAG 113 (1899). The present Central Criminal Court was constructed in 1907 on the former site of Newgate, which was ultimately torn down in 1902.

sessions, who have since died, as thought, from the noisome stench of the prisoners."[14]

Gaol fever, which is now believed to have been typhus, is caused by the bacteria *Rickettsia prowazekii* carried by the body louse *Pendiculus humanus corporis* and is transmitted by contact.[15] Symptoms include fever, chills, headache, rash, cough, nausea, vomiting, and confusion.[16] Typhus generally kills through sepsis and organ failure.[17]

But the miasma theory of disease, then prevalent, held that air became malignant due to contamination with suspended particles of rotting organic matter. Sweet smells could be expected to combat noxious ones, and so "the judges, from that time on, carried with them and had on the bench before them a nosegay of flowers to ward off the prison smells."[18] Lord Chief Justice Lee also ordered that preventive measures, including "fumigating the court several times a day by means of a hot iron plunged in a bucket filled with vinegar and sweet-smelling herbs," be implemented.[19] Many areas of the courtroom, including the bench and the dock, were likewise perfumed.[20]

The peril of gaol fever prior to the Black Session was not surprising, nor was it unprepared for. The first court at the Old Bailey was built in 1539.[21] It was known then that prisoners would "be many tymes vystyed with Syknes and by reason therof the place ys infectyd and moche peryll and daungyer hath chauncyd to the Justyces and other worshipful cominers."[22]

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[14] 20 GENTLEMAN'S MAGAZINE 233 (1750).

[15] CDC, *Epidemic Typhus* (last reviewed Nov. 13, 2020), www.cdc.gov/typhus/epidemic/index.html.

[16] *Id.*

[17] David H. Walker et al., *Rickettsial Diseases*, *in* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE (J. Larry Jameson et al. eds., 20th ed. 2018). The author regrets that more nothing more than basic medical reference texts could be consulted, as he would have had several panic attacks at the detailed descriptions of disease and etiology.

[18] DONALD RUMBELOW, THE TRIPLE TREE: NEWGATE, TYBURN AND OLD BAILEY 30 (1982). The reference to posies in the children's nursery rhyme "Ring a ring o' roses" is thought to originate from their similar role as prophylaxis during the Great Plague of London, 1665-66. However, there is no evidence to support this claim. DANIEL HAHN, THE OXFORD COMPANION TO CHILDREN'S LITERATURE (2d ed. 2015). *See also* WILLIAM S. BARING-GOULD & CIEL BARING-GOULD, THE ANNOTATED MOTHER GOOSE 252 n.116 (1962).

[19] JOHN CAMPBELL, 3 LIVES OF THE LORD CHANCELLORS AND CHIEF JUSTICES OF ENGLAND 118 (1873).

[20] Albert Crew, *The Reformation of the Old Bailey*, 3 MEDICO-LEGAL & CRIMINOLOGICAL REV. 149, 160 (1935). One imagines that these interventions were about as useful as the plague doctor's beaked mask, which, while stuffed with flowers, herbs, and oils, also came perforated with air holes. Erin Blakemore, *Why Plague Doctors Wore Those Strange Beaked Masks*, NATIONAL GEOGRAPHIC, www.nationalgeographic.com/history/article/plague-doctors-beaked-masks-coronavirus (last visited Jan. 31, 2022).

[21] RUMBELOW, *supra* note 18, at 67.

[22] *Id.*, quoting the resolution passed by the City of London Common Council to providing for the first court at the Old Bailey.

After the Great Fire of London in 1666, the building was rebuilt in 1673 as an open-air amphitheater, but was eventually closed up in 1736.[23] Unfortunately, the importance of ventilation did not outweigh the wish to avoid the elements. Even in the wake of the Black Session, not much changed structurally at the Old Bailey. Well into the late 19th century, before construction of the new courthouse, it was described in this publication's predecessor as "a gloomy building with several narrow, draughty and ill-ventilated courts imbedded in it."[24] After all, crises pass, or we tire of them, or we fail to adapt and hope they won't happen again.

There is not much to say about the obvious parallels to our own time, nor really is there a way to say it subtly. Disease and death are grim business, and certainly not confined to the past. The work of the courts must continue in times of plague, and it has. The state courts have devised unique approaches to mitigate risk while hearing cases, as have the federal courts.[25]

It is difficult to believe that these new preventive rituals — the masks, vaccine requirements, and advances in air filtration — will seem charming in 250 years. That is, except perhaps for the artifact of the Zoom cat lawyer.[26] Should the judges of the Old Bailey appear online as kittens, each holding a small posy of flowers, we will perhaps see our own strange history reflected in the traditions of that venerable court.

Fair daffodils, we weep to see
You haste away so soon.

Robert Herrick
To Daffodials (1648)

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[23] *Id.* at 68-70.

[24] *The Demolition of Newgate*, *supra* note 13, at 114. As for reform in prison conditions, one early step was the passage of the Gaol Distemper Act 1774, 14 Geo. 3 c. 59 (Eng.), which provided for cleaning and ventilation. John Howard's critical *The State of the Prisons in England and Wales* followed in 1777.

[25] State court responses to the COVID-19 pandemic can be found at NATIONAL CENTER FOR STATE COURTS, *Coronavirus and the Courts*, www.ncsc.org/newsroom/public-health-emergency (last visited Jan. 28, 2022). Federal court orders are collected at UNITED STATES COURTS, *Court Orders and Updates During COVID-19 Pandemic*, www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic (last visited Jan. 28, 2022).

[26] 394th District Court of Texas, *Kitten Zoom Filter Mishap*, YouTube (Feb. 9, 2021), youtu.be/KxlPGPupdd8.

EXEMPLARY LEGAL WRITING 2021
BOOKS

FOUR RECOMMENDATIONS

G. Edward White†

Herma Hill Kay
Paving the Way: The First American Women Law Professors
(University of California Press 2021)

This book is the culmination of a project that Herma Hill Kay conceived in 1989, when she was named the president of the Association of American Law Schools; that she worked on sporadically between then and 2000, when she retired from the deanship at Berkeley; and that occupied much of her attention between that year and 2010, resulting in her having largely completed a manuscript two years before her death. Kay's object in the project was to identify the women who been members of American law school faculties before she was appointed to the Berkeley faculty in 1960. By 1990 she had identified thirteen such women and had begun interviewing those who were still alive, ultimately interviewing nine of what eventually became fourteen early female law professors, the fourteenth having been mistakenly listed as starting at Wisconsin in 1961 when she actually had joined the faculty in 1959. "I was motivated" to write the book, Kay said, "because the stories of these fourteen early women law professors [are] rapidly being forgotten."

When Kay died the book manuscript was not yet in a publishable state, being overly long and missing some details in its coverage. A group of Kay's

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friends and colleagues persuaded Patricia Cain of the Santa Clara law faculty, a longtime close friend of Kay, to shepherd the manuscript to publication. That gestation process has resulted in some unevenness of coverage.[1]

Paving The Way's principal historical contribution is a collective portrait of the fourteen women law professors who preceded Kay. Together most of them shared some distinctive characteristics. Most were graduates of the law schools who hired them as faculty members, and had done conspicuously well in their student careers, several receiving the highest academic grades in their graduating classes. Most remained at their home institutions for their entire careers. None, in interviews with Kay or in other records of their careers, exhibited a sense of being discriminated against on the basis of their gender. Their attitudes seem characteristic of "first-generation pioneers" in numerous professions, combining a sense of being "outsiders" with a determination to succeed on the terms of the occupation they were undertaking, which, for Kay's first fourteen, meant combining a demanding, rigorous approach to classroom teaching with the avoidance of contentious faculty issues, including gender discrimination.

The last characteristic displayed by several of Kay's original subjects was their having gone through the process of entering law school and eventually joining law faculties while raising children. In only one instance were a female candidate's family commitments taken into account in assessing her comparative lack of productivity in her tenure decision. In general, American law faculties both expected their early female members to bear the principal responsibilities for child rearing and gave them no credit for that role. For the most part Kay's pioneers quietly accepted that attitude, persevered, and thrived. Let's hope their female successors aren't experiencing comparable attitudes from male colleagues, and if so aren't tolerating them.

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[1] In addition to Kay's narratives of the lives and careers of women who joined law faculties before 1960, there is a lengthy chapter on women entrants into the legal academy in the 1960s, 1970s, and 1980s. It is not clear how much of that chapter was included in Kay's manuscript, but its emphasis, given the much larger number of entrants in those days, is more quantitative than analytical. A concluding chapter to the book is followed by an "Appendix," briefly documenting the career of the sixth of the pioneering women, Clemence Myers Smith, who taught at Loyola (Los Angeles) from 1952 to 1982, and an "Afterword" by Melissa Murray, who joined Kay on the Berkeley faculty in 2006 and whom Kay mentored in her early career. The Appendix on Smith was apparently added to correct her having been omitted in Kay's original manuscript. It is not clear why Murray's Afterword was added. Most of Murray's essay advances an argument that Kay's criteria for including coverage of her pioneer subjects was based on the American Bar Association's declining to accredit institutions that did not offer three-year, fulltime programs. Consequently Kay eliminated from her consideration early faculty members at several schools that served African-American, immigrant, and female students.

Gregory Ablavsky
Federal Ground: Governing Property and Violence in the First U.S. Territories
(Oxford University Press 2021)

It became evident, after the British colonies in America declared their independence and eventually wrote a federal Constitution to accompany their state governments, that the "western lands" of those states were going to become outlets for settlement. Moreover, beginning in 1803 the United States acquired a vast amount of new territory from Spain, France, and Great Britain, doubling its territorial size.

That territory, when first acquired, was almost exclusively occupied by indigenous tribes. It was plain, however, that it would not long remain in that state as the non-indigenous resident population of the United States grew and migrated westward. The central question raised by that prospect was how the new "federal territory" should be governed as it transitioned from a largely "vacant" (in terms of European settlement) area to new states poised to enter the Union.

Ablavsky's book is about the details of how that question was attempted to be answered in the "first" federal territories, which became the states of Tennessee and Ohio. In an impressive unearthing and analysis of primary sources, he demonstrates that neither of two existing historiographical narratives captures the process of governing those territories. The Tennessee and Ohio territories, in the years before those states entered the Union, were neither examples of unfettered federal power nor locations where chaos reigned and the federal government's authority was largely nonexistent. Instead they were regions beset by common problems that were responded to in a common fashion.

The problems were the allocation of land titles and the governing of violence between tribal members and settlers. With respect to the former, the common response was the creation of federal land agencies charged with the disposition of land through the "exhaustion" of "Indian titles" and sales to settler speculator groups and individual settlers. With respect to the latter, the common response was the creation of federal territorial courts whose goal was to administer impartial justice between settlers and tribes. The first of the responses was largely "successful" in that it facilitated the widespread dispossession of tribes from land they had occupied. The second response largely failed, resulting in both settlers and tribes increasingly resenting one another's presence and eventually precipitating action on the part of states carved out of federal territories to remove tribes from within their borders.

Critical to both responses, Ablavsky demonstrates, was the emergence of local settler residents as federal officials. They not only staffed federal land agencies and federal courts, they managed to become dispensers of federal government largesse, sometime to native tribes but more commonly to settlers engaged in land ventures or seeking to pacify or direct the activities of tribes. The governance of the first federal territories was thus a mixture of a regular, but not always successful, federal presence and the increasing involvement of settlers in the federal government, often for self-interested reasons. The responses of Tennessee and Ohio territories, Ablavsky concludes, provided a model which subsequent federal territories adopted, and resulted in relatively long intervals in which regions of the United States remained territories while the problems confronted by Tennessee and Ohio, which proved to be habitual in the American West, were addressed. One might conclude from Ablavsky's analysis that at least some residents of federal territories had little incentive to promote those territories' joining the Union, since as federal officials they were exerting more influence over policy decision than they might once statehood had been secured.

David Alan Sklansky
A Pattern of Violence: How the Law Classifies Crimes and What it Means for Justice
(The Belknap Press of Harvard University Press 2021)

Sklansky begins his book by identifying "two stories … in the recent history of the American criminal justice system" that he characterizes as "tragedies." One is the rate of mass incarcerations for criminal offenses in America, which is now "five or ten times as high as … in democratic societies elsewhere in the world," so that the U.S. has "5 percent of the world's population and 25 percent of its prisoners." Moreover, the American prison population is "disproportionately dark-skinned and poor," with "people of color [accounting for] 60 percent of all prisoners."

The other story involves the collapse of police reform. Widely thought at the opening of the twenty-first century to be so successful that it no longer needed to even be on the agenda of public officials and policymakers, police reform seems to have so deteriorated over the past two decades that "for many Americans, the police [seem] beyond reform: they [need] to be abolished, and replaced with something radically different."

Sklansky believes that both of those stories are "about the law understands and responds to violence." Mass incarceration, in his view, "has been driven in large part by fears about violent crime." Roughly half of the people currently serving prison sentences have been convicted of offenses classified as "violent."

And “the failure of police reform … is partly a story about a decline in the salience of violence in the rules that govern law enforcement, and in our thinking about the police more broadly.” As military-style equipment and tactics became common features of policing in the early twenty-first century, and the courts’ attitude toward “stop and frisk” cases increasingly permitted violent detentions of persons by police officers, conceptions of “police misconduct” shifted from an attention on “incivility, … invasions of privacy, or the use of informants” to “police violence,” especially “the extraordinarily high rate at which American police forces kill young men of color.” Violence, perceptions about it, and reactions to it were directly connected both to the rise of mass incarceration and the collapse of police reform.

The paradox around which Sklansky’s book pivots is not one that he explicitly identifies, but it can readily be discerned. Mass incarceration rests on the assumption that violent crime is qualitatively “worse” than non-violent crime and that violent criminals are thus more dangerous to members of the public than other criminals, and perhaps characterologically “badder” individuals, worthy of being incarcerated. But that assumption does not seem to govern responses to police behavior, at least not until very recently. Violent police “misconduct” has not tended to be treated as “worse” than other forms of police misconduct, such as corruption or illegal surveillance or intrusion. The resultant paradox is that violence is taken to be an extremely salient characteristic in the sentencing of criminals, but not in the disciplining of members of the police. Moreover, Sklansky suggests, neither assumption may be accurate, because our understanding of legal ideas about violence — “how the legal system understands violence and tries, or does not try, to tame it” — may be imperfect.

Patterns of Violence is fundamentally about “how American law thinks, and sometimes fails to think, about violence.” It raises such questions as “Is violence always worse than nonviolence? How is violence defined? What causes violence, and how is it best controlled? Is violence rooted in the character of violent people or in the circumstances they confront?” Sklansky believes that “the answers the law gives to these questions are more complicated and more varied than we often imagine,” and that “ideas about violence embedded in the law are deeply entangled with race, with gender, [and] with class.” Those are important and pressing questions, and Sklansky’s exploration of the answers current American criminal law seeks to give them is both rewarding and troubling.

Claire Priest
Credit Nation: Property Laws and Legal Institutions in Early America
(Princeton University Press 2021)

For many years the historiography of the Founding Era pivoted around debates about whether "republicanism" or "liberalism" was its dominant perspective on issues of political economy. Republicanism tended to be associated with collectivist and hierarchical conceptions of work, labor, and socioeconomic status, whereas liberalism was identified with free markets, individualized conceptions of work and labor, and the relaxation of status hierarchies. Although most scholars acknowledged that late eighteenth-century America contained strands of both ideologies, a central message of the debates was that "precapitalist" attitudes toward property-holding and economic interchange were still present in the world of the framers.

Credit Nation, the culmination of work stretching back to a 1999 student note in the *Yale Law Journal*, revises that historiography in a surprising fashion. By concentrating on developments in England in the early eighteenth century and some decisions made by British colonies in America at the same time, Priest demonstrates that from the early eighteenth century on the American colonies conceived of property, and its transfer, differently from England.

In England the dominant policy affecting property transfers, especially land, was the preservation of landed estates in the nobility and aristocracy. This policy was effectuated by two principal mechanisms: confidentiality in the identification of land titles and restrictions on the capacity of creditors to attach landholdings in satisfaction of debts. Since the actual ownership of land tended to be known only to individual family members and those representing them, it was difficult for creditors to discern the assets of persons in debt to them. And even if they could learn who owned land, they could not affect the capacity of family members to transfer land to their relatives unencumbered by debt.

In the British colonies in America, however, land was far more of a speculative commodity than in England and was freely transferred. Recording acts in colonies made it much easier to determine the ownership of land. Many more persons acquired land with the prospect of selling it as settler population growth increased. In its speculative capacity, land came to be seen as an asset comparable to personal property, and in the early eighteenth century colonies tended to reclassify land so as to allow creditors to attach landholdings in satisfaction of debts.

Meanwhile English merchants who had extended credit to colonial planters in the early eighteenth century began to express dissatisfaction with

their inability to attach colonial landholdings to satisfy debts. Parliament responded with the Debt Recovery Act of 1732, which reclassified land as a commodity in all the British colonies and enabled creditors to attach it. The Act essentially meant that any property held by American colonists — land and personal property, including slaves — could be attached by creditors in England or elsewhere. Although slaves were exempted from the Act in all British colonies in the early nineteenth century, the United States was no longer a British colony, so slaves continued to be a source of debt repayment.

Priest argues that the commodification of land in colonial America, and the inclusion of slaves as objects creditors could attach, transformed the treatment of property in America, making it more clearly an object for commodification and market exchange. The ability of creditors to attach slaves in satisfaction of debts, she claims, had the effect of furthering the growth of slavery in the United States, as slaveowners with limited capital flow could seek credit to develop their plantations, knowing that they had a "free" supply of slaves to serve as collateral.

Priest's work reveals that property-holding in colonial and Revolutionary America took on a distinctively commercial form much earlier than commonly believed, as well as the unfortunate role that form had in perpetuating American slavery. Early American historiography needs to be revised to take her work into account.

What's in a name? That which we call a rose
By any other word would smell as sweet.

William Shakespeare
Romeo and Juliet (1595)

FIVE RECOMMENDATIONS

Cedric Merlin Powell †

Erwin Chemerinsky
Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights
(Liveright 2021)

Preeminent constitutional law scholar and dean Erwin Chemerinsky offers a compellingly sober account of how the Supreme Court empowered the police — by expanding their investigatory and enforcement powers — and effectively diminished the civil and constitutional rights of citizens. The title of the book says it all — citizens are presumed guilty, and the presumption is legitimized by a Court actively engaged in expanding the power of police so that constitutional protections are significantly diluted.

Presumed Guilty chronicles how the Court dismantled all the fundamental protections established by the Warren Court and gave its approval of wide-ranging power and discretion to police in the "War on Crime." Undermining the Fourth Amendment so that a citizen's privacy and autonomy become secondary to the police's investigatory mandate; discarding the Fifth Amendment privilege against self-incrimination so that suspects have only a sem-

† Wyatt Tarrant & Combs Professor of Law, Louis D. Brandeis School of Law, University of Louisville. Copyright 2022 Cedric Merlin Powell.

blance of constitutional protection; ignoring gross systemic malfunctions like false eyewitness identifications; and insulating police misconduct from review in the courts — all leading to the subversion of civil rights.

Chemerinsky masterfully examines the Court's criminal justice jurisprudence, and, case-by-case, connects them to the devastating impact on citizens on the ground. *Presumed Guilty* opens with the heart-wrenching cry of George Floyd — "I Can't Breathe" — and illustrates in painful detail how race, a Supreme Court opinion captioned *City of Los Angeles v. Lyons*, which inexplicably held that chokehold victims could not seek injunctive relief unless they could prove that they would be subject to a chokehold again, and a system that is predisposed to deny relief all subvert constitutional rights (especially those of Black and Brown people).

Presumed Guilty makes a formidable contribution to a burgeoning canon that critically assesses the structural dynamics of race, racism, and the systemic interplay of the criminal justice system.

Laura Coates
Just Pursuit: A Black Prosecutor's Fight for Fairness
(Simon & Schuster 2022)

Part memoir, part self-reflective journal, and fully comprehensive in its indictment of the criminal justice system, *Just Pursuit* is a skillfully executed assessment of the system by Laura Coates, a former federal prosecutor. *Just Pursuit* is far from the typical narrative of a prosecutor finding redemption after realizing that she was part of the crushing machinery of mass incarceration. Here the prosecutor's inner struggle between her identity as a Black woman (and this is a complex intersectionality in itself) and as an agent of the system locking up a disproportionate number of her own people is laid bare.

After securing yet another guilty verdict against a Black defendant, Coates recounts how the words of her trial supervisor, "We … got … another … one!" snapped her into the reality of her choice to leave the prosecutor's office, tell her story, and work to reform the system. Coates writes

> I walked away the day my four-year commitment ended, not knowing whether I had been a proud champion or a coward, complicit or exonerated, the public's humble servant or its slave. … I removed the muzzle and used my experiences in the courtroom as a guide to educate the public as a law professor, news analyst, and radio talk show host. In that, I have found a new calling (p. 7).

Coates certainly found her calling. *Just Pursuit* is written with passion and resolve to dismantle a criminal justice system where race matters at every level.

Peter S. Canellos
The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero
(Simon & Schuster 2021)

In a majestic and captivating treatment of the life of the Great Dissenter, John Marshall Harlan, Peter S. Canellos canvasses not only history, but the far-reaching implications of the color line. "There are silences in history." And so begins Cannellos' introduction to John Marshall Harlan, a towering jurist of the late 19th and early 20th century, who broke the silence of complacency and retrogression with his resoundingly prescient dissents in *The Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896), decisions that continue to shape the enduring legacy of race and racism in American society. Harlan wrote his dissents for future generations because, Cannellos posits, "He saw things that [the other justices] did not" (p. 2).

And the way that Harlan saw those things was shaped by a complex life view of a mirror image color line that his fair-skinned African-American brother Robert — whose parentage was a matter of "hushed discussion" (p. 5) — could see but never traverse for there were strict laws, conventions, and limits even for those Blacks who were constructively "free." Harlan "learned first-hand, from his family, that those born into slavery could drink just as deeply of freedom as white men could" (pp. 8-9). *The Great Dissenter* offers inspiring insights into how Justice Harlan interpreted the Constitution to make that freedom a reality in a post-Reconstruction union reasserting the primacy of white supremacy.

Finally, *The Great Dissenter* complements *Separate* (2019), Steve Luxenburg's comprehensive historical narrative of *Plessy v. Ferguson,* by focusing on Justice Harlan's judicial philosophy and how it was shaped by his life and times.

Kathleen Belew and Ramón A. Gutiérrez
A Field Guide to White Supremacy
(University of California Press 2021)

In these fraught and explosive times, there is no more appropriate primer to guide the reader through a polity on the verge of unraveling than *A Field Guide to White Supremacy.* A distinguished convening of interdisciplinary scholars, journalists, and historians excavates the foundations of white supremacy. In 19 essays, the authors distill the central tenets of white supremacy and how they circulate in a post-racial society to reify subordination.

A Field Guide to White Supremacy constructs a pathbreaking conceptual and doctrinal bridge between whiteness studies and Critical Race Theory as the authors analyze the maintenance and profitability of whiteness; iterations of white supremacy and the present day effects of past discrimination; the power

of whiteness to exclude through anti-immigration policies; and how white supremacy has moved from the fringe to the mainstream. (I take issue with the term "fringe," as white supremacy is endemic to American life, indeed the book proves this fact.) *A Field Guide to White Supremacy* will be an invaluable resource in disrupting falsehoods, centering the analysis of race in a post-racial society, and providing the conceptual tools to eradicate structural inequality and white supremacy. "If we can recognize and name the many variants of white supremacy around us, might we imagine a world that is not so permeated with them?" (p. 9). The answer is an empathic, "yes" because we are only limited by our own imaginations in liberating our world from the enduring pernicious power of white supremacy.

Gilda R. Daniels
Uncounted: The Crisis of Voter Suppression in America
(NYU Press 2021)

Concluding that the Voting Rights Act was unnecessary, the Supreme Court, in *Shelby County v. Holder* (2013), a 5-4 decision, held that the statutory preclearance provision unconstitutionally subjected states, with a prior history of voter suppression and discrimination, to unduly burdensome federal supervision given the current neutral and fair conditions of American democracy. This is the New States' Rights federalism where the Court signals to the states to expand their power, shift to retrogressive policies, and entrench a minority political party (the Republican Party of the former president) in power through voter suppression disguised as efforts to eliminate fraud and make the franchise accessible to all.

Identifying all of the anti-democratic voting reforms, cloaked in the deceptive cover of neutrality, as undermining the fundamental right to vote, *Uncounted* "identifies and analyzes the cycles of voter suppression. These cycles occur from progress to regress and continue to replicate" (p. vii). To break this cycle of subjugation, which dates to the First Reconstruction and the passage of the Fifteen Amendment in 1870, *Uncounted* prescribes structural solutions designed to open the process of democracy by fortifying the fundamental right to vote. A fully invigorated fundamental right to vote would mean universal suffrage ("an affirmative right to vote embedded in the federal and state constitutions," p. ix); automatic voter registration; same-day registration, early voting, and no-excuse absentee ballots (*id.*). Removing all these structural barriers to voting would ensure that all votes would be *counted*. In these existential times, where democracy hangs in the balance, *Uncounted* is essential reading as we fight to "break the cycle of voter suppression and move from crisis to cure to true democracy" (p. x).

THE INELUCTABLE MODALITY OF THE VISIBLE

FAIR USE AND APPROPRIATIONISM IN FINE ART

Heather J. Meeker[†]

In 2021, the sale of Beeple's $69 million NFT *Everydays-The First 5000 Days* made international news.[1] It was one of the most expensive pieces of art ever sold at auction, but the sale was especially newsworthy because it challenged our definition of visual art — and our definition of art ownership. The work was a collage of 5,000 artworks created by the artist over more than 13 years, and it was the first purely digital art ever offered by Christie's.[2]

Beeple's art represented an entire career's worth of effort, an astonishing work. Perhaps one of the more astonishing aspects of the work is that he was not sued for using several iconic movie and video game characters in his 5,000th day[3] — a practice with long and controversial history in fine art and the law.

Visual art may seem frivolous in a world facing a global pandemic and environmental calamities, but is increasingly part of our world and our culture. Today, we spend more and more of each day absorbing visual images — from Instagram feeds, to the logos on our computer screen, to emojis with which we communicate. Some say we are in a post-literate world, but in fact, we now live in a multi-literate world, where we use the language of visual images to communicate, as much as we use words.

Visual images have always had a unique way of making us think. In *Ulysses*, James Joyce, through his alter-ego Stephen Dedalus, spoke of the "ineluctable modality of the visible." In doing so, he drew on precepts going back as far as Aristotle. In contemporary parlance, we are all visual learners. Modern visual artists are the progeny of Joyce, speaking in a symbolic language of quotations and allusions. The grammar of this process in art is sometimes

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[1] twitter.com/ChristiesInc/status/1361670588608176128/photo/1.

[2] www.christies.com/features/Monumental-collage-by-Beeple-is-first-purely-digital-artwork-NFT-to-come-to-auction-11510-7.aspx?sc_lang=en.

[3] *Id.* (scroll down to "01.07.21").

called Appropriationism — the incorporation of familiar visual images into new works of art — and is heavily associated with the post-Modern art movement of the late 20th century. But appropriation — capitalized or not — continues strong today. And it is still at loggerheads with copyright law.

Modern Art, Postmodern Art, and Appropriationism

Modern art began with Cubism. At the turn of the 20th century, western culture was experiencing great change, absorbing the transformation of the industrial revolution. The progression from Cezanne's moody yet recognizable countrysides[4] to Marcel Duchamp's practically unrecognizable "Nude Descending a Staircase"[5] took place in less than a decade — 1904 to 1912.[6]

The first Appropriationist style was collage. The industrial revolution brought not only social change, but the mass availability of manufactured things, sometimes things that were shoddy and disposable in a way that seemed to cheapen day-to-day experience. Fine art was quick to assimilate and comment on these new things. In his 1912 painting "Still Life with Chair Caning," Picasso incorporated an oilcloth printed with a caning design found on the cafe tables, injecting an image from the real world into his composition.[7] Collage was soon embraced by the Dadaists. In 1920, for example, Hannah Hoch created "Pretty Maiden," a collage replete with 22 BMW logos, a pneumatic tire, a wig, and a light bulb.[8]

Soon, visual artists began incorporating mass-produced images, as well as mass-produced things, into their artworks, and the result was Pop Art. As Marshall McLuhan said, "Information pours upon us, instantaneously and continuously."[9] Even Robert Hughes, one of the more outspoken critics of post-Modern art, shares this view. "Nature has been replaced by the culture of congestion: of cities and mass media. We are crammed like battery hens with stimuli, and what seems significant is not the quality of meaning of the

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[4] Paul Cezanne, *Mont Sainte-Victoire* (1904-06), The Henry and Rose Pearlman Foundation, on long-term loan to the Princeton University Art Museum, artmuseum.princeton.edu/cezanne-modern/c%C3%A9zanne/mont-sainte-victoire.

[5] Marcel Duchamp, *Nude Descending a Staircase, No. 2* (1912), Philadelphia Museum of Art, PD-US, en.wikipedia.org/w/index.php?curid=3922548.

[6] ROBERT HUGHES, THE SHOCK OF THE NEW 19, 52-53 (1991). This book is a classic work of art criticism, and highly recommended for more background on post-Modernism.

[7] Pablo Picasso, *Still Life with Chair Caning* (1912), Picasso Museum, Paris, www.pablopicasso.org/still-life-with-chair-caning.jsp#prettyPhoto[image2]/0/.

[8] Hannah Hoch (1920) Pretty Maiden, utopiadystopiawwi.wordpress.com/dada/hannah-hoch/the-beautiful-girl/.

[9] MARSHALL MCLUHAN AND QUENTIN FIORE, THE MEDIUM IS THE MESSAGE 63 (1967).

messages, but their excess. Overload has changed our art."[10] Keep in mind that Hughes wrote this many years before the iPhone transformed us into a society of images and gestures.

Artists, armed with the technology of mass production and digital authoring tools, are now able to create digital images with little or no technical training. The first to publicly capitalize on that idea was Andy Warhol, who set up his "Factory," a studio in which hired artisans mass-produced his ideas. Later, Jeff Koons, a commodities broker-turned-artist, became notorious — and a defendant in a famous lawsuit in the 1990s — for producing Appropriationist sculptures that he had no hand in crafting. But this lack of craft was part of the point; one tenet of post-Modernism is its notion that quality and originality are "sinister devices of cultural control."[11]

Copyright and Fair Use

To the law, appropriation is fundamentally copyright infringement, so the philosophical underpinnings of Appropriationism and intellectual property law naturally conflict. In copyright law, originality and appropriation fight it out under the aegis of the *fair use doctrine*. The Copyright Act[12] specifies the factors to be taken into account when determining whether a possible infringement is fair use.

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

There are two competing — or perhaps parallel — philosophies of creativity underpinning fair use. One view is that creativity happens in the mind of the artist. The romantic conception of authorship envisions the artist creating art from nothing but imagination. This view supports a narrow definition of fair use. The Appropriationist notion is that creativity is mostly a synthesis

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[10] Robert Hughes, *The Shock Of The New*, at 324.
[11] Paul Richard, *Welcome to the 'Image World'; At the Whitney, a Sleek, Chic and Shallow Response to the Media Blitz*, WASH. POST, Nov. 12, 1989, at Gl.
[12] 17 U.S.C. 107.

of existing expression, a notion that questions the idea of originality. This view supports a broad definition of fair use.

How should the law strike a balance between these two philosophies? The "ineluctable modality of the visual" is a Joycean way of saying that visual arts are special — they are different from works based on sound, or touch, or words. Assuming that's true, should visual arts enjoy special treatment under copyright law, and particularly under fair use?

The fair use doctrine has been called "the most troublesome in the whole law of copyright."[13] As Lawrence Lessig quipped, "'fair use' is the right to hire a lawyer,"[14] commenting on the decade-long war between Google and Oracle over the application of fair use to software: two trials, two Federal Circuit reversals, one Supreme Court reversal of that, and over $100 million in legal fees.[15] The vagueness of the fair use doctrine makes Appropriationism a risky business. Courts are reluctant to resolve fair use questions on summary judgment, so relying on fair use as a defense is often expensive, lengthy, and unpredictable. That means that a defendant who can't afford to fight ends up being silenced instead.

Much of the development of copyright law in the last decades has been a process of adapting the law to new forms of expression; as technological advancements have come faster and in greater leaps, they stretch copyright law far beyond its original focus. At the same time, as a political matter, the media industry has successfully lobbied for more and longer copyright protection, mostly without effective opposition. The duration of copyright protection has been inflating — now life plus 70 years for individuals — even while the technology to mix and recast images in creative ways has hurtled forward. Lately, the advance of art and technology has put more and more pressure on the fair use doctrine, as we seek to balance the rights of the quoter and the quoted in our world.

Fair Use Factors and Appropriationism

The first factor is usually not favorable to Appropriationism. To a lay person, the purpose of Appropriationist art does not fit neatly into either a commercial or non-commercial category. But to the law, fine art is a business. Commentators have criticized the courts for classifying fine arts as a commercial use, saying that the distinction between commercial and educa-

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[13] *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).
[14] twitter.com/lessig/status/1379116748180447237?s=20.
[15] en.wikipedia.org/wiki/Google_LLC_v._Oracle_America,_Inc.

tional purposes is indistinguishable when applied to the fine arts.[16] Moreover, as art finds its way into museum collections or is displayed to the public, it does inure to the public benefit. One federal district court in California has held that broader scope is given to fair use in the field of fine arts than in "commercial enterprises."[17]

The second factor, the nature of the copyrighted work, categorizes the original work, parallel to the way the first factor categorizes the infringing work. Courts generally give less latitude to artists than to authors of academic or news material. The Second Circuit has held that "When informational works are involved, as opposed to creative ones, the scope of fair use is greater."[18] Courts generally draw the line between these categories rigidly, turning a deaf ear to claims that artistic expression is intended to inform its viewer.

The ineluctable modality of the visible is crucial to the third factor. Unlike text or music, which are sequential in nature and can be more easily excerpted, visual material comes in one, instantaneous image. One court has held that every frame of a film is a work of art, thus rendering the use of any one frame a complete copying of the underlying work.[19] Some commentators have therefore suggested that the substantial use criterion should not be applicable to visual works.[20] Over the years, the courts have begun to agree. For visual images, use of an entire work often will qualify as fair use. In *Nunez v. Caribbean Int'l News Corp.*,[21] a case involving re-use of photographs by a newspaper, the court simply said, "The third factor does not seem particularly relevant in this context."

The last enumerated factor is the effect on the potential market for the original work, originally the "single most important element" of the fair use analysis.[22] This factor asks whether the new work has supplanted the market for the original work. For fine artists, this factor can cut either way, depending not only on the equities of the case but on the vagaries of the art market. Courts often distinguish between the market for the plaintiff's work and the market for the infringing work. This factor can also backfire for the plaintiff, when the very fact of the copyright infringement claim increases sales of the infringed work. But some courts disregard this notoriety value.

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[16] Sigmund Timberg, *A Modernized Fair Use Code for Copyrights*, in JOHN LAWRENCE AND BERNARD TIMBERG, FAIR USE AND FREE INQUIRY 313-14 (2d ed. 1989).

[17] *Loew's Inc. v. Columbia Broadcasting Sys., Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955) (the *Gaslight* case).

[18] *See Wojnarowicz v. American Family Assn.*, 745 F. Supp. 130, 144 (S.D.N.Y. 1990).

[19] Time, Inc. v. Bernard Geis Assoc., 293 F.Supp. 130, 159 (S.D.N.Y. 1968).

[20] Timberg, *Modernized Fair Use*, in LAWRENCE AND TIMBERG, at 313.

[21] 235 F.3d 18 (1st Cir. 2000).

[22] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Transformation: The "Fifth Factor"

Fair use in Title 17 covers a non-exclusive list of factors, intended only to set the stage for an equitable judgment. Over the past few decades, courts have relied more and more on an uncodified fifth factor — transformation — in fair use analysis. This factor is often cast as part of factor one. A use is transformative when it "adds something new, with a further purpose or different character," as the Supreme Court put it in *Campbell v. Acuff-Rose Music*.[23] Via a string of cases in the late 1990s and the 2000s, the courts began to place more and more emphasis on this factor. In a seminal article on the topic, Judge Pierre Leval said:

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. … [If] the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[24]

This new focus on transformation arguably changed the relationship of copyright and Appropriationism forever.

Fair Use, Appropriationism, and Fine Arts in the Courts

The patron saint of Appropriationism is Andy Warhol. Warhol was the figurehead of the pop art movement in the 1960s, and his trademark style reproduced commercial images that had become cultural icons. His best known work is the 1962 "32 Campbell's Soup Cans."[25] His serial photographs of Marilyn Monroe (in *Marilyn Diptych)* are now cultural icons in their own right.[26]

One heir to Warhol's artistic vision is Richard Prince, who engages in a form of Appropriationism called re-photography, and is most famous for his appropriation of the men from Marlboro cigarette ads.[27] In 1983, Prince ran afoul of the law by appropriating a photograph of Brooke Shields, which he

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[23] 510 U.S. 569 (1994).
[24] Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).
[25] Andy Warhol, *Campbell's Soup Cans* (1962), MOMA.
[26] Andy Warhol, *Marilyn Diptych* (1962), Tate Museum.
[27] Richard Prince, *Untitled* (cowboy) (2016), LACMA.

entitled "Spiritual America No. 1" and exhibited in a fake art gallery he had set up.[28] The picture's original photographer, Gary Gross, attempted to serve Prince with a lawsuit but was thwarted by the disappearance of the fake gallery.[29]

Even 30 years later, Prince was still warring with copyright law, but with more success. Patrick Cariou, a professional photographer, had published a book of photographs entitled *Yes Rasta*, capturing "the strict, separatist, jungle-dwelling, fruit-of-the-land lifestyle — popularized by reggae legends Bob Marley, Peter Tosh, and Burning Spear." Prince created a series of paintings and collages entitled "Canal Zone," incorporating the Cariou photographs, along with other images and materials.[30] The district court found infringement notwithstanding Prince's assertion of the defense, and ordered Prince to deliver unsold "Canal Zone" works to Cariou. But on appeal, in *Cariou v. Prince*,[31] the Second Circuit concluded that 25 of the 30[32] works at issue constituted fair use, because Prince's "composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs." The court also found no evidence that Prince's work usurped the market for Cariou's photographs. The market for Prince's art was fine art collectors and museums, some selling for $2 million or more, whereas Cariou's book of photographs was marketed as a commercial book, at modest prices. (Indeed, as of this writing, it is available on Amazon.com for $24.95.)

Prince's Appropriationism, as well as his battles with copyright law, continue to this day. His "New Portraits" series was a collection of screenshots of Instagram posts.[33] It resulted in at least two ongoing lawsuits in which Prince has invoked fair use. The posts feature comments of Prince, like "non sequitur," "gobbledygook," "jokes," "oxymorons," "'psychic jiu jitsu,'" and "inferior language" that "sounds like it means something."[34]

Prince's Instagram installation is particularly interesting given the counterpoint in other fair use cases involving Instagram postings. In a recent case, a paparazzo took a picture of Emily Ratajkowski, a model and actress, and

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[28] William Zimmer, *Appropriation: When Borrowing From Earlier Artists is Irresistible*, N.Y. TIMES, June 14, 1992, sec. 13CN at 22.

[29] Paul Taylor, Richard Prince, *Art's Bad Boy, Becomes (Partly) Respectable*, N.Y. TIMES, May 17, 1992, Arts & Leisure sec. at 31.

[30] www.artistrights.info/cariou-v-prince.

[31] 714 F.3d 694 (2d Cir. 2013).

[32] Infringement analysis on the other 5 was remanded to the district court.

[33] Richard Prince, *New Portraits* (2019), MOCAD, detroitartreview.com/2019/11/richard-prince-portraits-mocad/.

[34] *Graham v. Prince*, Complaint Section 28 Case 1:15-cv-10160-SHS (S.D.N.Y. Dec. 30, 2015). The other case is *McNatt v. Prince*, Case 1:16-cv-08896-SHS (S.D.N.Y. Nov. 16, 2016), whose complaint contains an entire section called "Defendant Prince's Contempt for Copyright Law."

Ratajkowski copied the photo, added the words "mood forever" to the bottom of the photo, and posted it to her own Instagram account as a "story" — a feed that persists for only 24 hours. The photographer sued for copyright infringement. The court declined to decide the fair use defense on summary judgment, saying that there was an issue of fact as to whether the use was transformative.[35] The similarity between the substantive transformation here and in the Richard Prince installation suggests that Prince might be successful on a fair use defense — but clearly, Prince makes a practice of dancing on the edge of what is lawful, and that is part of his artistic vision.

Collage is still alive, though physical collage now intersects with "found art." In 1988, artist Dennis Oppenheim created a sculpture for a Santa Monica business development. entitled "Virus,"[36] which resembled "a jungle gym with 34 fiberglass figures of Mickey Mouse and Donald Duck skewered on a matrix of bronze rods."[37] Oppenheim cast the figures from plastic toys made 60 years ago in Japan. He molded them into Fiberglass in dull colors. The Walt Disney Company discovered the artwork less than a year after it was completed, filed suit, and demanded the sculpture's removal, alleging copyright infringement. Disney offered to settle the matter with a $15,000 retroactive license, but Oppenheimer refused. The artist claimed that, due to fabrication difficulties, he made no profit on the sculpture and could not afford the license. He offered to cut up the figures to make them less recognizable, but Disney in turn demanded removal of the sculpture. Oppenheim made this comment about the lawsuit: "You go to a flea market, you buy a bunch of figures, two of them turn out to be Mickey Mouse and Donald Duck, and you put them in a sculpture or a collage. Artists do this all the time. That's appropriation."

But the digital age is rife with electronic collage. Jeff Koons, whose work has created a cottage industry for copyright lawyers, created a digital collage called "Niagara" that incorporated a commercial image of Gucci sandaled feet from *Allure*, a lifestyle magazine. There, the Second Circuit held the use transformative, saying that transformation "almost perfectly describes" the appropriation by Koons to create "a massive painting commissioned for exhibition in a German art-gallery space."[38]

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[35] *O'Neil v. Ratajkowski*, 1:2019cv09769 (S.D.N.Y. October 23, 2019).
[36] Dennis Oppenheim, *Virus* (1988), Museum of Fine Arts, Houston.
[37] Suzanne Muchnic, Disney Orders Removal of Sculpture, L.A. TIMES, Oct. 16, 1992, at Bl, B8.
[38] *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

Art Imitates Art

Most of Pop Art was reuse of commercial images, or images considered unartistic by the Appropriationist artist. But sometimes, different castes of artists borrow from each other.

One dispute took place in in the mid-1960s over the Andy Warhol series "Flowers," which was based on a photograph of hibiscus blossoms by Patricia Caulfield.[39] Warhol was estimated to have painted more than nine hundred "Flowers."[40] Caulfield sued Warhol, and the case was settled. However, that case was before the 1976 Copyright Act that codified the fair use doctrine. Reportedly, the settlement included copies of the offending print. However, it allowed Warhol to continue to use the photograph in his art.[41]

Probably the most famous — and most criticized — case about Appropriationism was the 1990s case *Rogers v. Koons*.[42] Jeff Koons, a notorious Appropriationist artist, used a photograph by Arthur Rogers, a commercial photographer, to create a sculpture for his "Banality" show. Rogers had been commissioned by an acquaintance, Jim Scanlon, to make a photographic portrait of his dogs. Rogers photographed Scanlon and his wife holding eight German Shepherd puppies between them in a row. The photograph was exhibited in the San Francisco Museum of Contemporary Art and sold under license as a commercial postcard.

"Banality" consisted of twenty sculptures to be fabricated by an Italian studio. Koons neither draws nor paints, and does not keep a studio.[43] Koons bought a copy of the postcard, tore the copyright notice off, and sent it to Italy to be copied. He visited the studio and directed the artisans to use the same angles, poses, and expressions "as per photo." He altered the work in minimal ways, placing daisies in the couple's hair and adding vivid colors. The sculpture was made in an edition of four, three of which Koons intended for exhibition and sale and one of which he reserved for himself. Koons titled his sculpture "String of Puppies."

Rogers filed suit in federal district court for copyright infringement. Koons asserted the fair use defense, claiming that he was parodying not the original postcard but the sentimental and maudlin elements of our culture that it symbolized. The court rejected the argument, identifying the elements

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[39] rugs.com/blog/andy-warhol-flowers-patricia-caulfield-hibiscus-blossoms/.

[40] JOHN HENRY MERRYMAN AND ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 202 & note 15 (2d ed. 1987).

[41] These facts have been reported in various secondary sources, but are hard to verify.

[42] 960 F.2d 303 (2d Cir. 1992).

[43] Kristine McKenna, *The Art World is Ripe for Me'; Jeff Koons' High Profile Marketing at Media Manipulation Makes his Talent Seen Secondary*, L.A. TIMES, Jan. 22, 1989, Calendar sec. at 4.

of the photograph that created a copyrightable work — lighting, pose, angle, selection of film, and camera — and held that since Koons copied these elements, he had substantially copied the work. The court ordered a remand on damages and required Koons to give the plaintiff the sculpture Koons had retained for himself.

Any lay viewer can see the similarities between these two works, but can also see that they are quite different in character and artistic message. Martin Garbus, a New York attorney specializing in constitutional law, commented in a 1992 *New York Times* article that the decision in *Rogers v. Koons* may have been unduly influenced by the fact that the court never viewed the actual sculpture.[44] The decision was written on the basis of Rogers's photograph and a photograph of Koons's work. Both were black and white, and both were the size of a postcard. Garbus felt that the photograph did not adequately bring out the differences in Koons's work — the unique coloring, huge size, and obvious satirical intent. John Caldwell, Curator of Painting and Sculpture at the San Francisco Museum of Modern Art, agrees that it is not possible to judge artwork like Koons's from a small photograph.[45] Caldwell calls the decision in *Rogers v. Koons* "outrageous." He comments that Rogers, who has possession of Koons's sculpture, does not deserve it. "It's not his work," he explains.

Koons's "Banality" show appropriated other images as well, with fewer legal repercussions. The cornerstone of his "Banality" phase work included a 1988 sculpture entitled "Michael Jackson and Bubbles." The sculpture, like "Puppies," is done on a semi-monumental scale and painted with exaggerated, garish colors. Michael Jackson, with white skin and gold clothes and decoration, is seated beside his pet chimpanzee. The image was copied directly from a publicity photograph.[46] Caldwell reports that according to Koons, Michael Jackson was pleased with the work.[47] In previous works, Koons has appropriated the Pink Panther and Odie (of the Garfield cartoon), and faced lawsuits for each.[48]

Finally, no description of Appropriationism would be complete without Marcel Duchamp's 1919 work "L.H.O.O.Q." — his mustachioed Mona

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[44] Martin Garbus, *Law Courts Make Lousy Art Critics*, NEWSDAY, Apr. 22, 1992, at 46.

[45] Telephone interview with John Caldwell, Curator of Painting and Sculpture, San Francisco Museum of Modern Art (Dec. 12, 1992).

[46] Captions from the "Banality" room at *Jeff Koons*, exhibit at the San Francisco Museum of Modern Art (Dec. 10, 1992 through Feb. 7, 1993).

[47] Telephone interview with John Caldwell.

[48] *It's Art, but is it Theft as Well?*, N.Y. TIMES, Sept. 22, 1991, at D7.

Lisa.[49] If Da Vinci held a copyright in 1919, it is likely that this work never could have survived its legal exposure. But then again, it would have been nearly miraculous for any painting to become such an icon of western culture within its term of copyright protection.

The value of appropriation was already being questioned by the art world that created it, soon after its initial heydey. "Oh no, not another appropriationist, simulationist image-stealer," lamented one art critic, calling the Appropriationists the "rerun tribe."[50] Thirty years ago, Robert Hughes called Appropriationism a "dead end"[51] and an art critic for the *New York Times* commented, "Post-Modernism has already made its points."[52]

But while art movements may come and go, copyright law is forever. Warhol's estate is still litigating some of his creations. In 2019, more than 30 years after Warhol's death, a fair use case is still ongoing. In 1981, Lynn Goldsmith, a photographer, took shots of the musical artist Prince. *Vanity Fair* magazine licensed one of these photos as an "artist's reference," and then commissioned Warhol to create an illustration based on the photo. Warhol ultimately created 16 silkscreen works based on the photo. After Prince died in 2016, Goldsmith learned of the use, made claims of copyright infringement, and the Warhol Foundation brought an action for declaratory judgment. The district court found the use transformative and therefore non-infringing, partially on the strength of the *Cariou* case. Goldsmith appealed to the Second Circuit, which concluded that the work was not transformative, saying "the district judge should not assume the role of art critic and seek to ascertain the intent behind or the meaning of the works at issue … judges are typically unsuited to make aesthetic judgments … ."[53] The Second Circuit referred to the *Cariou* case as a "high-water mark" for fair use, stated that the Warhol Prince works were less transformative than those five for which it remanded in that case, and remanded to the district court. The case is still pending, now at the Supreme Court.[54]

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[49] Marcel Duchamp, *L.H.O.O.Q.* (1919) Norton Simon Museum. en.wikipedia.org/wiki/File:Marcel_Duchamp,_1919,_L.H.O.O.Q.jpg.

[50] Kevin Thomas and Suzanne Muchnic, *The Art Galleries: La Cienega Area*, L.A. TIMES, Oct. 16, 1987, Calendar sec. at 24.

[51] Robert Hughes, *Mucking with Media; The Whitney Offers a Long Trek Through the Alien Goo*, TIME, Dec. 25, 1989, at 93.

[52] Andy Grundberg, *As It Must To All, Death Comes To Post-Modernism*, N.Y. TIMES, September 16, 1990, § 2, at 47.

[53] *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021).

[54] Ronald Mann, *Justices debate whether Warhol image is "fair use" of photograph of Prince*, SCOTUSBLOG (Oct. 14, 2022), www.scotusblog.com/2022/10/justices-debate-whether-warhol-image-is-fair-use-of-photograph-of-prince/.

Personal Note, and Conclusion

I first wrote about this topic in 1992, in law school, and my article in the *University of Miami Entertainment & Sports Law Review* was my first published legal writing. Now, in 2022, I have been in private practice for nearly 30 years, mostly in the field of copyright licensing, and written quite a lot about copyright law. During that time, of course, the world has changed, and my perspective has changed, too. In updating this article, it was interesting to revisit these ideas with a new point of view.

The decision in *Cariou v. Prince* was a bright note for artists, and did some good to repair the damage of *Rogers v. Koons*. But remedies for cases of Appropriationism that fail the fair use test have still not been addressed. In *Rogers v. Koons,* the court granted not only damages but an injunction, and ordered that Koons return the unsold copies of the statue to Rogers.[55] This is what made many in the art community believe the *Rogers v. Koons* decision was unfair — not so much its assessment of liability, but its application of injunctive relief.

Today, the courts rely much more heavily on transformation as an element of fair use than they did 30 years ago. This factor, a nascent offshoot of factor one in 1992, is custom-made for Appropriationism, and the result in *Cariou v. Prince* illustrates how it can tip the balance. Today, due to the transformation test, the opinion in *Rogers v. Koons* or the outcome of the Warhol *Flowers* case could have been different. In fact, transformation is the core of what is valuable about Appropriationism. It is why we react differently to the Marlboro Man re-photography of Richard Prince, which merely reproduces the photographs of others, and the Pop Art of Andy Warhol, who transforms them so completely that his works have their own iconic status.

Also, in the meantime, the phenomenon of free culture, in which I have been heavily involved for most of my legal career, has created a lawful and privately-ordered system for appropriation in visual art. While my own practice has mostly centered on open source software licensing, open licensing in visual images has grown in concert with the open source movement — led by the Creative Commons initiative started by Larry Lessig. Both open source and Creative Commons were sea changes that were bound to happen. In the 2000s, the law was lagging far behind technology in allowing sharing of images and other copyrightable works. So, various "open" licensing models emerged to standardize license terms enough to allow sharing and improvements without complex clearance work or lawsuits — or waiting for Congress

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[55] *Rogers v. Koons*, 960 F.2d at 313.

to adjust the law. In a sense, appropriation isn't appropriation if it's allowed. Perhaps that is one reason why the case law in this area has slowed during the intervening years. A great deal of material is available under terms that allow sharing and transformation, via licensing vehicles that did not exist in the 1990s. But also, Appropriationism is partially a commentary on the very copyright law that threatened to silence it. So now that there are free culture licenses, it is fair to ask, how much does Appropriationism matter anymore?

The reuse of images on the Web is rampant, of course, but I distinguish the use of commercial images in fine art from the use of media images in fan art, memes, or mash-ups. Many owners of commercial images actually encourage fan art, because it is mainly an homage that enhances the market for their media properties — for example, Star Trek promotion of fan art.[56] So, while the Web is rife with this kind of appropriation, it is rarely litigated. In fact, allowing use of media images in fan art is a way that media companies exercise control over what might otherwise be fair use, because they often impose "morality clauses" that limit re-use in ways that would be offensive or derogatory — for example, the DC Universe guidelines.[57] For Appropriationism, on the other hand, casting the original in an unfavorable light is usually the whole point.

In 1992, I suggested that injunctive relief for Appropriationist art was not good policy, and that copyright infringement damages — particularly disgorgement of profits — could be a proxy for a compulsory licensing model, given a music-style compulsory license model would not work for fine art. It's easy to suggest something like compulsory licensing as a newly-minted lawyer. But even with the perspective of 30 years of practice, I haven't changed my view much. I still think that the courts should maintain a baseline definition of fair use, for which there is no liability, and accommodate Appropriationism by changing not the scope of the defense, but the availability of remedies. Injunctive relief should not be available in fine art, because of its chilling effect on expression. In other words, to me, it might have been reasonable for Koons or Warhol to share some of their proceeds from their art with those whose images they appropriated, but the fact that Rogers owns the only extant copy of Koons's "String of Puppies" is a small tragedy. Artists can be ordered to share their profits, but shouldn't be ordered to give up their creative works to those trying to silence them.

I still perceive a difference between fine art and mere everyday Internet appropriation of images, and think that injunctive relief should be an available

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[56] www.startrek.com/news/fan-art-friday-featuring-some-of-our-favorite-fandom-creations.
[57] support.dcuniverse.com/hc/en-us/articles/360035343533-FanArt-Submission-Guidelines.

remedy for the latter. The challenge, of course, is to distinguish between the two, and I leave that to the next generation to sort out.

A prior version of this article, entitled "The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era" appeared in the *University of Miami Entertainment & Sports Law Review* in 1993.[58] Thanks to both the *University of Miami Entertainment & Sports Law Review* for publishing my article in the first place, and to the editors of *The Green Bag* for encouraging me to update it.

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You can also find an online version of this article, with many of the images discussed in the article, at www.heathermeeker.com/the-ineluctable-modality-of-the-visible-fair-use-and-appropriationism-in-fine-arts.

> I never saw daffodils so beautiful. They grew among the mossy stones about and about them; some rested their heads upon these stones as though on a pillow for weariness; and the rest tossed and reeled and danced, and seemed as if they verily laughed with the wind that blew upon them over the lake.
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> Dorothy Wordsworth
> *Grasmere Journal* (Apr. 15, 1802)

[58] repository.law.miami.edu/umeslr/vol10/iss1/9.

STOPPING TO SMELL THE 1-800-FLOWERS

DIGNITARY HARMS IN ACCESSIBILITY LITIGATION

Blake E. Reid[†] *& Zainab Alkebsi**

On first glance, *Gathers v. 1-800-Flowers.com* is a garden-variety web accessibility case.[1] Advocacy organization Access Now, on behalf of its members Lisa Gathers and Stephen Théberge, blind Bay Staters,[2] and R. David New, a blind Floridian, sued 1-800-Flowers.com, operator of a variety of web-based gift shops, for failing to make its websites accessible to the screen readers often relied on by web users who are blind and visually impaired[3] in violation of the Americans with Disabilities Act (ADA).[4] The District of Massachusetts allowed the suit to proceed over a thicket of technical objections.[5]

1-800-Flowers.com was quickly tossed atop the overflowing cornucopia of web accessibility cases, which some circuits (like the First) have endorsed, others (like the Third) have not, and others (like the Ninth) have endorsed only conditionally when there is a "nexus" between a website and a physical

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[1] Gathers v. 1-800-Flowers.com, No. 17-CV-10273-IT, 2018 WL 839381, at *1 (D. Mass. Feb. 12, 2018).

[2] *See* Craig F. Walker, *'Massachusettsan?'*, BOSTON GLOBE (Aug. 5, 2019) (explaining that while the official term for people from Massachusetts is "Massachusettsan," many locals prefer "Bay Stater" or (gulp) "Masshole").

[3] There is significant debate over the appropriate language to use in these contexts; we defer to the formulations used by the plaintiffs in *1-800-Flowers.com*. *E.g.*, Amended Complaint at 2, ¶ 4 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 20, filed May 5, 2017).

[4] Amended Complaint at 1-3, ¶¶ 1-2, 5-7 (highlighting an array of "floral, fruit, plants, gift baskets, gourmet foods, chocolate and candies, plush and specialty gift products" sold at the titular www.1-800-Flowers.com, "premium chocolates and confections" sold on www.fanniemay.com and www.harrylondon.com, "premium popcorn and specialty food products from www.thepopcornfactory.com, "baked cookies and gifts" from cheryls.com and "gift-quality fruit" from www.harryanddavid.com, and a wide range of other websites).

[5] *1-800-Flowers.com* at *1. Shortly thereafter, the parties stipulated and agreed to dismiss the case. *See* Stipulation of Dismissal with Prejudice at 1 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273, Doc. No. 50, filed July 24, 2018). The authors were unable to determine whether the dismissal was the result of a confidential settlement or some other reason.

place like a store or restaurant.[6] But *1-800-Flowers.com* provides an opportunity to set aside the metaphysical questions about the ADA's application that pervade the Internet accessibility literature[7] and reflect on the indignity that web users with disabilities frequently suffer for having the audacity to enforce their civil rights.

In particular, *1-800-Flowers.com* calls us to examine the harms visited on web users with disabilities who must undertake the rigors of litigation in federal court simply to undertake ordinary tasks such as buying flowers for a loved one. Prof. Elizabeth Emens has conceptualized the extra labor involved in vindicating disability rights as "a particular form of labor that especially burdens people with disabilities" — the "admin of life."[8] *1-800 Flowers.com* demonstrates how the disproportionate burden faced by people with disabilities can include not only economic and participatory harms, but dignitary harms that come with enduring and responding to the beration, insults, and impugning of one's character that often come with ADA litigation.

Access Now's complaint in *1-800-Flowers.com* explains the "isolation and stigma" faced by blind and visually impaired web users.[9] Users with disabilities often and suddenly encounter impassable technical barriers, imposed by the carelessness or overt cost-avoidance of firms that build websites without accessibility in mind.

As the old saying goes, "I must have flowers, always, and always."[10] But New, one of the plaintiffs, explained how his desire to "send flowers to family and friends" via www.1-800-Flowers.com led him to encounter a bouquet of technical incompatibilities with his screen reader software.[11] According to New, these incompatibilities ranged from missing buttons to misplaced error messages to a cacophony of audio played when New entered the "Customer Support" area of the site that refused to stop until he closed his browser and gave up on his order.[12] With few apparent options for recourse, New worked with Access Now and his fellow plaintiffs to bring suit.

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[6] *See generally* Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 598-99 (2020) (citing cases).

[7] *See, e.g.*, Blake E. Reid, Christian Vogler, and Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, COLO. L.R. FORUM (Nov. 9, 2020), lawreview.colorado.edu/digital/telehealth-and-telework-accessibility-in-a-pandemic-induced-virtual-world/.

[8] *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2331 (2021).

[9] *See* Amended Complaint at 3, ¶ 7.

[10] This quote is frequently attributed to Claude Monet, *e.g.*, Virginia Museum of Fine Arts, *"I must have flowers, always, and always."* (June 15, 2015), vmfa.museum/connect/i-must-have-flowers-always-and-always/, though the authors were unable to identify an authoritative source.

[11] Amended Complaint at 9, ¶ 29.

[12] *Id.* at 9, ¶ 30 .

In response, 1-800-Flowers.com accused New and the other plaintiffs of filing a series of "form complaints," citing to some twenty-nine complaints that they had filed against other website proprietors.[13] 1-800-Flowers alleged that the plaintiffs' allegations were undated and accused the plaintiffs of "embark[ing] on a fishing expedition … in search of alleged 'barriers'" only after 1-800-Flowers.com had filed its motion to dismiss.[14] 1-800-Flowers.com accused the defendants of "failing to plead a concrete, present plan" to actually return to the websites,[15] implying that the lawsuit was pretextual. 1-800-Flowers.com broadly accused the plaintiffs of "flooding the courts with [web accessibility] cases, and pursuing litigation . . . apparently for [their] own financial benefit."[16]

1-800-Flowers.com further argued that the problems with the websites amounted to only "a handful of technical issues" that weren't "specific to a disability" and were merely a function of "Internet technology [not being] perfect."[17] 1-800-Flowers.com even insinuated that the problems plaintiffs experienced might be their own fault — a result of screen reader software that "does not work perfectly."[18]

After New and the plaintiffs re-explained their experiences,[19] 1-800-Flowers.com again accused the plaintiffs of only "bother[ing] to actually access the [w]ebsites" after it had filed a motion to dismiss.[20] 1-800-Flowers.com even argued the plaintiffs had "[b]y implication, admit[ted] that the [w]ebsites are accessible" by not being sufficiently detailed in their complaint.[21]

Judge Talwani summarily denied 1-800-Flowers.com's motion to dismiss in an unpublished opinion, essentially ignoring the accusations of impropriety and relegating them to the purgatory of litigation conduct never to grace the pages of the *Federal Supplement*.[22] Indeed, some readers may join Judge Talwani in reading 1-800-Flowers' accusations as the ordinary puffery of overzealous trial lawyers, worthy of no more opprobrium than polite dismissal

[13] Defendant's Memorandum of Law in Support of Motion to Dismiss at 3-4 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 27, filed May 30, 2017).
[14] Def.'s Memo at 5-6 (quotation marks in original).
[15] *Id.* at 8.
[16] *Id.* at 6.
[17] *See id.* at 10.
[18] *Id.*
[19] Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 6-8 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 30, filed June 13, 2017).
[20] Defendant's Reply at 2 (D. Mass. Feb. 12, 2018) (No. 17-CV-10273-IT, Doc. 33, filed June 29, 2017).
[21] *Id.*
[22] *1-800-Flowers.com* at *3.

under the familiar contours of Rule 12(b)(6).[23]

But we contend there is more at play here. Judge Talwani's unpublished order declined to engage with the significant dignitary harm that 1-800-Flowers.com's ableist rhetoric and imputations visited on the plaintiffs.

Whatever the veracity of the plaintiffs' claims, 1-800-Flowers went beyond defending itself to leveling stunning accusations of impropriety and litigation chicanery against the plaintiffs, all stemming from the simple pleasure of buying flowers. 1-800-Flowers.com's rhetoric plays on a litigation-specific flavor of what Prof. Doron Dorfman has described as the fear of the "disability con" — a "moral panic" of people with disabilities "fak[ing]" legal assertions "to take advantage of rights, accommodations, or benefits."[24]

1-800-Flowers.com unsubtly and aggressively cited the blind and visually impaired plaintiffs' desire to access all websites, evidenced by their other lawsuits, to suggest that *this lawsuit* couldn't possibly be legitimate. The implication was clear: surely web users who were blind and visually impaired couldn't *really* expect to use the *whole* Internet, much less a trivial activity like ordering flowers.[25]

1-800-Flowers.com's implication went further: that the plaintiffs' claims were pretextual and that they were only *in it for the money* — despite the fact that they had sought only declaratory and injunctive relief along with costs and reasonable fees for their attorneys.[26] 1-800-Flowers.com's rhetoric mirrors that of political commentators who have accused disability rights lawyers of "churn[ing] out assembly-line complaints" and running "ADA filing mills."[27]

1-800-Flowers.com not only took aim at the lawsuit itself, but sought to discredit the actual experience of the plaintiffs with disabilities. It marginalized the significance of the barriers they encountered, contended that the plaintiffs had not explained their problems in sufficient detail, and even tried to blame them and their screen-reader software for the problems, suggesting that *they weren't doing it right*.

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[23] *See id.*

[24] *E.g.*, Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOCIETY REV. 1051 (2019).

[25] While the implication may have been to self-deprecate the seriousness of 1-800-Flowers.com's business, we note that the company is an enormous e-commerce conglomerate traded on the NASDAQ with a current market cap of more than 400 million dollars. www.nasdaq.com/market-activity/stocks/flws (last visited Oct. 21, 2022).

[26] Amended Complaint at 18-19.

[27] *See, e.g.,* Walter Olson, *ADA's Assault on the Web: Your Turn, Congress*, CATO INSTITUTE (July 8, 2016), www.cato.org/blog/adas-assault-web-turn-congress; *see also* Lainey Feingold, *Ethics in the Digital Accessibility Legal Space: ADA Enforcement Cases or Something Else?* (July 23, 2019), www.lflegal.com/2019/07/ethics-2/ (distinguishing legitimate web access cases from "drive-by, click-by, or surf-by cases").

1-800-Flowers.com implicitly rested its argument on an ableist stereotype of people who are blind or visually impaired not knowing how to use screen-reader software. 1-800-Flowers.com insinuated that that its websites were not the problem, and in turn that it should not be responsible for the necessary — and simple — fixes to make the websites accessible.[28] 1-800-Flowers' strategy was instead to conceptualize users with disabilities as the problem, and in turn to argue that no restorative action was necessary.

Finally, 1-800-Flowers.com forced the plaintiffs to re-explain their experiences. In doing so, 1-800-Flowers.com not only marginalized its responsibility for the websites' barriers, but inflicted unnecessary emotional labor onto the plaintiffs by forcing them to endure the emotionally exhausting and painful process of reliving barriers to access throughout the litigation.

Rhetoric like 1-800-Flowers.com's may be commonplace in federal court. But enduring it shouldn't be a prerequisite for basic access to simple pleasures, from digital flower delivery to the bounty of other cultural, social, economic, and democratic fruits that the web provides — and that non-disabled people often take for granted. As Okakura Kakuzo once wrote:

> In joy or sadness, flowers are our constant friends. We eat, drink, sing, dance, and flirt with them. We wed and christen with flowers. We dare not die without them … . How could we live without them?[29]

Before adding insult to injury, web accessibility defendants should ask themselves why they are denying access to the simple pleasures of their goods and services — and foregoing revenues from millions of customers with disabilities — instead of acknowledging their shortcomings and working with plaintiffs to resolve them. Web accessibility unequivocally is the morally, ethically, legally, and economically right thing to do. As Luther Burbank said, "[f]lowers always make people better, happier and more helpful; they are sunshine, food, and medicine for the soul."[30]

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[28] *Cf.* Eric Goldman, *11th Circuit Says Grocery Store Website Isn't Covered by the ADA — Gil v. Winn-Dixie*, TECHNOLOGY & MARKETING LAW BLOG (Apr. 18, 2021), blog.ericgoldman.org/archives/2021/04/11th-circuit-says-grocery-store-website-isnt-covered-by-the-ada-gil-v-winn-dixie.htm (querying why a web defendant chose to defend an ADA case instead of spending less money to simply "fix the site" and "generate additional revenue" from customers with disabilities as a result).

[29] The Book of Tea, ch. 6. www.gutenberg.org/files/769/769-h/769-h.htm.

[30] Nina Antze, *The Legacy of Luther Burbank*, THE BOTANICAL ARTIST (Dec. 2014), www.pcquilt.com/wp-content/uploads/2013/08/TBA_Dec_Burbank.pdf.

EXEMPLARY LEGAL WRITING 2021
BOOKS

FIVE RECOMMENDATIONS

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

Stephen Breyer
The Authority of the Court and the Peril of Politics
(Harvard University Press 2021)

It is not often that a sitting Supreme Court Justice authors a book. Justice Breyer's mini book (exactly 101 pages), based on a lecture that he delivered on the Court's power and separation of powers, traces how the public developed an acceptance of and respect for the decisions of the Court. Breyer uses Court decisions, including *Marbury v. Madison*, *Brown v. Board of Education*, and *Bush v. Gore*, to provide context for the evolution of the Court's power and the role played by the executive and legislative branches of government.

Breyer notes that even where there is significant disagreement with the Court's position (*Bush v. Gore* for example), there is ultimate acceptance and respect from the public. Even so, he warns that this acceptance cannot be taken for granted, citing recent data from Pew Research which show a precipitous decline in the public's perception of the Court's fairness and neutrality. He further notes that media influences and an increasing practice of inserting partisan politics into the commentary might be contributory to the diminish-

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ing perception of fairness and impartiality of the court. Decrying the infusion of politics in the Senate confirmation process, he states that "the popular perception has grown that Supreme Court justices are unelected political officials." Breyer however stridently and optimistically maintains that the differences on the Court are jurisprudential and not political. In essence, alignments of Justices are reflective of judicial, not political, philosophies with positions embedded in textualism or purposivism. This book is written in a style that will appeal to a diverse audience seeking a better understanding of the Supreme Court's position in a politically polarized era and the implications for the rule of law.

Herma Hill Kay (author) and Patricia Cain (editor)
Paving the Way: The First American Women Law Professors
(University of California Press 2021)

For the very first time, there is an excellent resource that traces the pathway of the first women professors in the legal academy. Paving the way explores the career trajectories of 14 women and how they surmounted obstacles to break into law teaching. Ruth Bader Ginsberg (also featured in the book), in a foreword, describes the work of the author, Herma Hill Kay, as a "prodigious effort" and one of "inestimable value." While this was undoubtedly a laudable effort, the criteria of only including ABA accredited schools and those approved for AALS membership proved to be exclusionary to women from underrepresented groups. There is an imperfect solution to remedy these omissions by including the accounts of women of color, such as Patricia Harris, the first black female law professor at Howard, in a separate chapter. In addition, women who entered the faculty from librarianship were also excluded from the first 14 women law professors, because of an adherence to the stipulation of full-time classroom teaching as a requirement for inclusion. Despite these unfortunate omissions, *Paving the Way* provides wonderful insight into the careers of early women law teachers.

Faith Gordon and Daniel Newman (editors)
Leading Works in Law and Social Justice
(Routledge, 2021)

The intersection between law and social justice is both vexing and crucial. On the one hand, the law can be a tool for driving positive changes in our society. On the other hand, the law can entrench and reinforce systemic injustice. Individuals interested in exploring this paradoxical relationship or passionate about social justice will find *Leading Works in Law and Social Justice*

an excellent foundational text. *Leading Works* is a compilation of essays wherein scholars and practitioners discuss books or articles that they see as foundational or critical to the study of law and social justice. These essays discuss different policies and legal frameworks and their connection to particular injustices, such as racism and classism. The works that the authors discuss range from classics by Karl Marx and W.E.B. Du Bois to writings by more contemporary individuals, including journalists, activists, and academics whose work is instrumental in promoting social justice in the legal system. While the contributors are all from Western Europe and Australia, the essays' topics and analyses are relevant to legal scholars internationally, including the United States. This excellent and thought-provoking book is of interest to anyone passionate about social justice or, more generally, people wanting to challenge their underlying assumptions about the function of the law and the role that the law could play in creating a more just society.

Naa Oyo A. Kwate (editor)
The Street: A Photographic Field Guide to American Inequality
(Rutgers University Press, 2021)[1]

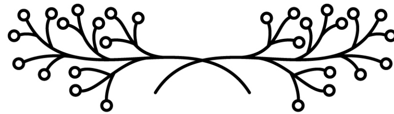
Inequality in the United States continues to be a highly relevant and critical topic for exploration. *The Street: A Photographic Field Guide to American Inequality* is a compilation of essays exploring different manifestations of inequality in the United States from transportation policies to health care and education to law enforcement. Where this book stands out, though, is in its innovative approach to this discussion by using the format of a field guide to "describe the policies and social exchanges that characterize and contest inequality in the United States."

Each chapter begins with a stark and stunning photograph, taken by Camilo Jose Vergara, of a scene in Camden, New Jersey before launching into the discussion. The chapter discusses the particular set of policies that drive inequality, how the picture relates to that topic, and the typical impact of these policies in cities across the United States. Each essay is well-researched and informative while remaining approachable for all readers regardless of expertise. The result is an impactful summary of inequality that also humanizes the people adversely impacted by it.

[1] Craig Futterman, a contributor to this exemplary work, is a professor at the same institution where reviewer Ariel Scotese is employed. This had no bearing on the book selection or the opinions expressed in the review.

Michael Hoeflich and Ross Davies (editors)
The Black Book of Justice Holmes:
Text Transcript and Commentary
(Talbot Publishing 2021)[2]

Justice Oliver Wendell Holmes, a long-serving associate justice of the Supreme Court of the United States (1902-1932), was an erudite jurist and a prolific note-taker, jotting down his observations on a wide variety of topics, including lists of books he had read and travel accounts. These notes were preserved over a fifty-year period in his Black Book. *The Black Book of Justice Holmes: Text Transcript and Commentary* provides an excellent accompaniment and aid to the original manuscript. The editors painstakingly undertake the formidable task of transcribing a significant portion of the Black Book while acknowledging imperfections in the endeavor due to Justice Holmes' copious, often hard-to-decipher notes and lists. Researchers and scholars will also benefit from the inclusion of scholarly essays providing insights on the life and work of Justice Holmes through the lens of the Black Book.



For oft, when on my couch I lie
In vacant or in pensive mood,
They flash upon that inward eye
Which is the bliss of solitude;
And then my heart with pleasure fills,
And dances with the daffodils.

William Wordsworth
I Wandered Lonely as a Cloud (1815)

[2] This exemplary work was co-edited by one of the editors of the *Green Bag Almanac & Reader*. This had no bearing on the book selection, which was based entirely on merit.

EXEMPLARY LEGAL WRITING 2021
JUDICIAL OPINIONS

THREE RECOMMENDATIONS

James C. Ho†

Preterm-Cleveland v. McCloud
994 F.3d 512 (6th Cir. 2021)
solo concurring opinions by
Judges Jeffrey Sutton, Richard Griffin, and John Bush

As a federal appellate litigator, I was always fascinated by rehearings en banc. To begin with, they are the rarest of beasts — the U.S. Supreme Court typically hears over twice as many arguments as the number of en banc arguments heard by all federal courts of appeals combined.

Moreover, when they do occur, en banc arguments in virtually every circuit involve well more than nine judges.[1] The greater numbers naturally make en banc advocacy quite the experience for advocates. It also makes it all the more striking when a judge takes the time to write a separate opinion that, for whatever reason, not a single other member of the en banc court sees fit to join.

Among the most notable examples of the past year: the en banc decision in *Preterm-Cleveland v. McCloud*.[2] By a vote of 9-7, the court rejected a constitutional challenge to an Ohio law that prohibited doctors from performing an abortion if they knew the mother wanted to abort because the unborn

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† Judge, U.S. Court of Appeals for the Fifth Circuit.
[1] 28 U.S.C. § 44.
[2] 994 F.3d 512 (6th Cir. 2021).

child has Down syndrome.

No federal appeal nationwide generated more separate solo en banc writings this past year. *Preterm-Cleveland* spurred not one, not two, but three solo en banc opinions — all concurrences — all highly impassioned about the topic at hand. And remarkably, the purpose of each solo writing was to sharply criticize long-established Supreme Court precedent in the area of abortion.

Judge Jeffrey Sutton bemoaned what he described as the federal judicial takeover of abortion regulation in 1973.[3] As he put it:

> Assuming … judicial responsibility over so much abortion policy comes with terrain-altering costs to the judiciary. An independent judiciary has always been crucial to America's constitutional order. But a politicized judiciary cannot be an independent judiciary. The more the judicial branch enumerates our country's policies in areas of unenumerated liberty rights over which the people have legitimate disagreements, the more it becomes a new source of power — an allocation of responsibility that comes with the worst features of gerrymandering: a warping of democracy and a perceived manipulation of the decision-making process. Any effort to insulate such power from the political fray is not likely to last long or end well. Far better, in my view, to give States like Ohio more latitude, not less, to weigh and decide complex questions about abortion policy.
>
> …
>
> The more the federal courts do when it comes to abortion policy, and the longer they do it, the less reason there is for compromise at the local level. That has not been good for the federal courts or for obtaining more stable law over an issue unlikely to go away anytime soon.[4]

Next up: Judge Richard Griffin wrote separately to observe that "[t]he philosophy and the pure evil that motivated Hitler and Nazi Germany to murder millions of innocent lives continues today. Eugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today."[5] He went on to explore the deplorable history of eugenics, both in Europe and in the United States, before concluding that, "whatever else might be said about" the Supreme Court's abortion jurisprudence, "it

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[3] *Id.* at 535.
[4] *Id.* at 537, 538.
[5] *Id.* at 538.

did not decide whether the Constitution requires States to allow eugenic abortions."[6]

Finally, Judge John Bush examined the interplay between Supreme Court precedent and the original meaning of the Fourteenth Amendment in the area of abortion. He articulated a framework for "balanc[ing] our role as lower court judges with our duty to apply the Constitution's original meaning."[7] "When no holding of the Supreme Court can decide a question, … our duty to interpret the Constitution in light of its text, structure, and original understanding takes precedence."[8] And he concluded that there are "serious questions as to the correctness of the Supreme Court's abortion jurisprudence … as a matter of the Constitution's original meaning."[9]

This flurry of separate writings in *Preterm-Cleveland* naturally leads to the following question: What's the point of writing separately, when you're just one of well over a dozen judges? The answer presumably varies from judge to judge — and from case to case. But the timing of these proceedings may suggest one possible objective: Judges Sutton, Griffin, and Bush issued their separate writings on April 13, 2021. A month later, on May 17, the Supreme Court granted certiorari in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

In re: MCP No. 165
20 F.4th 264 (6th Cir. 2021)
solo dissenting opinion by Judge John Bush

By an 8-8 vote, the Sixth Circuit denied initial hearing en banc to a legal challenge to the COVID-19 vaccination mandate issued by the Occupational Safety and Health Administration. The eight dissenters argued that OSHA lacked Congressional authorization to impose a vaccination mandate by regulatory fiat.

But Judge Bush decided to go even further — and did so without the company of any of his colleagues. He opined that Congressional authorization wouldn't have mattered in any event, because Congress lacks constitutional authority to impose a nationwide vaccine mandate.

Judge Bush provided a brief history of federal vaccine policy. He observed that "Congress has passed many laws to regulate the purity of vaccines, facilitate their distribution with information and funding, and compensate those

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[6] *Id.* at 540.
[7] *Id.* at 542.
[8] *Id.* at 543 (quotations omitted).
[9] *Id.* at 546.

injured by their administration, but it has apparently never invoked the commerce power to *mandate* their imposition upon the general public."[10]

Furthermore, Judge Bush invoked *NFIB v. Sebelius*.[11] As readers may recall, a majority of the Supreme Court in *NFIB* agreed that Congress has no constitutional authority to compel citizens to purchase health insurance. Judge Bush reasoned that, *a fortiori*, Congress cannot authorize the mandate challenged here. As he explained:

> [In *NFIB*,] Congress claimed the power to regulate the failure to engage in a commercial activity — the buying of insurance — because uninsured persons' failure to do so had a substantial aggregate effect on interstate commerce. Here, by contrast, OSHA claims the power to regulate the failure to engage in a *non-commercial* activity — the taking of a vaccine — because unvaccinated persons' failure to do so may affect interstate commerce. OSHA's theory of the commerce power is thus even more extravagant than what the Supreme Court has already rejected. If Congress cannot solve a perceived commercial problem with a "mandatory purchase," then how can it possess the authority, much less delegate it, to solve a perceived commercial problem by mandating that Americans engage in a *non-commercial* activity? The answer, of course, is that it likely cannot.[12]

In re Wild
994 F.3d 1244 (11th Cir. 2021)
dissenting opinion by Judge Lisa Branch and
solo dissenting opinion by Judge Frank Hull

My final example of a noteworthy solo en banc opinion involves the horrifying case of Jeffrey Epstein.

The Constitution guarantees various rights to those accused of a crime. But what about the *victims* of crime? Congress enacted the Crime Victims' Rights Act in 2004 to guarantee victims "[t]he right to be treated with fairness and with respect" — including "[t]he reasonable right to confer with the attorney for the Government in the case."[13]

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[10] *In re: MCP No. 165*, 20 F.4th 264, 290-91 (6th Cir. 2021) (collecting examples).

[11] 567 U.S. 519 (2012).

[12] 20 F.4th at 288 (citations omitted).

[13] 18 U.S.C. § 3771(a)(5), (8). Full disclosure: As chief counsel to Senator John Cornyn from 2003 to 2005, I worked on the Act when it was introduced as S. 2329 (108th Cong.). S. 2329 was then incorporated into H.R. 5107 and enacted into law as Pub. L. No. 108-405. My wife Allyson later represented the lead Senate sponsors, Dianne Feinstein, Jon Kyl, and Orrin Hatch, as amici curiae in this appeal.

It's hard to imagine a more compelling case for protecting crime victims than this one. Courtney Wild was repeatedly victimized by Epstein — and then "left in the dark" and "affirmatively misled" "by government attorneys" who "secretly negotiated and executed a non-prosecution agreement with Epstein."[14]

Wild asserted her rights under the CVRA. As she explained, Congress went out of its way to protect her right to confer with the Government *even* "if no prosecution is underway."[15] Quoting the Fifth Circuit, she said that her right to confer "clearly" and "logically" "appl[ies] *before* any prosecution is underway."[16]

But the Eleventh Circuit rejected her claim by a 7-4 vote. It held that the Act does not grant victims a judicially enforceable right to confer with the Government without a pending indictment — and then outlined the additional "practical and constitutional problems" that recognizing such a right would cause.[17] Judge Gerald Tjoflat, joined by four of his colleagues, wrote separately to spell out those concerns further. He declared that it would be "unconstitutional" for Congress to codify such a right, because it would allow victims to interfere with prosecutorial prerogatives and place "intense pressure on the United States Attorney."[18]

Judge Lisa Branch authored the primary dissent, joined by three of her colleagues. In her view, "the plain text of the CVRA … provides crime victims with the statutory private remedy of judicial enforcement of those rights 'if no prosecution is underway.'"[19] She noted that the government had not "raised any as-applied challenge to the constitutionality of the statute," while noting it was "free to bring [one] in a future case."[20] She also observed that, "in the many years since the Fifth Circuit's opinion in *In re Dean* … , the government has not presented any evidence suggesting any difficulties."[21]

I also note the solo dissent authored by Judge Frank Hull, who observed:

> The Majority's ruling also exacerbates disparities between wealthy defendants and those who cannot afford to hire well-connected and experienced attorneys during the pre-charge period. Most would-be defendants lack resources and usually have no counsel

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[14] *In re Wild*, 994 F.3d 1244, 1247 (11th Cir. 2021).
[15] 18 U.S.C. § 3771(d)(3).
[16] *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (emphasis added).
[17] 994 F.3d at 1247, 1266.
[18] *Id.* at 1280, 1282-83 n.14.
[19] *Id.* at 1288.
[20] *Id.* at 1311 n.29.
[21] *Id.* at 1313 n.30.

> during this pre-charge period. Consequently, they do not have the pre-charge opportunity to negotiate the kind of extremely favorable deal that Epstein received. This sort of two-tiered justice system — one in which wealthy defendants hire experienced counsel to negotiate plea deals in secret and with no victim input — offends basic fairness and exacerbates the unequal playing field for poor and wealthy criminal defendants.[22]

As Judge Hull concluded, "the Majority laments how the national media fell short on the Epstein story," but "this case is about how the U.S. prosecutors fell short on Epstein's evil crimes."[23] The court's approach "leaves federal prosecutors free to engage in the secret plea deals and deception pre-charge that resulted in the travesty here."[24]

Where have all the flowers gone?
Long time passing
Where have all the flowers gone?
Long time ago
Where have all the flowers gone?
Young girls picked them every one
When will they ever learn?

Pete Seeger
Where have all the flowers gone? (1961)

[22] *Id.* at 1327.
[23] *Id.*
[24] *Id.* at 1326.

BLUNT TOOLS AND DELICATE BUDS

THE ORCHID TRADE, CITES, AND U.S. ENFORCEMENT

Meredith Capps†

Learning that socialite Lee Radziwill, sister of First Lady Jacqueline Kennedy and at one point a Slavic princess (by way of marriage),[1] purportedly once declared, "[i]f I see an orchid that's fantastically expensive, I'll buy it,"[2] legal readers versed in environmental crimes might pause to wonder whether lay purchasers of these prized blooms investigate the provenance of their acquisitions. Radziwill's proclamation may, of course, have pre-dated present-day legal frameworks regulating trade in certain imperiled plant species, but she would surely not be alone in failing to consider that her local florist unwittingly participates in illicit trade, nor that her houseplant is the object of criminal activity. In this brief essay, I examine laws governing the orchid trade, the prevalence of that trade, and enforcement activity, offering several examples of floral legal intrigue.

LAW GOVERNING THE ORCHID TRADE

In the United States, the Endangered Species Act and the Lacey Act render importation of species designated by selected federal agencies unlawful, absent agency approval.[3] In order to import protected plant species into the U.S., one must obtain a permit from the U.S. Department of Agriculture and/or the Fish and Wildlife Service, and protected plants are outlined in appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[4] a treaty to which the U.S. and 183 other nation-states are parties.[5] Those, such as I, who are ignorant of recognized

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[1] *Lee Radziwill*, WIKIPEDIA, en.wikipedia.org/wiki/Lee_Radziwill (last updated June 30, 2022).

[2] Caroline Hallemann, TOWN & COUNTRY, *Lee Radziwill's Best Quotes on Life, Regrets, and Beauty* (Feb. 16, 2019), www.townandcountrymag.com/society/tradition/a26373096/lee-radziwill-best-quotes.

[3] 15 U.S.C. § 1538; 16 U.S.C. § 3372.

[4] Convention on International Trade in Endangered Species of Wild Fauna and Flora Appendices I, II and III valid from 22 June 2021, cites.org/sites/default/files/eng/app/2021/E-Appendices-2021-06-22.pdf.

[5] List of Contracting Parties, Convention on International Trade in Endangered Species of Wild

orchid species might assume in consulting the CITES list that only a few categories of orchids are protected therein, seeing but eight species listed under the *orchidaceae* classification of Appendix I, and a single line encompassing undifferentiated species listed in Appendix II. However, both the CITES Plants Committee[6] and the American Orchid Society[7] state that *all* orchids are protected by CITES, and for purposes of this brief article I shall trust their assertions and advise would-be orchid traders to make a habit of seeking a permit. Not only is this scope of CITES orchid species coverage impressive, so, too, is the dominance of orchids in the universe of protected plants, as orchids apparently constitute 70% of CITES-listed species.[8]

PREVALENCE OF THE ORCHID TRADE

As a foreign, comparative, and international law librarian I naturally, in considering the orchid trade, first examined its global characteristics. How expansive, I wondered, is the cross-border trade in orchids generally, and the illicit trade more specifically? Though orchids are valued by some as attractive home or business decor, they are also used in certain communities as traditional medicines.[9] Orchids can be used in cosmetics products and perfumes, and in weaving and dyes.[10] Trade in orchids for horticulture is typically commercial and such trade is reasonably well documented, but while orchids harvested for use as food or medicine are often sold in their own domestic markets, international in this category appears to be on the upswing.[11] Trade data indicate that more than 1 billion orchids crossed borders in the decade from 1996- 2005,[12] with an estimated $121 million generated by sales within the United States in 2003.[13] Although most documented orchid trade consists

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Fauna and Flora, cites.org/eng/disc/parties/chronolo.php.

[6] Twenty-second meeting of the Plants Committee, Tbilisi (Georgia), 19-23 October 2015, *Undocumented Trade In Species of Orchidaceae*, cites.org/sites/default/files/eng/com/pc/22/Inf/E-PC22-Inf-06.pdf ("All species in the family Orchidaceae (orchids) are covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Orchidaceae represent the large majority of species appearing [in] CITES Appendices I and II.").

[7] American Orchid Society, *Orchid Conservation, CITES*, www.aos.org/about-us/orchid conservation/cites.aspx.

[8] Amy Hinsley et al., *A Review of the Trade in Orchids and Its Implications for Conservation*, 186 BOTANICAL J. OF THE LINNEAN SOC'Y 435, 440 (2018), https://doi.org/10.1093/botlinnean/box083.

[9] ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE 10 (2002).

[10] Hinsley, *supra* note 8, at 435.

[11] Twenty-second meeting of the Plants Committee, *supra* note 6 (finding instances of orchids used in Chinese medicine exported from Myanmar and India to China, and from Asia to the United Kingdom and Europe).

[12] Hinsley, *supra* note 8, at 436.

[13] Chuck Woods, *Orchid Mania: Exotic Plant Now the Fastest Growing Segment of Nation's $13 Billion*

of artificially grown plants, hundreds of thousands of documented wild plants are traded each year, and experts fear that the illegal trade in wild orchids is threatening these particularly vulnerable varieties.[14]

Is CITES thought to be an effective international legal mechanism for regulating trade in threatened orchid species? The CITES Plants Committee has itself expressed doubt regarding the treaty's impact on conservation, noting that the instrument's breadth in covering all orchid species may, paradoxically, disincentivize research and education regarding conservation at the domestic level, and discourage international cooperation with respect to such research.[15] Some evidently disenchanted orchid professionals are even willing to admit non-compliance. In 2016, researchers in the United Kingdom surveyed over 400 orchid growers and hobbyists in the UK, U.S., and Japan, and their findings may startle, or at least surprise, the conscientious consumer. Nearly 10% of respondents acknowledged having smuggled orchids across their border without completing any CITES paperwork, nearly 5% stated that they had transported orchids for which they had utilized paperwork for a different species, and another nearly 11% of respondents said that they had received orchids purchased online without having obtained permitting paperwork.[16] Though one might hope that ignorance of the law offered some excuse, survey results suggested that the opposite is, in fact, more often true — respondents demonstrating meaningful understanding of CITES frameworks were, in their survey, actually *more* likely to actively avoid compliance.[17] And CITES enforcement difficulties abound — customs officials typically lack expertise in species identification; species diversity renders education challenging as even experts struggle with taxonomy; lack of public concern, awareness, and funding diminishes investment; and plant origins are difficult to trace.[18]

Domestic Penalties and Examples

Having established that there is, indeed, a thriving worldwide orchid economy supported by both legal and illicit trade, I sought examples of criminal prosecution, or other legal consequences, of prohibited trade in or-

Floriculture Industry, U. of FL. NEWS (Aug. 26, 2004), https://news.ufl.edu/archive/2004/08/orchid-mania-exotic-plant-now-the-fastest-growing-segment-of-nations-13-billion-floriculture-industry.html.

[14] Hinsley, *supra* note 8, at 436.

[15] Twenty-second meeting of the Plants Committee, *supra* note 6, at 4.

[16] Amy Hinsley et al., *Estimating the Extent of CITES Noncompliance Among Traders and End-Consumers; Lessons from the Global Orchid Trade*, 10 CONSERVATION LETTERS 602, 605 (2017), conbio.onlinelibrary.wiley.com/doi/pdf/10.1111/conl.12316.

[17] *Id.* at 607 (the authors suggest that "noncompliance may be linked to widespread negative opinions of CITES").

[18] Hinsley, *supra* note 8, at 445-48.

chids right here in the United States. One prominent action against orchid dealer George Norris stands out, having generated attention in the media, and among libertarian advocacy groups who decry what they see as a needlessly stringent regulatory scheme and overzealous prosecution.

Norris, a Texas resident, and Manuel G. Arias Silva, a resident of Peru, were indicted in 2004 by a federal grand jury in Florida on several counts, including smuggling in violation of 18 U.S.C. § 545, making false statements to customs officials in violation of violation of 18 U.S.C. § 1001(a), and violating the Endangered Species Act.[19] The indictment alleged that although Norris and Arias Silva did obtain CITES paperwork for their transactions, Arias Silva in fact shipped Norris different species than those listed on the CITES permit, and falsely labeled the substituted illicit product, providing a key to Norris, who ultimately sold the protected plants.[20] Arias Silva was sentenced to 21 months in prison, followed by three years of supervised released, and ordered to pay a $5,000 fine.[21] Norris pleaded guilty, but claimed that his sentence was inappropriate because the district court considered the entire value of the orchid shipments at issue, rather than the value of only the protected items, in applying sentencing guidelines.[22] The government prevailed, and Norris's 17-month prison sentence was ultimately affirmed by the Sixth Circuit.[23]

The Heritage Foundation published a lengthy article depicting the then-released Norris as a frail grandfather, unable, as a felon, to possess a firearm by which he might instill his love of hunting in his grandchildren, damaged by his experience with law enforcement, and living in a precarious financial state.[24] The Heritage Foundation also authored an opinion piece discussing Norris's case in *The Washington Times*, titled "Criminalizing Everyone."[25] In 2009 Norris's wife, Kathy, testified before the House Subcommittee on Crime, Terrorism, and Homeland Security in a hearing titled "Over-Criminalization of Conduct/Over-federalization of Criminal Law."[26] *NPR*

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[19] United States v. Norris, 452 F.3d 1275, 1278 (11th Cir. 2006).

[20] *Id.*

[21] Dep't of Justice, *Peruvian Orchid Dealer Sentenced to 21 Months in Miami for Smuggling Protected Peruvian Orchids* (Jul. 27, 2004), www.justice.gov/archive/opa/pr/2004/July/04_enrd_515.htm.

[22] *Norris*, 452 F.3d at 1280.

[23] *Id.* at 1283.

[24] Andrew Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization* (Jul. 27, 2009), www.heritage.org/courts/report/the-unlikely-orchid-smuggler-case-study-overcriminalization.

[25] Brian W. Walsh, *Criminalizing Everyone*, THE WASHINGTON TIMES (Oct. 5, 2009), www.washingtontimes.com/news/2009/oct/05/criminalizing-everyone/.

[26] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 33-40 (2009).

featured Norris in an episode of its *Uncertain Hour* podcast.[27]

Department of Justice press releases also provide examples of serious efforts by federal law enforcement to prosecute orchid offenders. In 2001 the Department announced that it had recently arrested and charged several individuals, including nationals of Australia, South Africa, Mexico, Zimbabwe, Ecuador, Indonesia, and Hong Kong, with smuggling, conspiracy, and making false statements in connection with orchid trading in California.[28] In 2004 Virginia orchid merchant James Kovach pleaded guilty in federal court in Tampa to two misdemeanor counts of violating the Endangered Species Act, acknowledging his role in importing more than 300 orchids from Peru without obtaining CITES permits. The Marie Selby Botanical Gardens and its Director of Systematics, Wesley E. Higgins, were also found guilty in the transaction, despite accepting the plants, which included a previously unidentified species, with the perhaps laudable intent of identifying the new variety and publishing information regarding the same (though in a less than virtuous turn, Kovach asked that Higgins name the species after Kovach himself).[29]

And returning to the *Norris* matter recounted above, smuggling is, it seems, sometimes a family business, one that legal prosecution will not deter. In 2015, Manuel's son, Victor Manuel Arias Cucho, was stopped in Los Angeles International Airport while attempting to transport more than 1,000 orchid specimens into the country from Australia, along with more than $15,000 in cash, hidden in tubes, clothing, pillows, toy boxes, and foil and newspaper within his luggage.[30] Arias Cucho avoided prison time in this instance, pleading guilty in exchange for two years of probation and a $7,500 fine.[31] His father, however, was, according to the criminal complaint, at large, the subject of an international extradition warrant … yet again, for orchid smuggling.[32]

By now readers may be convinced of the serious nature of legal consequences associated with importing unpermitted orchids, but wonder whether falsified paperwork is the best that I have to offer with respect to factual

[27] *See* Villanova Univ., *The Curious Case of Orchids and Over-Criminalization* (Mar. 15, 2018), www1.villanova.edu/villanova/law/newsroom/webstories/2018/0315.html.

[28] Dep't of Justice, *Federal Agents Arrest Six Men Charged with Illegal Trafficking in Rare Plants* (Jul. 23, 2001), www.justice.gov/archive/opa/pr/2001/July/348enrd.htm.

[29] Dep't of Justice, *Virginia Orchid Dealer Pleads Guilty to Violating Endangered Species Act* (June 10, 2004), www.justice.gov/archive/opa/pr/2004/June/04_enrd_397.htm.

[30] Criminal Complaint at para. 8, 11, U.S. v. Cucho, No. 2:15-cr-00581 (C.D. Cal. Sept. 25, 2015).

[31] Judgment and Probation Commitment Order, U.S. v. Cucho, No. 2:15-cr-00581 (C.D. Cal. Oct. 28, 2015).

[32] Criminal Complaint at para. 9, U.S. v. Cucho, *supra* note 32.

excitement. Though one would be forgiven for assuming that the orchid trade, while environmentally consequential, lacks in interpersonal drama, at least one reported case this author located suggests otherwise.

In the matter of *Martin v. County of San Diego*, no parties were charged with illegal import, but the illicit trade nevertheless clouded the matter, as plaintiff David Martin was something of a pariah in the orchid community given his role as a federal informant working with local law enforcement officials, and supplying information regarding other area vendors in connection with an investigation that was, delightfully, called "Operation Botany."[33] Martin had sued a fellow orchid vendor, William Phillips, for defamation, claiming that Phillips told his family and fellow orchid vendors that Martin burglarized his nursery, and that Phillips told law enforcement officials that Martin was "a crook," which Martin claimed was an effort to discredit himself and the federal investigation,[34] as part of a broader scheme to protect orchid smugglers. A federal district court was persuaded that Phillips's statements to fellow vendors might be deemed malicious given his knowledge of Martin's status as an informant, and allowed those claims to proceed. Martin was not satisfied, however, with suing Phillips alone, and also sued the city and the police department in connection with their burglary investigation, even raising constitutional claims and claims of false arrest and false imprisonment, against officials who transported him to the hospital for DNA testing. Martin's claims remained the subject of litigation for more than a decade.

As a postscript, Phillips's business, Andy's Orchids, still operates in Encinitas, California, and according to the business's website cultivates 7,000 species. Not only has Andy's operation remained robust, but he is the beneficiary of effusive online customer reviews, averaging 4.5 stars on Yelp,[35] 5 stars on Facebook,[36] and 5 stars on Google reviews.[37] Perhaps, having enjoyed this foray into the wild (pun intended!) world of orchid trading, readers will seek out their own reputable local purveyors, and posit but a question or two regarding import paperwork for foreign species, while marveling upon their well-curated selection with fresh appreciation.

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[33] Martin v. Cty. of San Diego, No. 03 CV1788 LEG (WMC), 2006 WL 8441692, at *3 (S.D. Cal. Mar. 30, 2006).

[34] For more on Operation Botany, see Lauren Kessler, *The Cult of the Cycads*, N.Y. TIMES MAGAZINE, Aug. 28, 2005, at 30.

[35] *Andy's Orchids*, YELP, www.yelp.com/biz/andys-orchids-encinitas.

[36] *Andy's Orchids*, FACEBOOK, www.facebook.com/AndysOrchids.

[37] Selected comments include the bold "best selection of species orchids in the northern hemisphere," and the essential "staff is very knowledgeable and they have a clean bathroom." GOOGLE, www.google.com (search for "Andy's Orchids Google Reviews").

FOUR RECOMMENDATIONS

Jed S. Rakoff[†] *& Lev Menand*[*]

Erwin Chemerinsky
Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights
(Liveright 2021)

This is not the first great book that Erwin Chemerinsky, Dean of Berkeley Law School, has authored, but it is perhaps his most chilling. For in 308 pages of tightly reasoned detail, he demonstrates beyond cavil how the Supreme Court of recent decades (and well before the addition of the Trump appointees) undertook to undercut most of the reforms by which the Warren Court had sought to reduce police misconduct. As Chemerinsky shows, prior to the Warren Court, extreme deference to police practices was the norm in both state and federal courts. But in a series of brave decisions, the Warren Court sought to impose constitutional restraints on everything from routine frisks to deadly choke-holds. Yet by the 1970s, and gaining speed thereafter, the Court sought to "refine" these restraints to the point of non-existence. As it now stands, for example, in most states the police can stop almost anyone at anytime on the flimsiest of excuses, and, should the person dare to

[†] U.S. District Judge, Southern District of New York. Copyright 2022 Jed S. Rakoff and Lev Menand.
[*] Associate Professor of Law, Columbia Law School.

protest or fail to follow police directions with total precision, the police are free to choke or shoot the offender, sometimes fatally.

Except in some minority communities that suffer most from such misconduct, most Americans approve of their police departments, with the result that neither the executive nor the legislative branches of government are likely to impose or enforce restraints. It thus becomes the role of the judiciary to protect our citizens from police misconduct. But, far from so doing, the judiciary, and especially the Supreme Court of the last few decades, has not simply abdicated this role but has, as Chemerinsky demonstrates, "contributed enormously to the problem of policing, and race-based policing, in the United States" by removing whatever restraints the Warren Court had imposed.

At the same time, Chemerinsky argues, the radical solutions advocated by some of those who recognize the problem — solutions as impractical as abolishing the police — not only are doomed to failure but also fail to focus on the fact that it is the judiciary that is best situated in our governmental arrangements to impose meaningful restraints on police misconduct. Given the present composition of the Supreme Court, Chemerinsky believes that it is the state courts, or at least some of them, who are most able to carry out these reforms, although he also details a host of legislative measures that might gain passage in those states where outrageous acts of homicide by the police have stoked moral outrage. For despite the American tradition of strongly supporting the police, such outrageous incidents do at times convince many ordinary Americans that something must be done, even to prosecuting the offending policepersons. But until more Americans come to recognize that these extreme events are just the tip of the iceberg, it is unlikely that broader-based institutional reforms will occur. It is one of the many strengths of Chemerinsky's book that not a single reader will be left with anything but a total conviction that bringing about such reforms is a moral imperative, one that even the courts may come to recognize.

Claire Priest

Credit Nation: Property Laws and Legal Institutions in Early America

(Princeton University Press 2021)

The U.S. economy revolves around credit. Americans borrow to buy cars, homes, and appliances; send their kids to college; run their businesses and cover emergency expenses. All of this borrowing depends upon law. Law governs property claims and contracts, debt obligations and bankruptcy. Lenders are willing to lend because, among other things, they believe that the legal system will ensure that they are paid back (with interest) most of the time.

In a brilliant new monograph, Claire Priest, the Simeon Baldwin Professor of Law at Yale Law School, and an expert in American property law, recovers the legal origins of our credit economy in the British colonial and early American Founding period. Priest shows that in an effort to attract investment from the Old World and strengthen the position of domestic creditors, the colonies (and later the states) established market-oriented property institutions. As early as the 1730s — decades before the Revolution — they dismantled the English inheritance system, permitting unsecured creditors to gain title to land over heirs. They defined land as a chattel — something that could be seized by creditors just like machinery or equipment — breaking with the English practice, which often shielded land from creditors. And they treated enslaved people as commodities, breaking entailments to land, so that creditors could treat enslaved people as collateral for loans.

In elucidating the origins of our "credit nation," Priest is sensitive to intellectual and ideological dimensions as well as economic and material determinants. As leaders of a self-proclaimed republic, Americans were keen to eliminate feudal property rules that entrenched wealth in Europe. The United States, abundant in natural resources and short on machinery and finished goods, was also hungry for foreign investment. By creating a legal framework beneficial to creditors, it could weaken protections for inherited fortunes while also attracting capital from abroad and encouraging domestic creditors to invest at home. As Priest reminds us, capitalism is a legal system, and American laws and institutions are at the center of the country's commercial and financial economy.

Marc I. Steinberg
Rethinking Securities Law
(Oxford University Press 2021)

The securities markets of the United States have changed radically in the past few decades. Where once the stocks of most public companies were held by individual investors, they are now mostly held by asset-management funds and the like, whose focus is on increasing assets under management and who often hold stakes in companies passively, regardless of their performance. Moreover, with the explosive growth of private securities markets, which now account for more than half the new capital raised each year in the United States, the oversight role of the S.E.C., which is largely focused on public markets, has substantially diminished. Recognizing these changes, Professor Steinberg, a well-known expert in securities laws, proposes a simple but radical solution: federalize corporate governance.

As most lawyers know, corporations in the U.S. are largely governed by Delaware law. This oddity dates to the late 19th century, when the tiny state of Delaware sought to improve its economy by offering the rapidly expanding corporations of that era the opportunity to avoid all state taxes if they re-incorporated in Delaware. Most large U.S. corporations accepted the offer, and two-thirds of all Fortune 500 companies are still incorporated in Delaware. But the long-term result was that the Delaware legislature, and to some degree its courts as well, became ever more supportive of corporate management, leading to the current situation where anything (well almost anything) goes if it can be portrayed as an exercise of "business judgment."

After each major corporate scandal of the past 20 years, Congress has tried to address this problem through minor intrusions into the requirements of corporate governance, but little has changed. Steinberg would take the bull by the horns by turning over to the federal government virtually complete control of corporate governance. For example, he would have Congress pass legislation mandating that the chair of a company's board of directors be an independent director holding no position in the company's management. Similarly, the proposed legislation would require that at least one member of the board be chosen from the company's non-management employees. Further still, Steinberg's proposed legislation would impose a strict cap on the percentage of disparity between the CEO's compensation and that of the median employee.

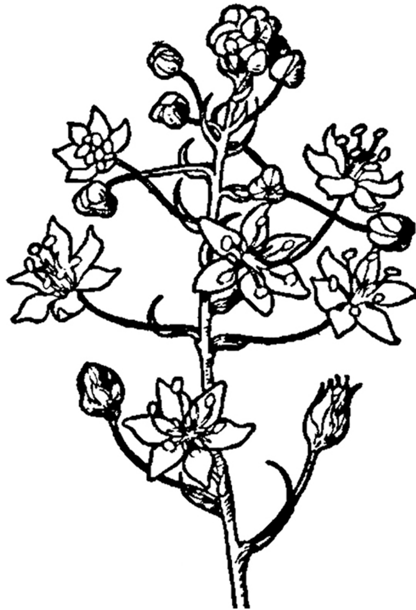
In these and numerous other ways, Steinberg's book causes the reader to rethink much of what most securities lawyers have taken for granted. How likely it is that his proposed legislation will be enacted in the immediate future is more unclear, not least because the Presidency is currently occupied by a loyal inhabitant of Delaware. But when there is another corporate crisis — and inevitably there will be — many of Steinberg's radical suggestions may well take root.

Christine Walker
Jamaica Ladies: Female Slaveholders and the Creation of Britain's Atlantic Empire
(University of North Carolina Press 2021)

In the 18th century, Jamaica was Britain's wealthiest slaveholding colony. But, as the legal archives of the time demonstrate, a large number of the slaveholders in Jamaica were women — many of them, in fact, freed slaves. In this fascinating study of previously overlooked Jamaican archives, Christine Walker, an assistant professor history at Yale-NUS College in Singapore, convincingly demonstrates that these female slaveholders achieved wealth

and status in Jamaica far surpassing what most women of their time could have achieved elsewhere. But in the process, even those women who had formerly been slaves themselves became strong supporters of this brutal regime.

Winner of the Cromwell Foundation's Prize for the best book of legal history published in 2021, *Jamaica Ladies* shows, all too sadly, the role played by these "handmaidens of empire" in perpetuating and rationalizing slavery. It also provides considerable insight into the culture of slavery that soon overtook much of the U.S. as well.



Gather ye rosebuds while ye may,
Old Time is still a-flying;
And this same flower that smiles to-day,
To-morrow will be dying.

Robert Herrick
To the Virgins, to Make Much of Time (1648)

FIVE RECOMMENDATIONS

Susan Phillips Read †

Jack M. Beermann
The Journey to Separate But Equal: Madame Decuir's Quest for Racial Justice in the Reconstruction Era
(University of Kansas Press 2021)

This book tells the story behind *Hall v Decuir*,[1] a "little-known first step" toward the United States Supreme Court's eventual adoption of the separate-but-equal doctrine in *Plessy v Ferguson*,[2] and a "significant milestone in the march toward Jim Crow." The litigation arose out of the refusal of the captain and owner of the riverboat *Governor Allen* to provide Madame Josephine Decuir with a stateroom in the "ladies' cabin," an area of the boat with more refined accommodations, which was reserved for White women. Madame Decuir, a member of the French-speaking mixed-race aristocracy of antebellum Louisiana, was traveling from New Orleans to a location upriver, accompanied by her lawyers, to examine records related to the remnants of the property of

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† Associate Judge (ret.), New York Court of Appeals.
[1] 95 U.S. 485 (1878)
[2] 163 U.S. 537 (1896).

her late husband, a one-time wealthy plantation owner whose finances were devastated by the Civil War. At the time of Madame Decuir's trip, Louisiana's 1868 constitution and an 1869 statute forbade racial segregation and exclusion in many public places, including all modes of transportation.

Madame Decuir brought suit to recover damages and to vindicate her right to equal dignity and respect in post-slavery Louisiana. She recovered $1,000 in damages in the trial court and successfully defended the verdict in the Louisiana Supreme Court, which called her treatment "a gross indignity to her personally." The United States Supreme Court, however, reversed, holding that Louisiana lacked the power to prohibit discrimination on the *Governor Allen* because the boat was engaged in interstate commerce on the Mississippi River. The author notes that, of the "many blows cast in this period by the Supreme Court against civil rights enforcement[, *Hall v Decuir* was] the only one in which the Court prevented a Southern state from using *its own law* to protect Black people from discrimination" (emphasis in original). As the author points out in the Epilogue, however, by the mid-20th century *Hall* had become a useful precedent in the fight against state laws imposing segregation in interstate transportation.

The author has chased down the extensive litigation record, surprisingly still in existence with just a few gaps, and has examined the lives and circumstances of the colorful cast of litigants, attorneys and judges who took part in *Hall v Decuir*. This approach adds considerable interest to a narrative that never flags.

Peter S. Canellos
The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero
(Simon & Schuster 2021)

John Marshall Harlan was born to a prominent slaveholding family in Kentucky. He freed the slaves whom he owned only after ratification of the Thirteenth Amendment, which he himself had opposed. Yet Harlan became "The Great Dissenter" on the post-Reconstruction United States Supreme Court. During his tenure on the Court from 1877 to 1911, Harlan consistently broke with his colleagues to protest decisions that constricted the rights of the formerly enslaved. He effectively laid out the legal framework for the eventual repudiation of *Plessy* and the 20th-century civil rights movement.

All of this has been chronicled before. Less well-known about Harlan is his respectful and admiring relationship with his mixed-race brother Robert.

Rumored to be the son of Harlan's father and an enslaved woman, Robert Harlan, something of a polymath, grew up alongside the future Justice and was a successful horseracing impresario, gold rush entrepreneur, financier of Black-owned businesses, world traveler, state representative and leading Black citizen of Ohio. As the biographer observes, his brother's success must have made an impression on the Justice and influenced his racial attitudes and jurisprudence. Robert Harlan is a fascinating character, and the discussion of his life lends much additional interest to this biography.

Jorge M. Contreras
The Genome Defense: The Epic Legal Battle to Determine Who Owns Your DNA
(Algonquin Books of Chapel Hill 2021)

The Genome Defense explains the genesis of *Association for Molecular Pathology (AMP) v Myriad Genetics, Inc.*,[3] a case brought by the American Civil Liberties Union (ACLU) on behalf of 20 medical organizations, geneticists, women's health groups, and patients, and traces its journey to the United States Supreme Court. Mutations of the BRCA1 and BRCA2 genes are linked to a dramatically increased risk of breast and ovarian cancer. After discovering the precise location and sequence of the BRCA1 and BRCA2 genes, Myriad obtained key patents, thereby preventing any competitor from developing a cheaper diagnostic test or even studying these genes. In *AMP*, the Court sided with the ACLU on the question of whether a human gene can be patented, holding that a naturally occurring DNA segment is a product of nature and is not patent-eligible merely because it has been isolated.

The book highlights the forethought required to make *AMP* a successful "test" case against a well-funded adversary in the powerful biotech industry. For example, the ACLU identified Myriad as the defendant because its gene patents related to more prevalent conditions rather than a rare disorder; assembled multiple plaintiffs in order to withstand the inevitable challenges to standing (in the end, only one plaintiff survived); raised public awareness of gene patenting through cultivation of major print and television news outlets; assembled a team of scientifically-knowledgeable advisers; and took care to couch complex scientific subject matter as much as possible in understandable terms (e.g., the lead attorney reduced a potential technically complex "Question Presented" to the simple, common-sense "Are human genes patentable?").

[3] 569 U.S. 576 (2013).

Noah Feldman
The Broken Constitution: Lincoln, Slavery, and the Refounding of America
(Farrar, Straus and Giroux 2021)

This book is a thought-provoking addition to the vast and ever-growing body of literature examining the life and thought of our sixteenth President. The author argues that Lincoln understood the Constitution as a compromise to accommodate slavery where it already existed in order to obtain Southern ratification and thereby allow the United States to form and expand. Like his hero, Henry Clay, Lincoln optimistically anticipated that slavery would eventually fade away, but that did not happen. Instead, the territorial expansion facilitated by the formation of the union and encouraged by the invention of the cotton gin fueled sectional hatred and strife over slavery every time a new state sought to join the United States.

While Lincoln in his first inaugural address announced that he was prepared to recognize the legal legitimacy of slavery if this would hold the states together, he eventually concluded that he had to "break" the compromise (and compromised) Constitution in order to preserve the union. Hence, he used armed force to prevent the Confederate states from leaving the union; unilaterally suspended basic civil liberties; and emancipated the slaves in the Confederate states, three actions at odds with his understanding of the Constitution. These measures, the author contends, allowed Lincoln to free the Constitution from its compromised character and laid the groundwork for the Constitution to be remade by the Thirteenth, Fourteenth, and Fifteenth Amendments into a moral vision of liberty and equality.

Martha Minow
Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech
(Oxford University Press 2021)

Saving the News is an installment of Oxford Press's *Inalienable Rights* series of compact books written by legal scholars to explore a particular freedom cherished by Americans. The title seems counterintuitive: The First Amendment provides that "Congress *shall make no law* … abridging the freedom of speech, or of the press" (emphasis added), which seems, on the face of it, to rule out government intervention in matters of free speech and freedom of the press. The author argues, however, that constraining government from restricting these freedoms does not bar government from taking

actions to strengthen them. As she points out, antitrust law, tax law, government subsidies, intellectual property law, and libel and defamation law already coexist, if at times uncomfortably, with the First Amendment.

The author identifies major trends in the news business which, in her view, have impeded the public's access to independent information, a mainstay of self-government. These trends include the rise and disruptive nature of free-riding digital platforms, which divert advertising revenue from legacy media and especially from local news; failing business models for newspapers; new owners with varied agendas; and shrinking viewership for broadcast news. The author's suggestions for reform include requiring payment for news circulated on social media in order to help support journalists and editors; curtailing immunity of digital platforms to liability lawsuits; regulating large digital platforms as public utilities; and supporting nonprofit consumer-protection efforts and nonprofit news sources. Some of these proposals are similar or identical to those suggested by members of Congress. Whether the reader agrees with the author's views about the nature and existence of a problem or her prescriptions for cure, this book offers a concise analysis of issues bound to be the subject of lively public debate in the coming years.

To gild refined gold, to paint the lily,
To throw a perfume on the violet,
To smooth the ice, or add another hue
Unto the rainbow, or with taper-light
To seek the beauteous eye of heaven to garnish,
Is wasteful and ridiculous excess.

William Shakespeare
King John (1591-1598)

FLOWERS V. MISSISSIPPI

HOW A PODCAST HELPED WIN A SUPREME COURT CASE

Tony Mauro[†]

The abbreviated name of the Supreme Court case *Flowers v. Mississippi* has no connection to the flora of the Magnolia State.

But the fuller title of the case, *Curtis Flowers v. State of Mississippi,* stands as an extraordinary example of how litigation can evolve and succeed at the Supreme Court with the help of the news media — a podcast, to be precise.

Flowers was sentenced to death for allegedly killing four employees of a furniture store in Winona Mississippi in 1996. He insisted from the beginning that he was innocent. Prosecutor Douglas Evans tried Flowers six separate times in Mississippi courts, persistently using peremptory challenges to strike African-Americans from the jury pool. Flowers is Black.

His lawyers fought for decades on his behalf, not only asserting that he was innocent but claiming that the almost all-Black jury strikes violated *Batson v. Kentucky*, the 1986 Supreme Court decision holding that racial discrimination in the selection of jurors violates the Sixth and Fourteenth Amendments.

The Flowers case went as far as the Supreme Court, not once but twice: in 2016 when his case was remanded for further consideration, and then in 2019 when a majority of the court concluded that Evans's jury strikes were of discriminatory intent. Justice Brett Kavanaugh wrote for a 7-2 majority, with Justices Clarence Thomas and Neil Gorsuch in dissent. After the decision was handed down, Mississippi's charges against Flowers were dropped, and he was freed in September 2020.

So, why did the Supreme Court rule this way, and what did the news media have to do with it? Seeds of the answer begin with the heinous crime itself. The small town of Winona was stunned by the murder of four residents, which swiftly drew media coverage.

"You know what a quadruple murder does for a town that never saw anything like that before," Jerry Mitchell, a renowned Mississippi journalist told

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me in an interview. Mitchell, a MacArthur Fellow who reported on civil rights cases at *The Clarion-Ledger* in Jackson, said, "It was stunning. You can imagine all the reporting that went on in those days. But it was pretty much people regurgitating what the authorities said."

Winona residents wanted to get the crime dealt with quickly, Mitchell said. "They believed he was guilty. All the white locals that I talked to or had connections with, they were all convinced the guy's guilty and they just need to hurry up and get done with this and execute this guy."

For the first three trials, the jury convicted Flowers and sentenced him to death. But the verdicts were overturned by the Mississippi Supreme Court for a variety of reasons, including prosecutorial misconduct. For the next two trials, the juries included Black jurors and could not reach a verdict. For the sixth trial — the one that went up to the U.S. Supreme Court — the jury consisted of 11 whites and one Black, and yet again, they convicted Flowers and sentenced him to death. A divided Mississippi Supreme Court ruled that the state used valid "race-neutral reasons" in picking the jurors, so the *Batson* rule was not violated. In the first trip to the U.S. Supreme Court, the justices sent the case back to the Mississippi Supreme Court to evaluate a *Batson*-related issue. By a 5-4 vote, the Mississippi high court again upheld the conviction and the death sentence.

Clearly, all along the way, the belief that Flowers was a killer persisted in Mississippi. Finding the truth might have been a task for the news media, but that would have been easier said than done.

"It is unrealistic to expect that an experienced newspaper reporter will be on hand in Flowers's hometown of Winona, Mississippi (population 4,100) and in towns like it across the country to independently monitor the conduct of prosecutors and judges," Frank LoMonte, a University of Florida journalism professor, wrote in an American Bar Association publication. "The disintegration of professional community journalism puts the duty of oversight on the public's shoulders."

Nationwide media organizations did not seem to delve deeply into the Flowers case either — until a podcast titled "In the Dark" came along. "There may have been some national stories here and there," Mitchell at *The Clarion-Ledger* said, "but really, it was 'In the Dark.' It deserves a lot of credit. I think they're the ones that really came in, dug into it."

APM (American Public Media) Reports — a collection of investigative journalists, documentary producers, and data reporters — produces "In the Dark." Its stated mission is to report on issues "that are often hidden from public view." It reports on "powerful institutions and people, injustice and accountability."

Based on a tip from Mississippi, the "In the Dark" team decided to take up the Flowers story like nobody else did — investigating not just the murder, but the trials and the legal process as well. They interviewed pertinent players who revealed information about the alleged murders that was never heard before, and developed important data never seen before. They tallied information about 6,700 jurors in the Mississippi district where Flowers was tried, finding that the prosecutor's office struck Black people from juries at more than four times the rate it struck white people.

They spoke to witnesses, neighbors, and others who said things they had not told police or prosecutors. The team sometimes spent weeks or months to get to know sources, hoping they would talk. They even interviewed prosecutor Evans several times.

In other words, it was the kind of investigation that neither prosecutors nor defense lawyers nor the traditional news media would have the time or resources to undertake.

"For a five-person team of reporters and producers to be full-time on the story for a year, that's a serious commitment and I know that's not a commitment that many people could make," senior producer Samara Freemark told me in an interview.

The information unearthed by the team proved useful as the Flowers case made its way to the high court. The data from the podcast became a new backdrop of sorts for the Supreme Court case. Two amicus briefs in support of Flowers cited information gleaned by "In the Dark."

"APM's coverage made it possible for us to show how racial injustice was the driving factor in the decision to prosecute Mr. Flowers, the weakness of the prosecution against him, and the selection of a jury willing to convict him and sentence him to death for a crime he did not commit," said James Craig of the MacArthur Justice Center, counsel of record in the amicus brief filed on behalf of the Mississippi-based Magnolia Bar Association.

Another brief, filed by the NAACP Legal Defense and Educational Fund, mentioned "In the Dark" nine times.

It's not new for litigants to cite news stories, but the depth of APM's investigation may be unprecedented, and therefore of unusually high value.

Freemark emphasized that "as reporters we are not working for the defense. We don't turn over information to the defense, but whatever we make public for publishing obviously is fair game and can be used. You want to check our work? There it is."

Apart from the two amicus briefs, the impact of the "In the Dark" podcast on the Supreme Court is hard to quantify. But oddly enough, one sign that it may have been noticed came from Justice Thomas, a dissenter from

the *Flowers* decision. He argued that the Supreme Court should not have taken up the case: "Perhaps the Court granted certiorari because the case has received a fair amount of media attention," Thomas wrote. "But if so, the Court's action only encourages the litigation and re-litigation of criminal trials in the media, to the potential detriment of all parties — including defendants. … Any appearance that this Court gives closer scrutiny to cases with significant media attention will only exacerbate these problems and undermine the fairness of criminal trials."

For law-reportorial commentary, there is no one better than David Ziff. Consider this Twitter gem from December 1, 2021:

> @djsziff: BREAKING: The Federal Appendix is no more. After a twenty-year run publishing "unpublished" opinions, West announced last month it is discontinuing our old friend F. App'x. I guess there's not much of a market for bound volumes of non-precedential opinions. h/t @lawtalkingguy
>
> @djsziff: I haven't been able to find news of this elsewhere. In other words: West did not publish its decision to stop publishing unpublished decisions.

THE WARS OF THE ROSES

A BRIEF HISTORY OF HOW AMERICAN CITIES HAVE REGULATED FLOWER VENDORS

Jeremy S. Graboyes[†]

By the time I remember it, downtown Richmond had already gone to seed. The Hotel John Marshall — where my grandmother clasped an orchid-covered prayer book when she married my grandfather — had closed. The streets were lifeless outside work hours, whole blocks replaced with empty parking lots. The two steadfast department stores, Thalheimer's and Miller & Rhoads, gasped for breath. Sixth Street between them, for centuries the city's commercial heart, had become one of those lusterless, green-roofed festival marketplaces — like Harborplace in Baltimore — meant to resuscitate failing downtowns.

But the city had once swelled with life. Sixth Street teemed with produce vendors and flower vendors, who sold the dahlias, lilacs, and sweet Williams they grew in their country gardens. The flower vendors were, the *Times-Dispatch* remarked, "surely no less picturesque" than the Piccadilly flower girls or "their sisters on the banks of the Seine." "Where but in Richmond," the paper asked, "can the somewhat prosaic task of filling the family larder be carried out against so picturesque and romantic a background as that made by the happy, smiling flower women of the Sixth Street Market."[1]

Throughout the nineteenth century and well into the twentieth, the answer was obvious: Charleston, New York, Washington, New Orleans, Philadelphia, San Francisco, Los Angeles … Every city had its flower vendors, and everywhere they were picturesque. *Picturesque*. That adjective recurs across regions and decades. It must have been the vendors' defining attribute for dwellers of the gray-brown cities in an era of intense growth and industrialization. Without them, one paper wrote, "we should have little to remind us of the primitive state of the earth before man built the town — of the green and flower decked fields of the country."[2]

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[1] *Cities and Trees*, RICHMOND TIMES-DISPATCH, Apr. 5, 1948, at 10; Vera Palmer, *'Pretty Bunches, Mistis, Pretty Bunches'*, RICHMOND TIMES-DISPATCH, June 2, 1935, at 51.

[2] *City Intelligence*, N.Y. DAILY HERALD, Apr. 28, 1846, at 2.

The flower vendors were harbingers of warmth and rebirth. Newspapers cheered their arrival each year. "Here come the flower vendors," Mary Pickford wrote in a 1916 syndicated column, "now we know the spring is here!"[3] "[C]ity people know that spring has come," goes another account, "when they see the flower vendor's cart, spilling red geraniums, trundled down the street and hear his unflowery and raucous solicitation."[4]

More than just symbols of the season, flowers formed an essential part of everyday life. Flowers were fashion. They formed the lexicon of a rich and effervescent language. And so visiting the vendors became one of those little daily rituals. The vendors were also artists, weaving "floral treasures into forms of taste and beauty" and "spread[ing] their colors as recklessly as the mad Van Gogh." They were magicians and priests, too, "scatter[ing] abroad everywhere their holy influence."[5] The vendors were, in their way, as fundamental to American streetscapes as sidewalks and streetlamps.

"Resilience, Direction, and Purpose"

The flower vendors must indeed have been *picturesque*. But it's easy to lose sight that, beneath their picturesqueness, they were also people seeking opportunity. Because barriers to entry are low, selling flowers has been a natural choice for members of many marginalized groups. Vendors need next to no capital, formal education, training, physical ability, English proficiency, or documentation. They can acquire their wares by growing them themselves, buying them from friendly suppliers, even picking them freely in nature. Working for themselves, vendors could also avoid discriminatory employers and commercial landlords and gain greater autonomy over their working conditions.

The roots of flower vending in the South lie in the gardens, or patches, that enslaved communities relied on to supplement scanty rations. Alongside edible plants, gardeners cultivated flowers and other ornamental plants, suggesting that patches were not just food sources but also spaces for "beauty" and "spiritual refuge."[6] The gardens could also be a source of income.[7] In *Thirty Years a Slave*, Louis Hughes describes selling flowers in Memphis.[8]

[3] *Daily Talks by Mary Pickford*, BOS. POST, Apr. 14, 1916, at 10.
[4] RICHARDSON WRIGHT, HAWKERS & WALKERS IN EARLY AMERICA 234 (1927).
[5] *Street Corner Magic in Spring*, RICHMOND TIMES-DISPATCH, Apr. 16, 1948, at 26; *Flowers*, NEW ORLEANS TIMES-PICAYUNE, May 1, 1858, at 2.
[6] Dwight Eisnach & Herbert C. Covey, *Slave Gardens in the Antebellum South: The Resolve of a Tormented People*, THE SOUTHERN QUARTERLY (Fall 2019), at 11-23.
[7] JESSICA B. HARRIS, HIGH ON THE HOG 84 (2011).
[8] LOUIS HUGHES, THIRTY YEARS A SLAVE 66 (1897).

An 1851 account from near Natchez describes "slaves who come into the city on Sundays" to sell flowers and shrubs.[9]

Many Black families established farms throughout the rural South after emancipation, and tasks often fell along gender lines. Men worked cash crops in the field, while women managed the gardens. These gardens offered one of the few paths for Black women to access opportunity, and many became businesswomen selling flowers in Southern cities.[10] Nine of these women appear in a June 1870 issue of *Harper's Weekly*. They stand against the brick wall of Washington's Central Market surrounded by a forest of trees, shrubs, and flowers. Horticulturist and writer Abra Lee calls them the "legendary flower sellers" on her blog *Conquer the Soil*. She describes seeing this image for the first time: "[M]y jaw dropped … . They represent resilience, direction, and purpose. The rough path I've walked for 20 years as a horticulturist has long been laid with beautiful flower petals. And these are the women I get to thank."[11]

The legendary flower sellers passed their businesses to their daughters and granddaughters, including the women who sold flowers on Sixth Street in Richmond and the famed "flower ladies" of Charleston. Joyce Coakley, whose grandmother was among the flower ladies, describes them in her book *Sweetgrass Baskets and the Gullah Tradition*. They woke early, trudged seven miles to the harbor carrying heavy baskets laden with the flowers they'd grown, and took the ferry into the unfamiliar city to earn a living. It was, Coakley writes, "the first attempt by any organized group to seek employment outside the African American community."[12]

Other groups have also found opportunity selling flowers on the streets of American cities. In her 1862 guide *How Women Can Make Money*, social reformer Virginia Penny listed "florist" and "flower girl" as occupations well suited for women.[13] Flower girls became a celebrated symbol of city life, immortalized in paintings, plays like *Pygmalion*, and films like *City Lights*.

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[9] *Grave Yard Robbers*, CONCORDIA INTELLIGENCER, Mar. 8, 1851, at 2.

[10] Dianne D. Glave, *'A Garden So Brilliant With Colors, So Original in Its Design': Rural African American Women, Gardening, Progressive Reform, and the Foundation of an African American Environmental Perspective*, 8 ENVTL. HIST. 395, 399 (2003); Kathryn Downing, *The Legendary Flower Sellers*, DENVER BOTANICAL GARDENS (Jan. 29, 2021), www.botanicgardens.org/blog/legendary-flower-sellers; Cummer Museum, *Culture and Conversation: The Invincible Garden Ladies with Abra Lee*, YOUTUBE (Jan. 15, 2021), www.youtube.com/watch?v=IHgvLF_r_zU.

[11] Abra Lee, *The Original Flower Farmers*, CONQUER THE SOIL (Mar. 26, 2020), conquerthesoil.com/the-original-flower-farmers.

[12] JOYCE V. COAKLEY, SWEETGRASS BASKETS AND THE GULLAH TRADITION 47 (2005).

[13] VIRGINIA PENNY, HOW WOMEN CAN MAKE MONEY, MARRIED OR SINGLE, IN ALL BRANCHES OF THE ARTS AND SCIENCES, PROFESSIONS, TRADES, AGRICULTURAL AND MECHANICAL PURSUITS 140-42 (1870).

"Flower-sellers in the market at Washington, D.C."
Harper's Weekly, June 4, 1870 (drawn by A.L. Jackson)

Many immigrants from Southern Europe and the Eastern Mediterranean got their start selling flowers on the streets of northern and western cities.[14] As they and their descendants gained a firmer toehold in American society, they were succeeded by newer immigrants from Mexico, Cuba, and Nicaragua.[15]

Seniors, veterans, people with disabilities, people affected by poverty, and children have also sought paths to opportunity through flower vending. In the absence of a strong social safety net, flower vending has served as a way for members of these communities to earn some money. This has sometimes verged on explicit policy. One early twentieth-century mayor of Los Angeles, for example, supposedly issued all kinds of unauthorized permits and licenses

[14] Thomas Burgess, GREEKS IN AMERICA 36 (1913); Edmon J. Rodman, *The Sephardic immigrants who brought flowers to L.A.*, JEWISH JOURNAL (Feb. 13, 2014).
[15] Lizette Alvarez, *Down From Poverty: How Family Fled Mexico for Fetid Tunnel Cell*, N.Y. TIMES, Oct. 9, 1996; Alex Stepick, *Miami: Capital of America*, *in* NEWCOMERS IN THE WORKPLACE: IMMIGRANTS AND THE RESTRUCTURING OF THE U.S. ECONOMY 129, 138 (Louise Lamphere et al., eds.) (1994).

to seniors, veterans, and people with disabilities and their children as "an act of charity."[16]

"I Have Made You Merchants!"

People have sold flowers in city streets since ancient times and in America since the early colonial period, and the push to regulate them is surely as old. Governments have justified the regulation of flower vendors on many grounds. Early efforts were likely tied to regularizing tax collection or the establishment of public markets, which gave officials greater control over how cities were provisioned.[17]

Child labor laws affected flower vendors, many of whom were children. In the 1870s, Congress sprang into action to eradicate the "Italian Slave-Trade" after Gilded Age New Yorkers were scandalized by the hundreds of Southern European children — like Horatio Alger's *Phil the Fiddler* — who suddenly appeared selling flowers, shining shoes, and playing violin in the city's streets.[18] Child labor laws passed a few decades later drove the child flowers vendors from the streets of Philadelphia, New York, and Los Angeles.[19]

The advent of automobiles led officials to target flower vendors as "a hazard to traffic conditions" — a clash immortalized in Jean Merrill's children's book *The Pushcart War* — and a distraction to motorists. They called the vendors a "fire menace" and proposed converting curbsides to parking.[20] New laws and changing urban environments drove flower vendors from city streets to suburban roads; then use of those spaces was restricted too.

Flower vendors fell victim to city beautification efforts whose proponents attempted to order urban chaos according to pseudo-scientific notions of logic and order. Although streets have always been multi-use spaces — thoroughfares, gathering places, playgrounds, and marketplaces — devotees of the City Beautiful and other urban renewal movements viewed street vendors skeptically. The desire to order public space could border on the obsessive. Fiorello LaGuardia reportedly singled out flower vendors, with organ grinders and Good Humor ice cream sellers, in his campaign to eradicate pushcarts

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[16] *No More Free Faker's License*, L.A. HERALD, Jan. 9, 1907, at 3.

[17] Daniel M. Bluestone, *"The Pushcart Evil": Peddlers, Merchants, and New York City's Streets, 1890–1940*, J. URB. HIST., Nov. 1991, at 68.

[18] *Children as Slaves*, N.Y. TIMES, June 17, 1873, at 1; *The Italian Slave-Trade*, N.Y. TIMES, July 7, 1872, at 3.

[19] *British Paupers*, St. Paul Daily News, Sep. 5, 1893, at 1; Proceedings of the Commissioners of the Sinking Fund of the City of New York, 1893-1894, at 262 (1904); *A Proxy Parent for Little Ones*, Phila. Times, Feb. 16, 1896, at 19; *Small Girl Merchants*, Phila. Times, Jan. 12, 1891, at 6.

[20] *Traffic Changes Are Effective In City Tomorrow*, Sep. 22, 1935, at 17; *Traffic Changes Aid Progress, Police Report*, RICHMOND TIMES-DISPATCH, Sep. 24, 1935, at 24.

in New York. "I found you pushcart peddlers," he announced at the opening of an indoor market, "I have made you MERCHANTS!"[21] This perspective — that street commerce is somehow illegitimate or at least less legitimate than brick-and-mortar establishments — remains pervasive.[22]

Local officials have often cited consumer protection to justify the regulation of flower vendors. Detroit, for example, passed an ordinance in 1938 to "eliminate fraudulent practices on the part of irresponsible, itinerant merchants engaged in the business of 'doping' flowers."[23] (A state court found the law unconstitutional.) And in a 2017 viral video, a police officer told vendors outside a high school graduation near Bakersfield: "We don't know where these flowers came from. What if a little girl is in the graduation, and she has an allergic reaction to a chemical that was sprayed on that flower for bugs, and she gets a reaction from it."[24]

But perhaps the most cited justification for regulating flower vendors is the need to level the playing field for florists or eradicate unfair competition. It's hard not to see many such laws as thinly veiled attempts to control competition by and opportunities available to people of color, recent immigrants, women, people with disabilities, low-income people, and others who have always turned to selling flowers in search of opportunity.

Consider San Francisco in the late nineteenth century. Locals and visitors alike adored the group of Italian immigrants, mostly young boys, who sold affordable bouquets in the shadow of Lotta's Fountain. "Visions of loveliness," one paper called them. "[I]t does not need a heroic reach of imagination," one author wrote, "to change that Lotta Fountain crowd of lads into a bunch of Roman boys in a corner of the *Piazza di Spagna*, or in a nook on the white marble stairs of *Monte Trinita*."[25]

Florists were less fond of this "market of the populace." They tried several tactics to put the vendors out of business. They spread rumors that the vendors' wares were purloined from headstones and funeral parlors. They complained to the police, who regularly and enthusiastically arrested the vendors for obstructing the sidewalks or blocking traffic.[26] No one else seemed to

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[21] Suzanne Wasserman, *Hawkers and Gawkers*, *in* GASTROPOLIS: FOOD AND NEW YORK CITY 153, 163 (Annie Hauck-Lawson & Jonathan Deutsch, eds.) (2009).

[22] *See* Michael W. Wakefield, José Castillo & Verona Beguin, *Transient Businesses: A Street Vendor Typology and Exploratory Study*, 19 J. BUS. & ENTREPRENEURSHIP 65, 65-66 (2007).

[23] S.S. Kresge Co. v. Couzens, 290 Mich. 185 (1939).

[24] So. Cal. News Gp., *Body cam footage of Perris arrest of flower vendor (Video 2)*, YOUTUBE (Nov. 19, 2018), www.youtube.com/watch?v=bCJTAKIZNo4.

[25] Elodie Hogan, *Children of the Streets*, 4 THE CALIFORNIAN 517, 519 (1893); *Our Pretty Flower Girls*, S.F. CALL, July 15, 1892, at 7.

[26] Hogan, *supra* note 25, at 520-21; *City Licenses*, S.F. CHRON., July 31, 1892, at 21; *Our Pretty*

mind the vendors. "[T]he people of San Francisco are lovers of the beautiful," one paper responded. "They fairly adore flowers, and it matters not to them that they are crowded off the walks or compelled to squeeze through narrow passages so that the flowers may have the room."[27]

In 1892, at the florists' urging, the city passed an ordinance increasing the license fee for vendors to $10 per quarter for a license. About 25 boys paid up. Each wore a "three-cornered tin tag, like a miniature family shield" under his coat to prove to any "stalking autocrat in blue" that he was licensed. But arrests continued — even among the licensed.[28] "If the flower peddlers ran a bar attachment," the *Examiner* joked, "with an illegal side entrance, and a game in the rear, the police would deal more gently with them."[29]

Then in 1895, with business lagging amid a great depression, the florists petitioned the Board of Supervisors to raise the license fee to $25 a quarter — a rate so high it would surely drive the vendors from the streets. After the Board agreed to the plan, an "immediate wave of indignation swept over the city." Newspapers lamented the plot to "abolish one of the most unique features of life in San Francisco" and to "snatch the bread and butter from the mouths of over two score of poor, hard-working people" who "add so much to the animation of street life." Soon half the city was sporting flowers on their wrists and lapels in solidarity.[30] Even the Merchants' Association joined the cause; its President called the florists' efforts "a persecution."[31]

Phoebe Hearst asked humorist Frank Gassaway to elegize the affair in her son William Randolph's newspaper. Called "Guilty," Gassaway's poem recounts the tearful testimony of a fictional police officer who faces discipline for refusing to arrest unlicensed flower vendors:

Flower Girls, S.F. CALL, July 15, 1892, at 7; *A Raid on Peddlers*, S.F. EXAMINER, Dec. 13, 1891, at 4; *War on Flower Peddlers*, S.F. EXAMINER, Mar. 17, 1889, at 5; *Local News Notes*, S.F. CHRON., Mar. 17, 1889, at 16; *Flower-Vendors*, S.F. CALL, May 6, 1890, at 8; *Robbing the Gardens*, Oakland Tribune, Mar. 2, 1889, at 3.

[27] *They Are Offenders*, S.F. CHRON., Mar. 4, 1895, at 10; *see also Florists and the Law*, S.F. CHRON., Mar. 5, 1895, at 6.

[28] *A Battle of Flowers*, S.F. CHRON., Feb. 27, 1895, at 18; *Had No License*, S.F. EXAMINER, Mar. 27, 1893, at 3; *Unlicensed Flower Peddlers*, S.F. CALL, Mar. 27, 1893, at 10; *The Bell Without A Tinkle*, S.F. EXAMINER, Jan. 29, 1893, at 13; Hogan, *supra* note 25, at 521.

[29] S.F. EXAMINER, Mar. 3, 1895, at 6.

[30] *They Are Offenders*, S.F. CHRON., Mar. 4, 1895, at 10; *The Convention Must Come*, S.F. CALL, Mar. 2, 1895, at 12; *The Merchants' Association*, S.F. EXAMINER, Mar. 2, 1895, at 12; *A Battle of Flowers*, S.F. CHRON., Feb. 27, 1895, at 18; Deserving *Florists*, S.F. EXAMINER, Feb. 14, 1895, at 6.

[31] *Deserving Florists*, S.F. EXAMINER, Feb. 14, 1895, at 6; *A Battle of Flowers*, S.F. CHRONICLE, Feb. 27, 1895, at 18; *Florists at Outs*, S.F. CHRON., Mar. 7, 1895, at 9.

> "It's because of this new ordinance," the stalwart bluecoat said,
> "The one against the little tots that try to earn their bread;
> I mean the kids with flowers to sell that on the corners stand
> You've noticed them, your Honor, a half-starved little band?[32]

A week later, Phoebe Hearst presented the poem to the Chairman of the Board of Supervisors at a hearing on the new ordinance. The Chairman read it aloud. "A few moments of dead silence followed," Gassaway recalled, "and then the originator of the ordinance himself rose and with tears running down his cheeks moved the rescinding of the measure which was unanimously voted."[33]

"One of the Most Picturesque Features of Our City"

Attempts to drive the flower vendors from the streets were frequently thwarted by the public's love for the *picturesque*. Efforts by Richmond officials throughout the 1930s to shut down the flower vendors' businesses or convert their spaces to parking were repeatedly met with protests from the Mayor and women's groups like the Housewives League and the Federation of Garden Clubs. Letter after letter to the editor of the *Times-Dispatch* bemoaned the destruction of "one of the most picturesque features of our City."[34]

Then in 1939, the City Attorney issued an opinion finding flower vending illegal. The Mayor refused to "interfere with people who are trying to earn a modest living" and proclaimed he would not take any action that would "make Richmond as flat and colorless as the Middle West." "Most people prefer to look at the flowers instead of our monuments," he insisted. "Indeed, it might as well be said that the monuments are obstructions." (Amen.) "The time has come, I think, to let every civic society and garden club arouse themselves to what is being done to remove the beautiful flowers from our streets."[35]

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[32] *"Guilty."*, S.F. EXAMINER, Mar. 9, 1895, at 6.

[33] Frank H. Gassaway, *Mrs. Hearts and the Flower Children*, UNIV. OF CALI. CHRON., at 256 (July 1919); *F. H. Gassaway, Author and Poet, Dies Suddenly*, OAKLAND TRIBUNE, May 22, 1923, at 18.

[34] *Likes Flower Vendors*, RICHMOND TIMES-DISPATCH, Dec. 9, 1932, at 12; *Flower Vending Saved for 'Picturesqueness'*, RICHMOND TIMES-DISPATCH, May 21, 1937, at 10; *Trade Group Acts to Stop Flower Peddling on Streets*, RICHMOND TIMES-DISPATCH, Nov. 20, 1932, at 1; *Traffic Changes Are Effective In City Tomorrow*, Sep. 22, 1935, at 17; *Traffic Changes Aid Progress, Police Report*, RICHMOND TIMES-DISPATCH, Sep. 24, 1935, at 24; *Flower Vending Saved for 'Picturesqueness'*, RICHMOND TIMES-DISPATCH, May 21, 1937, at 10.

[35] *Flower Vendors an Asset to the City, Says Mayor Bright*, RICHMOND TIMES-DISPATCH, Mar. 22, 1939, at 4.

And arouse themselves they did. Enraged citizens wrote to the *Times-Dispatch* in support of "the movement." Though it's clear they loved the flowers, it's equally clear they loved the aesthetic the flower vendors lent the city. Invoking racist imagery, letter writers celebrated how "thoroughly 'Southern'" the Black flower vendors were and how marvelously they evoked "those leisure-loving days before the war."[36] Painter Julien Binford marveled at the "shortsightedness" of officials who "would destroy at a sweep the means of livelihood of a good-looking group of people and the models of those who by pen or brush carry note that Richmond exists, and beautifully."[37]

The flower vendors of Sixth Street were saved — partly for their own benefit but especially for the benefit of those who found them picturesque. But by emphasizing vendors' aesthetic appeal to others, picturesqueness can also function as control. Though white Richmonders appreciated the women who sold home-grown flowers on Sixth Street, they had less enthusiasm for their husbands, fathers, brothers, and sons selling flowers to make ends meet during the Great Depression. These men were immediately cast as unfair competition to the florists. (Never mind that nearly a dozen florists supplied them.) "What we regard as a beautiful and picturesque thing has become a nuisance and a racket," the Mayor declared. He ordered police to drive vendors from most of the city outside Sixth Street and limited vendors to selling only flowers they'd grown themselves.[38]

The effects were swift. Days after the new policy went into effect, *Times-Dispatch* writer Margaret Barker Seward went looking for a Black couple who grew flowers on their farm and regularly sold them at a residential corner near downtown. The wife was missing that day, and the husband sat in his car looking "scared to death." Seward and the vendor spoke for a few minutes. Suddenly, a white man approached. Seward describe the ensuing conversation:

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[36] *Women Chorus Approval of Flower Sellers' Defense*, Mar. 23, 1939; *Our Flowering Streets*, RICHMOND TIMES-DISPATCH, Mar. 23, 1939, at 10; *Nostalgia for Landmarks*, RICHMOND TIMES-DISPATCH, Mar. 24, 1939, at 12; *Council and the Esthetic*, RICHMOND TIMES-DISPATCH, Mar. 25, 1939, at 8; *The Blossoming Corners*, RICHMOND TIMES-DISPATCH, Mar. 27, 1939, at 8; *Gamble's Hill Pageant Planned*, RICHMOND TIMES-DISPATCH, Mar. 28, 1939, at 10; *Flowers at the Curb*, RICHMOND TIMES-DISPATCH, Apr. 5, 1939, at 8; *This Week in the Garden*, RICHMOND TIMES-DISPATCH, Apr. 16, 1939, at 39.

[37] *Artist Finds Practical Reason For Permitting Flower Vendors*, RICHMOND TIMES-DISPATCH, Mar. 26, 1939, at 10.

[38] *Downtown Flower Vendors Banned; Others Restricted*, RICHMOND TIMES-DISPATCH, Oct. 7, 1939, at 6; *Housewives To Hear Speech By Mrs. Alexander*, RICHMOND TIMES-DISPATCH, Sep. 6, 1939, at 15; *Stone House Group Studies Move to Ban Flower Vendors*, RICHMOND TIMES-DISPATCH, July 13, 1939, at 24; *Forest Hill Stone House Donated Gifts*, RICHMOND TIMES-DISPATCH, July 11, 1939, at 10.

> "Are you selling flowers?" the white man asked. "Well, come along to the station house then and bring your flowers with you."
>
> "I didn't know I was doing nobody no harm here," the vendor said, "I raise eve'y one of these flowers and I can prove it."
>
> "Come on to Second Police Station," said the white man.
>
> Another woman, who had walked eight blocks to buy flowers, asked the man "what harm were these stands doing there anyway." They were obstructing traffic, the man said, and the merchants had complained. (There was no traffic at the intersection, Seward noted, and there never was.)

The vendor slowly secured his flowers in the back seat then got in the car and started driving to the station. The white man "followed close behind." Seward later followed up with the police. The vendor had been let off with a warning.[39]

"Able Bodied Men"

Something similar happened in Los Angeles in 1906. Flower vendors there were mostly seniors, people with disabilities, veterans, and children. The city licensed them, without clear legal authority, as "an act of charity."[40] But after child labor laws drove the child vendors from the streets, people started to notice "able bodied men" selling flowers alongside the seniors, people with disabilities, and veterans. These "able bodied men" — and they were always described as "able bodied," "big," "burly," or "husky" — were immigrants, many Sephardic Jews, from the Ottoman Empire.[41]

The new Mayor, Arthur Harper, pledged to stop licensing street vendors. His administration refused to grant licenses, and the police drove the flower vendors from the main streets. There was clear popular sympathy for the "invalid and crippled" vendors. ("Must these be driven to the county poor farm?" the *Post-Record* demanded.) Sensing popular discontent at the loss of "one of the most picturesque features of Los Angeles' life," Harper quickly recommended that the Council allow him to grant licenses to the flower vendors for a $5 monthly fee.[42]

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[39] Margaret Barker Seward, *Along Richmond Streets*, RICHMOND TIMES-DISPATCH, Oct. 29, 1939, at 4.

[40] *No More Free Faker's License*, L.A. HERALD, Jan. 9, 1907, at 3.

[41] Rodman, *supra* note 14.

[42] *Flower Sellers Get Licenses*, L.A. EVENING POST, Feb. 1, 1907, at 2; *Mayor Aids Old Sellers of Flowers*, L.A. EVENING EXPRESS, Feb. 2, 1907, at 3; *City Hall Chips*, L.A. TIMES, Feb. 6, 1907, at 18; *Mayor Seeking Money for City*, L.A. HERALD, Feb. 7, 1907, at 9; *Make War on Flower Sellers*, L.A. HERALD, Feb. 2, 1907, at 12; L.A. HERALD, Feb. 3, 1907, at 14; *Are Florists Selfish?*, L.A.

But there was little feeling for the "able bodied men" who had "chose[n] the idle life of a vendor" and "could just as well be doing manual labor."[43] "Let the women and children and cripples continue the business under proper limitations," one florist said. But a "big, able-bodied Greek who sells violets at the corner of Third and Broadway is worth $20,000. He should be compelled to pay dearly."[44] "Of course the children should be kept off the streets after dark," one city councilman remarked, "but I do not see why the city should discriminate against these children to help these foreigners."[45]

The police chief ordered "all able-bodied flower vendors off the streets" in July 1907, leaving only "the aged or crippled" free to continue selling flowers. "This is not proper work for an able-bodied man," he explained, "and, besides, these Italian vendors have formed a combine to drive the cripples off the street. But this trust will be busted in record time. From now on no able-bodied man will be allowed to sell flowers on the streets of Los Angeles."

The Mayor agreed. He supported licenses for the seniors and people with disabilities but vowed to drive out the "strong" immigrants.[46] By early

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HERALD, Feb. 28, 1908, at 4; *Favors a Square Deal*, L.A. TIMES, Feb. 23, 1907, at 16; *Flower Venders Get Short Delay*, L.A. HERALD, Feb. 5, 1907, at 3.

[43] *Must These Be Driven to the County Poor Farm?*, L.A. EVENING POST-RECORD, Sep. 25, 1907, at 1; *Here Is the Pitiful Story of One "Able Bodied" Flower Vendor*, L.A. EVENING POST-RECORD, Sep. 23, 1907, at 7; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; L.A. EVENING POST-RECORD, Oct. 4, 1907, at 4; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; *"How Doth the Busy Little Bee" When He Mistakes a Nose Bloom for a Rose Bloom*, L.A. EVENING POST-RECORD, Oct. 2, 1907, at 1; *Feeble Old Man a Police a Police Victim*, L.A. EVENING POST-RECORD, Oct. 31, 1907, at 1; *Why Gabriel Was Moved*, L.A. EVENING POST-RECORD, Nov. 1, 1907, at 1; *Antonio, Violet Vendor, Waxes Wroth When Equine Eats His Wares*, L.A. EVENING POST-RECORD, Jan. 20, 1908, at 2; L.A. EVENING POST-RECORD, Sep. 24, 1907, at 4; *Mayor Aids Old Sellers of Flowers*, L.A. EVENING EXPRESS, Feb. 2, 1907, at 3.

[44] *Flower Vendors Meet the Mayor*, L.A. EVENING POST-RECORD, Sep. 26, 1907, at 3; *Decrepit Florists to Remain on Streets*, L.A. EVENING POST-RECORD, Sep. 27, 1907, at 8; *Flower Vendor Makes a Plea for Life and Spurns Offer of Charity*, L.A. EVENING POST-RECORD, Sep. 28, 1907, at 3; *Stands for Flower Vendors*, L.A. EVENING EXPRESS, Sep. 28, 1907, at 18; *Summary of the Day*, L.A. TIMES, Sep. 28, 1907, at 18; *Flower Vendors Win Their Fight*, L.A. EVENING POST-RECORD, Oct. 1, 1907, at 1; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; *Local Bits*, L.A. EVENING POST-RECORD, Oct. 9, 1907, at 8; *Mayor Aids Old Sellers of Flowers*, L.A. EVENING EXPRESS, Feb. 2, 1907, at 3; *Asks Mayor to Prohibit Comeback Floral Frames*, L.A. HERALD, Oct. 1, 1907.

[45] *Believe Flower Girls Discriminated Against*, L.A. HERALD, Mar. 11, 1905, at 7; *Flowers Embarrass the Newly Wed Prosecutor*, L.A. HERALD, Aug. 17, 1906, at 8; *25 Years Ago Today — From the Express, Sept. 9, 1906*, L.A. EVENING EXPRESS, Sep. 9, 1931, at 14.

[46] *Strong May Not Sell Flowers*, L.A. EVENING POST-RECORD, July 29, 1907, at 1; *Flower Vendors Meet the Mayor*, L.A. EVENING POST-RECORD, Sep. 26, 1907, at 3; *Decrepit Florists to Remain on Streets*, L.A. EVENING POST-RECORD, Sep. 27, 1907, at 8; *Flower Vendor Makes a Plea for Life and Spurns Offer of Charity*, L.A. EVENING POST-RECORD, Sep. 28, 1907, at 3; *Stands for Flower Vendors*, L.A. EVENING EXPRESS, Sep. 28, 1907, at 18; *Summary of the Day*, L.A. TIMES, Sep. 28,

1908, permits were largely limited to "women, decrepit persons and youths." The few "able bodied" vendors who could acquire licenses for $5 a month were told they "would be good perhaps only for a month and that they must keep moving continually to avoid arrest." By year's end, the police remained committed to ending the street trade "as soon as it can be done without working a severe hardship on the poor people who make a scant living in this manner."[47]

"Local Color"

Even among groups protected by their picturesqueness, aesthetics could operate as a form of control. That was the case in Charleston, a city once genuinely famous for its flower vendors. The flower ladies, as they were called, were the descendants of enslaved people from Mount Pleasant, across the river. Some say they first came to Charleston in the nineteenth century; others describe their emergence during the Great Depression. But by the mid-1930s, they were an integral part of the Charleston streetscape.[48]

Charleston was then, and still remains, the consummate tourist town. Once among the richest cities in America, Charleston languished, decaying and gothic, in the decades after the Civil War. Then something happened. Woodrow Wilson was President. *Birth of a Nation* was the highest-grossing film until *Gone with the Wind* surpassed it. Charleston rode this new southern popularity, spawning the eponymous dance craze, DuBose Heyward's novel *Porgy*, Gershwin's opera *Porgy and Bess*.

The Charleston Renaissance was in full swing between the world wars. But unlike the Harlem and Southern Renaissances, which viewed the South critically, Charleston's Renaissance was a full-throttle publicity campaign. Artists like Elizabeth O'Neill Verner, who illustrated *Porgy*, filled their canvases and sketchpads with symbols of the Old South: cypress swamps, Spanish moss, marsh grasses, palmettos, piazzas, church steeples, and wrought-iron fences. Verner was instrumental in crafting this image of Charleston as sanitized antebellum fantasyland. "Her work is so iconic," says historian Harland Green. "I think that many Charlestonians, when we close our eyes, we actually see Elizabeth Verner's view of the city rather than our own."[49]

1907, at 18; *Flower Vendors Win Their Fight*, L.A. EVENING POST-RECORD, Oct. 1, 1907, at 1; *An Influence Not Known to Policies Gives Her a Right to Sell Flowers*, L.A. EVENING POST-RECORD, Oct. 3, 1907, at 1; *Local Bits*, L.A. EVENING POST-RECORD, Oct. 9, 1907, at 8.

[47] *Mayor Anxious to Aid Women*, L.A. Herald, Dec. 6, 1908, at 9; *Able-Bodied Foreigners Seek Vender Permits*, L.A. HERALD, Jan. 12, 1908, at 8; *Would Restrict Vendors in Central Square Park*, L.A. HERALD, Feb. 28, 1908, at 6.

[48] *The Flower Venders*, CHARLESTON EVENING POST, Dec. 18, 1934, at 13.

[49] Maura Hogan, *Top SC arts award moves forward with a name change that fosters arts world soul-searching*, CHARLESTON POST & COURIER, Oct. 23, 2020.

The flower ladies became a potent symbol of the city in this mythmaking, especially the group that congregated outside the central post office. They appeared on postcards and a 1939 *National Geographic* spread written by Heyward.[50] They were a hallmark of Verner's sketches and paintings too. She peopled her cityscapes with them and other Black workers, but she used them, to quote one historian, as "decoration rather than character study." In Verner's own words: "the negro is Nature's child; one paints him as readily and fittingly into the landscape as a tree or marsh."[51]

Despite their popularity, the flower ladies also had their detractors. The post office custodian insisted a regulation prohibited them from setting up shop there. Some people complained to the police that the vendors left plant cuttings in gutters. Some complained they employed sales tactics that were too "aggressive."[52] Others complained about the vendors' cries. As Jessica Harris documents in *High on the Hog*, complaints about the "auditory nuisance" of Black vendors weren't uncommon. In Charleston, there were calls to regulate their behavior as far back as 1823.[53]

The police eagerly enforced city ordinances that required the flower vendors to keep moving. Officers arrested vendors who stopped just long enough to make a sale or set down their heavy baskets.[54] They once arrested four women for "causing headaches" with their yellow jonquils.[55] But the newspapers received sacks of letters from concerned readers every time the police took action, and the vendors were always back on the street a week or two later.

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[50] DuBose Heyward, *Charleston: Where Mellow Past and Present Meet*, 75 NAT'L GEO. 273 (Mar. 1939); *Mrs. Verner Noted Etcher*, CHARLESTON NEWS & COURIER, Aug. 20, 1938, at 11; *The Flower Venders*, CHARLESTON EVENING POST, Dec. 18, 1934, at 13; Ethlynne E. Holmes, *Flower Vendors*, PHYLON 117 (2d Quarter 1941).

[51] ELLEN NOONAN, THE STRANGE CAREER OF PORGY AND BESSS: RACE, CULTURE, AND AMERICA'S MOST FAMOUS OPERA 131 (2012).

[52] *Selling Flowers on Streets Here Is 20th Century Development*, CHARLESTON NEWS & COURIER, Mar. 6, 1944, at 8; J. W. Joseph, *Meeting at Market: The Intersection of African American Culture, Craft, and Economy and the Landscape of Charleston, South Carolina*, 50 HISTORICAL ARCHAEOLOGY 94, 107 (2016).

[53] HARRIS, *supra* note 7, at 126.

[54] *Buses May Run West of Ashley*, CHARLESTON NEWS & COURIER, Mar. 13, 1940, at 6; Flower *Women Reprimanded, Then Given Their Freedom*, CHARLESTON EVENING POST, Mar. 9, 1940, at 13.

[55] *Flower Women*, CHARLESTON NEWS & COURIER, Mar. 3, 1944, at 4; *The Last Outpost*, CHARLESTON EVENING POST, Feb. 28, 1944, at 4; *Flower Girls at Postoffice Against Moving to Market*, CHARLESTON EVENING POST, Feb. 22, 1944, at 2; *Flower Women Reprimanded, Then Given Their Freedom*, CHARLESTON EVENING POST, Mar. 9, 1940, at 13; *Flowers*, CHARLESTON EVENING POST, Dec. 10, 1937, at 6; *Flower Girls Protest Rule Banning Postoffice Shade*, CHARLESTON NEWS & COURIER, July 1, 1935, at 10; *The Flower Venders*, CHARLESTON EVENING POST, Dec. 18, 1934, at 13; *The Flower Women*, CHARLESTON NEWS & COURIER, Dec. 13, 1934, at 5.

The mood had shifted by 1944. The Depression was over, and the economy was recovering. There was a war on too, and some insisted the women should be "working on farms, raising food for the war effort." Besides, it was rumored the women were selling flowers bought from big growers rather than the ones they grew in their own yards. Perhaps this was viewed as less picturesque.[56]

So the police chief ordered the vendors to move into the city market. They balked. The market hall was bad for business, they said. It was dirty, dark, and poorly located. It closed too early. "No postoffice sidewalk, no flowers," they protested. But the Mayor supported his police chief. "We have had too many complaints," he said, "and they will have to move."[57]

The backlash was swift. "One by one many landmarks are being removed and traditional customs abandoned," read one letter to the editor of the *News & Courier*.[58] "Has anyone the heart to deprive our service men," another asked, "the fond hope of seeing again the flower women on the postoffice corner?" The editor agreed. "Picturesque items in the landscape that add color are part of the stock in trade of tourist town and Charleston is a tourist town." Ousting the flower vendors was a poor business decision.[59] Preservationist Susan Pringle Frost invited readers to sign a petition; they turned out in droves.[60]

A relative of Frost's proposed a compromise: the Garden Club, a private organization, could regulate the flower vendors.[61] Verner was one of the Club's leading members. Although she later claimed the proposal originated with the vendors themselves, she had first floated it in 1939.[62] This time it took. The Mayor and the Garden Club agreed that the Club — Verner, really — would register and license the flower women, regulate their conduct, keep them "mannersable," and ensure the sidewalks were kept clean. A Club

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[56] *Flower Women Against Moving*, CHARLESTON NEWS & COURIER, Feb. 23, 1944, at 7.

[57] *Flower Women Move March 1*, CHARLESTON NEWS & COURIER, Feb. 27, 1944, at 12; *Mayor Says Flower Women Must Move to Market March 1*, CHARLESTON EVENING POST, Feb. 26, 1944, at 5; *Flower Women Against Moving*, CHARLESTON NEWS & COURIER, Feb. 23, 1944, at 7; *Flower Girls at Postoffice Against Moving to Market*, Charleston Evening Post, Feb. 22, 1944, at 2.

[58] *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Mar. 1, 1944, at 4; *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Feb. 29, 1944; *50 to 1 for Vendors*, CHARLESTON NEWS & COURIER, Feb. 29, 1944, at 4; *Postoffice Flower Women*, Feb. 27, 1944, at 4; *Keep Flower Women*, CHARLESTON NEWS & COURIER, Feb. 23, 1944, at 4.

[59] *Organize for Sweeping Up*, CHARLESTON NEWS & COURIER, Feb. 27, 1944, at 4; *Let Flower Women Stay*, CHARLESTON NEWS & COURIER, Feb. 24, 1944, at 4.

[60] *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Feb. 25, 1944, at 4.

[61] *Postoffice Flower Women*, CHARLESTON NEWS & COURIER, Feb. 26, 1944, at 4.

[62] *Flower Licenses Proposed*, Charleston News & Courier, Nov. 17, 1939, at 14.

member would supervise the flower women each day and ensure there were no more than 20 present at any time.

The vendors were also banned from approaching motorists. The city assigned a policeman to monitor the vendors and arrest anyone who crossed a white line painted on the sidewalk. According to Joyce Coakley, whose grandmother was among the flower ladies, the "daily challenge was to see who could cross the white line without being seen by Patrolman Brown. Usually, there was a chase to arrest violators."[63] Violators were fined $10 for crossing the line — about a week's earnings.

In her new role as regulator, Verner also gave the women brightly-colored kerchiefs to wear on their heads. This seemed too cheap a stunt even in a tourist town. "That proposal smacks of the artificial, and suggests a type of regimentation more like Hollywood and Miami than Charleston," the *Evening Post* cautioned. "The flowers ought to provide all the color that is needed to maintain the picturesqueness of the scene."[64]

Verner insisted it was all a misunderstanding, that the kerchiefs were just "a bit of pretty cloth" meant to make the Garden Club's "arduous task of laying down rules and regulations less harsh." She insisted that the "last thing the Garden Club of Charleston would wish is that these flower women be put in an artificial costume."[65] The kerchiefs were made optional (but pants were forbidden).[66]

This episode reemerged in 2020, when the South Carolina Arts Commission learned about Verner's "racially charged writings" and removed her name from its most prestigious award.[67] Verner's grandson insisted his grandmother had been a "sympathetic" friend to the vendors. "When the city tried to remove these women," he wrote, "she defended them and drew attention to what she described as their entrepreneurial spirit." They were

[63] COAKLEY, *supra* note 12, at 52; *61 Flower Women Register; Will Wear Bright Bandanas*, CHARLESTON NEWS & COURIER, Mar. 1, 1944, at 12; *Garden Club Makes Appeal, Flower Women Get Reprieve*, CHARLESTON NEWS & COURIER , Feb. 28, 1944, at 12; Elizabeth O'Neill Verner, *Similarity of Homes and Streets Impresses Artist on Visit*, CHARLESTON NEWS & COURIER, Nov. 25, 1946, at 12; *Garden Club Has Flower Show at May Meeting*, CHARLESTON NEWS & COURIER, May 2, 1946, at 8; *'Flower Girls' Arrested for Passing Boundary*, CHARLESTON EVENING POST, Feb. 8, 1945, at 2; *Flower Women Forfeit Bonds*, CHARLESTON EVENING POST, May 20, 1944, at 10.

[64] *Cloths, Not Bandannas*, CHARLESTON NEWS & COURIER, Mar. 5, 1944, at 4; *Not Too Flowery*, CHARLESTON EVENING POST, Mar. 1, 1944, at 4; *Flower Women Work Orderly Under New Plan*, Charleston Evening Post, Feb. 29, 1944, at 10.

[65] *Cloths, Not Bandannas*, CHARLESTON NEWS & COURIER, Mar. 5, 1944, at 4.

[66] *Flower Women Buy Vendors' Licenses*, CHARLESTON NEWS & COURIER, Mar. 2, 1944, at 5.

[67] Maura Hogan, *Highest SC arts award removes name of Elizabeth O'Neill Verner*, CHARLESTON NEWS & COURIER, Aug. 24, 2020.

"proud to have been chosen by her for their portraits, and considered her to be their biggest ally and supporter."[68]

Coakley recalled that Verner and the flower ladies had related to each other "as women in business." As for the kerchiefs, she insists Verner was "only striving to protect her grandmother's and the others' rights as business-women and was not at all exploiting them." Her own book includes a full-page photo of Verner and describes the Garden Club as having "champion[ed] the cause of the flower ladies."[69]

Still, it's difficult to detach Verner from a movement that consciously objectified Charleston's Black community in service of marketing a sanitized antebellum fantasyland to tourists. Like Julien Binford in Richmond, Verner "wanted the flower women because I painted them and I needed them as models." The Mayor was ultimately convinced to let the flower ladies stay not because they were entrepreneurs but because Verner convinced him that they provided "local color" in publicity materials. Whatever relationship there was between Verner and the flower ladies, the city granted expansive regulatory authority over a group of Black businesspeople to a white artist who profited from their image. Verner already had "considerable control … over the way they were represented in the Charleston landscape," writes historian Stephanie Yuhl. After 1944, she also controlled how they earned a living.[70]

"Shame!"

The story of the Charleston flower ladies raises several questions. How do localities regulate flower vendors? Although some have tried to ban their business altogether, most operate through licensing schemes that raise the price of entry by requiring licenses, imposing qualifications for licenses, charging for them, and restricting their number. Some laws also restrict how vendors operate, say by limiting where they can sell flowers and how long they can stay in one place, restricting vendors from selling to certain customers, regulating their displays, and, in the case of the Charleston flower ladies, controlling even their appearance and demeanor.

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[68] *Verner attack*, CHARLESTON NEWS & COURIER, Sep. 4, 2020.

[69] DEBORAH C. POLLACK, VISUAL ART AND THE URBAN EVOLUTION OF THE NEW SOUTH (2015); COAKLEY, *supra* note 12, at 59.

[70] STEPHANIE E. YUHL, A GOLDEN HAZE OF MEMORY: THE MAKING OF HISTORIC CHARLESTON 85-86 (2005); *Licenses of Flower Women Are Suspended*, CHARLESTON NEWS & COURIER, Mar. 10, 1945, at 3.

Then there is the question of who enforces these laws, and what are the consequences for vendors accused of violating them?[71] In Charleston, the city government gave a private garden club primary regulatory responsibility over the flower vendors. Localities more commonly authorize police departments to enforce regulatory schemes and may prescribe criminal consequences for violators.

The result has been uneven enforcement. Old newspapers are filled with anecdotes of police officers, mayors, clerks, judges, and juries who went easy on the flower vendors. After Washington, DC police arrested Fannie Kazlaskia and her three-year-old son in 1936 for selling flowers in a restricted area near the Veterans' Administration building, a judge suspended her fine when he learned she'd only been selling Memorial Day flowers picked in the country to support her family. When she was arrested a second time a few weeks later, another judge questioned "why a nice, clean-looking woman like Mrs. Kaslaskia should not be allowed to sell her flowers." She was released with a warning.[72]

Manuel Bartel stood trial in San Francisco that same year for obstructing the streets. The jury acquitted him within two minutes then "rushed forward, shook hands with him and urged him to carry on."[73]

Police arrested Abraham Gedefiar in 1938 for selling flowers without a license. It was his fiftieth arrest. A judged warned him he'd go to jail the next time.[74]

There was the "Greek violet king" of turn-of-the-century New York. "There was a time when the 'king' peddled posies without a license and was arrested thrice in a day," one paper recounted. "Once the judge told him to go over to First avenue on the East Side, and sell. That district then was less given to luxury than now, and the outdoor florist informed the bench that he was too good a business man to follow that advice. The judge laughed and discharged him."[75]

But for all these anecdotes, encounters with police could turn abusive or violent. A reporter for the *Evening World* observed in 1891: "If there is anything or anybody that these same flower peddlers stand in dread of it is a

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[71] Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2121 (June 1994).

[72] *Protest Against Arrest of Woman Flower Seller*, June 2, 1936, at 10; *Vendor Trial Delayed*, WASH. EVENING STAR, June 3, 1936, at 21; *Flower Vendor's Fine Suspended*, WASH. EVENING STAR, June 14, 1936, at 23; *Flower Vendor Warned and Freed*, WASH. EVENING STAR, Aug. 5, 1936, at 2.

[73] *Flower Vendor Upheld in Frisco*, READING TIMES, Dec. 25, 1936, at 10.

[74] *S.F. Flower Peddler Arrested 50 Times*, OAKLAND TRIBUNE, Oct. 29, 1938, at 13.

[75] *King Retains "Crown"*, WASH. EVENING STAR, Oct. 27, 1929, at 26.

New York copper. He keeps them moving all the time."[76] Another reporter observed: "Their eyes seem to be moving constantly, watching, not the approach of some fair customer but for the sudden appearance of the gentleman in a long blue coat and brass buttons." Vendors would flee from one policeman only to be threatened or beaten by another.[77]

A New York policeman once hauled a vendor into court for "annoying pedestrians." The officer testified the vendor had assaulted him. A man who had observed the incident objected: "Your Honor, this arrest was an outrage, and the officer should be punished instead of this prisoner." It was the officer who had assaulted the vendor — striking him on the head a dozen or more times and kicking him for no apparent reason — as onlookers cried "Shame!"[78]

More than a century later, in 1996, one flower vendor told a *New York Times* reporter, "The police haven't let us work. They enjoy humiliating us."[79] A few years later and 1000 miles south, a Miami jury found police had falsely arrested a licensed flower vendor eight times.[80] And just a few years ago, a video from Perris, California, went viral. It depicts an incident between officers and a group of flower vendors outside a high school graduation. An officer grabs a vendor's hair, wrestles her to the ground, covers her mouth with his hand, and kneels on her leg as she screams that she's in pain — all for the crime of selling flowers without a license.[81]

Flower vendors have challenged regulations and their enforcement since at least the nineteenth century. With some exceptions, the usual judicial refrain is that state and local governments may regulate their activities so long as there is a legitimate purpose for doing so, the regulatory means are reasonably calculated to achieve that purpose, and there are rules to guide the

[76] *Lilac Merchants*, N.Y. EVENING WORLD, May 8, 1891, at 3.

[77] *Greeks in America*, BROOKLYN CITIZEN, Feb. 1, 1891, at 13.

[78] *Flower Man Had a Friend*, N.Y. EVENING WORLD, May 10, 1895, at 6.

[79] Alvarez, *supra* note 15.

[80] Miami-Dade Cty. v. Cardoso, 963 So.2d 825 (2007).

[81] Alejandra Reyes-Velarde, *Flower vendor sues Riverside County Sheriff's Department over alleged unlawful arrest due to her race*, L.A. TIMES, Nov. 20, 2018, www.latimes.com/local/lanow/la-me-ln-flower-vendor-lawsuit-20181120-story.html; Ruby Gonzales, *Lawsuit claims Riverside County Sheriff's deputy used excessive force, violated flower vendor's civil rights*, THE PRESS-ENTERPRISE (Nov. 19, 2018), www.pe.com/2018/11/19/lawsuit-claims-riverside-county-sheriffs-deputy-used-excessive-force-violated-flower-vendors-civil-rights/; Jessica Rice, *Video of Officer Arresting Woman Selling Flowers Near Graduation Causes Social Media Stir*, NBC L.A., July 18, 2017, www.nbclosangeles.com/news/national-international/flower-vendor-video-arrest-perris/20178/; Kayla Epstein, *Video of flower vendor's violent arrest in California sparks outrage*, WASH. POST (July 18, 2017).

exercise of regulators' discretion.[82] Although these holdings are almost certainly correct as a constitutional matter, a valid law isn't always a good or an equitable one. Whatever the intent of ordinances regulating flower vendors — earnest or malicious — and no matter their lawfulness, their effects have always disproportionately affected marginalized communities.

But there are signs of change. About a year after the Perris incident, California passed the Safe Sidewalk Vending Act. The statute requires local governments to offer "objective health, safety or welfare concerns" when they regulate street vendors. ("Perceived community animus" and "economic competition" don't count.) The statute also establishes minimum standards for regulating street vendors and prohibits local governments from imposing criminal penalties on violators.[83]

New York announced in June 2020 that the city's police department would no longer have primary responsibility for enforcing street vendor regulations.[84] And legislation was introduced in New York and Washington, DC, that would recognize street vending as legitimate work that can benefit vendors and cities alike, decriminalize it, and regulate it more humanely and less arbitrarily.[85]

We've begun to reimagine cities. As thoroughfares become farmers' markets and curbsides become streateries, street commerce is increasingly seen as a positive good, enlivening public spaces and invigorating urban environments. At the same time, we should remain cautious of falling too deep into the trap of the picturesque. Through any efforts at regulation or deregulation, it's important to remember the interests of the flower vendors themselves, who have sought in selling flowers a chance at opportunity.

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[82] *See, e.g.*, Membreno v. City of Hialeah, 188 So. 3d 13 (Ct. App. Fla., 3d Dist. 2016); Bobka v. Town of Huntington, 143 A.D.2d 381 (N.Y. 1988); Russell v. Town of Pittsford, 94 A.D.2d 410 (N.Y. 1983); Whiting v. Salisbury, No. C.A. 78-68 (Sup. Ct. R.I. Aug. 1, 1978).

[83] Joseph Pileri, *Essential but Excluded: Vending in the Time of Corona*, NULR OF NOTE (May 1, 2020); Jess Bird, *Street vendors are part of the fabric of city life. Why do cities make their work harder?*, WASH. POST (Dec. 4, 2019).

[84] Tim Philpott & Fernanda Echavarri, *Why Do Street Vendors Have to Deal With Armed Cops?*, MOTHER JONES (June 24, 2020); Chris Crowley, *Bill de Blasio Says NYPD Won't Be Involved in Street Vendor Enforcement Anymore*, GRUB STREET (June 8, 2020).

[85] Collen Grablick, *D.C. Councilmember Reintroduces Bills Bolstering Street Vendor Protections*, DCIST.COM (Feb. 3, 2021); www.nysenate.gov/legislation/bills/2021/s1175; John Rennie Short, *Street Vendors Make Cities Livelier, Safer, and Fairer — Here's Why They Belong on the Post-COVID-19 Urban Scene*, UMBC MAG. (July 8, 2020).

FIVE RECOMMENDATIONS

Harold E. Kahn†

Commonwealth v. Cosby
252 A. 3rd 1092 (PA 2021)
opinion for the court by Associate Justice David Wecht

What is a reviewing court to do when faced with sexual assault convictions of an incarcerated reviled world-renowned comedian based in substantial part on the defendant's incriminating statements made in a civil case where he was required to testify after he had been told by the District Attorney that he would not be criminally prosecuted? To the dismay of many, the answer, according to Pennsylvania Supreme Court Justice Wecht, is to uphold the defendant's due process rights by compelling "specific performance" of the DA's non-prosecution decision, vacating the defendant's convictions, and releasing him from prison. The defendant, of course, is Bill Cosby.

In 2005 Andrea Constand accused Cosby of giving her pills to facilitate unconsented sex. After determining that his office would be unable to convict and desiring to assist Constand in her civil suit against Cosby by removing Cosby's ability to assert his Fifth Amendment right not to testify, the elected DA announced that Cosby would not be prosecuted. Forced to testify in the civil case, Cosby stated at his deposition that he had given Quaaludes to other women with whom he desired to have sex. Cosby paid over $3 million

† Judge, Superior Court of California, County of San Francisco (Retired).

to settle Constand's civil suit. Notwithstanding the DA's non-prosecution announcement, years later another elected DA in the same county charged Cosby with sexually assaulting Constand. The trial included Cosby's admissions about Quaaludes and testimony from five women in addition to Constand that Cosby had drugged them to obtain unconsented sex. Cosby was convicted, and imprisoned.

Writing for a bare majority of four justices, Wecht explained that "specific performance of [the non-prosecution decision] … is the only remedy that comports with society's reasonable expectations of its elected prosecutors and our criminal justice system … Anything less under these circumstances would permit the Commonwealth to extract incriminating evidence from a defendant who relies on the elected prosecutor's words … and then use that evidence against that defendant with impunity." Wecht concludes: to do anything other than vacate Cosby's convictions and bar future prosecution of Cosby based on Constand's accusations "would violate long-cherished principles of fundamental fairness. It would be antithetical to, and corrosive of, the integrity and functionality of the criminal justice system that we strive to maintain."

Estate of Michael J. Jackson v. Commissioner of Internal Revenue
121 T.C.M. (CCH) 1320 (2021)
opinion for the court by Tax Court Senior Judge Mark Holmes

The Hollywood Reporter called it the "Tax Court Trial of the Century." Michael Jackson's Estate petitioned for a redetermination of the assessed estate tax as a result of the King of Pop's untimely death. The parties disputed the fair market value of Jackson's image and likeness and his ownership interests in music composed by him and others. In an exhaustive book-length opinion, Judge Holmes provides a delightful mini-biography of Jackson's remarkable life and dissects, and at times eviscerates, the parties' competing experts' opinions.

Holmes relished the task of valuing the disputed Estate assets. Stripped of the color and details of Jackson's life, the legal and factual issues Holmes had to decide were dry stuff such as discount rates and hypothetical cash flows, and the applicability of an arcane concept called "tax affecting." Holmes did not shy from these necessary matters, including plenty of equations and tables to satisfy any math nerd. Yet, Holmes' eye for detail, his tell-it-like-it-is style, and his obvious delight in literary allusions, apt metaphors, and clever puns make for a fun read.

The opinion confronts the central tension that, while Jackson was enormously famous (at one point "the most famous person in the world") and

able to sell out large concert halls in minutes, his severely tarnished reputation was toxic to concert tour sponsors and merchandisers. Holmes painstakingly describes how the parties' experts dealt with this dilemma and convincingly explains which portions of the experts' testimony he agrees with and which portions he finds lacking.

Holmes' opinion would make a great law school course on the dos and don'ts of expert testimony. When one expert was caught fibbing, Holmes didn't pull any punches: "That was a lie." Holmes batted away another expert's opinion that Jackson's interest in Beatles songs had little value: "The idea that ownership interest … to 175 Beatles songs isn't marketable seems like a stretch." When an expert refused to admit an obvious point, Holmes wrote that "stubbornness receives no reward." When he found both sides' experts of no help, he said that "This left us with a mess." My favorite: in rejecting the view of the Commissioner's expert that the Neverland Ranch, Jackson's Santa Barbara County residence, could be used as a theme park, Holmes wrote: "Neverland was more of a recent crime scene than a future wonderland … a home owned by an alleged child molester where the alleged molestation took place would be less than an ideal spot for a theme park for children."

King v. Whitmer
556 F.Supp.3d 680 (E.D. MI 2021)
opinion for the court by District Judge Linda Parker

Unwilling to accept that Michigan's official count showed that Biden received 150,000 more votes than President Trump, attorneys associated with the Trump campaign filed a lawsuit alleging numerous violations of Michigan election laws. The complaint prayed for an order requiring Michigan election officials to certify that Trump won Michigan's electoral votes. As did all others of its ilk, the lawsuit failed. Though the plaintiffs eventually dismissed all of their claims and several pending appeals, the dismissals did not end the case. District Judge Linda Parker still had to rule on motions seeking sanctions against plaintiffs' attorneys.

Parker's opinion excoriates the Trump attorneys for filing a political lawsuit devoid of any factual or legal support. After exhaustively detailing a lengthy set of abuses committed by the Trump attorneys in filing and pursuing the lawsuit, Parker succinctly summed up her views: "This lawsuit should never have been filed." The complaint alleged an array of very serious election frauds including that "hundreds of thousands of illegal votes" were counted. Parker evaluated each fraud allegation and found all of them frivolous, asserted only to advance a political, not legal, agenda. Parker wrote:

> this case was never about fraud — it was about undermining the People's faith in our democracy and debasing the judicial process to do so … It is not acceptable to support a lawsuit with opinions, which ... no reasonable person would accept as fact … Nor is it acceptable to use the federal judiciary as a political forum to satisfy one's political agenda. Such behavior by an attorney in a court of law has consequences.

Those consequences, meted out by Parker, included ordering the Trump attorneys to pay defendants' fees and costs and to attend legal education courses on pleading standards and election law, as well as "referring the matter [to attorney disciplinary agencies] for investigation and possible suspension or disbarment."

While Parker recognizes that heavy sanctions should be reserved only for highly egregious misconduct, her careful opinion persuasively demonstrates that "Plaintiffs' attorneys … scorned their oath, flouted the rules, and attempted to undermine the integrity of the judiciary along the way."

People v. Alatorre
70 Cal. App. 5th 747 (2021)
opinion for the court by Associate Justice William Dato

Carlos Alatorre came to the United States from Mexico when he was four years old. When he was 24, Alatorre pled guilty to the crime of conspiracy to possess cocaine for sale. Three years later Alatorre sought to become a naturalized citizen "which had the unintended but very predictable consequence of alerting immigration authorities to his criminal conviction," resulting in his deportation. Several years after Alatorre was deported, new California legislation permitted a noncitizen who pled guilty to a crime without fully understanding the immigration consequences to file a motion to vacate his conviction. While living in Mexico, Alatorre learned about the new statute when he renewed his efforts to become a naturalized U.S. citizen. Alatorre's motion to vacate his conviction was denied as untimely by the trial court based on the finding that Alatorre had not acted with "reasonable diligence" because he had not filed his motion shortly after the new statute became effective.

In an opinion that deftly analyzes the text, purpose and history of the statute, Justice Dato determined that the trial court erred by applying the legal fiction that everyone is presumed to know the law. Dato explained:

> the Legislature has expressed its particular concern for immigrants who suffer convictions without understanding that it will in the

> future result in their deportation … It is a highly unique statute in that failure to understand the law is the essential predicate for relief. To insist … that petitioners are irrebuttably presumed to be aware and appreciate the significance of a new change in the law — despite all evidence to the contrary — would deny relief by substituting reliance on one legal misunderstanding for another in contravention of a manifest legislative intent.

Considering Alatorre's circumstances, Dato wrote that "the presumption that Alatorre could or should have known about [the statute] … as of the date of its enactment, of his own accord, and without the aid of a lawyer and without some event that would prompt him to retain one, borders on the absurd." Quoting from a New Hampshire decision, Dato added that "the law is not so senseless as to make absurd presumptions of fact." Apart from being a fine example of statutory interpretation, Dato's opinion stands out as paean to common sense.

Uzuegbunam v. Preczewski
141 S.Ct. 792 (2021)
dissenting opinion by Chief Justice John Roberts

If you asked most Supreme Court observers which Justice is the least likely to pen a solo dissent, a large majority would likely say the Chief. And for good reason: John Roberts' John Marshall-esque desire for consensus is legendary. As of the middle of his 16th term on the Court, Roberts had not written solo. No longer.

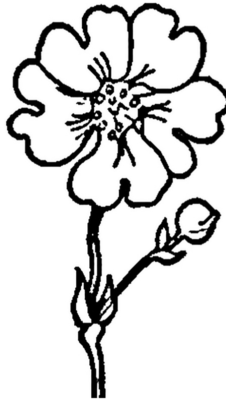
Plaintiffs initially filed their federal lawsuit seeking to enjoin free speech restrictions imposed by a college. Once the college eliminated the restrictions, plaintiffs acknowledged that they could no longer seek injunctive relief, while arguing that their request for nominal damages allowed them to maintain their lawsuit. The eight Justice majority agreed, holding that a plaintiff who seeks only nominal damages for a past constitutional violation may pursue a claim in federal court. Roberts dissented, stating that he places "a higher value on Article III" and a "fight over farthings" does not support federal court jurisdiction. Per Roberts,

> The case is moot because a federal court cannot grant … [plaintiffs] "any effectual relief whatever" … an award of nominal damages does not change their status or condition at all. Such an award instead represents a judicial determination that the plaintiffs' interpretation of the law is correct — nothing more. The court in such a case is acting not as an Article III court, but as a

> moot court deciding cases "in the rarified atmosphere of a debating society."

Roberts chides the majority as "seeing no problem with turning judges into advice columnists" and requiring "federal courts [to] open their doors to any plaintiff who asks for a dollar." While Roberts bemoans "the Court's sweeping exception to the case-or-controversy requirement," he observes that "the defendant should be able to end the case by" paying a dollar to the plaintiff. While Roberts describes the dollar payment as a "welcome caveat" that "may ultimately save federal courts from issuing reams of advisory opinions … it also highlights the flimsiness of the Court's view of separation of powers."

Although Roberts had never before issued a solo dissent, a parenthetical in his dissent suggests that he was not discomfited by being on the wrong side of an 8-1 decision. In the course of criticizing the majority's reliance on a 1703 dissent by Lord Holt, Roberts noted that "Holt was alone in dissent … (no shame there)."



> If a man could pass through paradise in a dream, and have a flower presented to him as a pledge that his soul had really been there, and if he found the flower in his hand when he awoke — Aye! and what then?
>
> Samuel Taylor Coleridge
> *Anima Poetae* (n.d., published 1895)

AN ARRANGEMENT OF ARBITRATION WEEDS

Nancy S. Kim†

Brett Long purchased flowers from ProFlowers.com.[1] He looked forward to receiving a lovely arrangement like the one he saw advertised on the website as a "completed assembled product." But what he received was a "do-it-yourself kit in a box" that required assembly.[2] Unhappy with the delivery, he sued Provide, the owner of the ProFlowers.com website, claiming violations of California's Consumer Legal Remedies Act and Unfair Competition Law. Provide moved to compel arbitration as required by its online contract. Long argued that he never saw the arbitration clause and so couldn't be bound by it. He wanted his day in court.

Ordinarily, a consumer with a legal dispute against a company may bring a claim in court. But if that consumer has purchased the product online, as Long did, then that consumer has undoubtedly been subjected to the retailer's Terms of Service or Terms of Use. In many cases, the TOS or TOU harbor mandatory arbitration clauses. The Proflowers website was no exception. Its TOU was a type of wrap contract known as a browsewrap and was viewable via hyperlink displayed at the bottom of each page of the website.[3] The words "TERMS OF USE" were capitalized, underlined, and nestled on the bottom of every page. The hyperlink was in light green typeface on the website's lime green background and "situated among 14 other capitalized and underlined hyperlinks of the same color, font and size."[4] When Long completed his order information, he had to input information and click buttons in a "bright white box set against the website's lime green background."[5] The hyperlink to the TOU was again at the bottom of the page and obscured by other hyperlinks and notices. After he placed his order, Long received an emailed order confirmation with marketing information for other product offerings, banner advertisements, account management notification hyper-

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† Michael Paul Galvin Chair in Entrepreneurship and Applied Legal Technology, Chicago-Kent College of Law/Illinois Institute of Technology. Copyright 2022 Nancy S. Kim.

[1] *Long v. Provide Commerce, Inc.,* 245 Cal. App. 4th 855 (2021).

[2] *Id.* at 859.

[3] *Id.* at 859-61.

[4] *Id.*

[5] *Id.*

links, logos, and then a paragraph in "small grey typeset" with two hyperlinks, one to "Privacy Policy" and the other to "Terms."[6]

Long declared that he did not notice any of the references to the TOU. However, if he had *and* if he had clicked on the hyperlink, he would have been taken to a different web page. On that page, was a heading labeled *Dispute Resolution* which contained the arbitration clause. But Long was neither a fine print-reading aberration of a human being nor an "especially observant Internet consumer"[7]; rather, he was an ordinary person, a reasonably prudent person, and that's all that the law requires somebody to be when they shop online. The court concluded that the notices were simply not sufficiently conspicuous to put a "reasonably prudent Internet user" on inquiry notice.[8]

In other words, Long did not need to be on his guard, scrolling down to the bottom of each page to check for any hidden notices. Even if Long had noticed the hyperlink to the TOU at the bottom of the pages, he would have had some assembling to do. Because like the advertised flowers, the terms were not what they seemed, and just as the kit required Long to put together his own arrangement, a user of the ProFlowers.com website had to assemble the terms by clicking on the hyperlink and traveling over to the page with the actual terms. Even then, viewing the arbitration clause required scrolling down to the bottom and finding the clause in the section labeled, *Dispute Resolution*.

To require a user to engage in this type of contract assembly is unreasonable. Even if Long had seen the hyperlink to the TOU, he probably wouldn't have clicked on the hyperlink, and even if he had clicked, scrolled down, and read the relevant paragraph, would he have understood what "arbitration" means?

Like flowers, words have roots. The word *arbitration* shares the same Latin roots as *arbiter*, which means an "eyewitness" or someone "appointed to settle a dispute." In the not-too-distant past, courts generally refused to enforce arbitration clauses. But state legislatures passed laws expressly permitting arbitration and so did Congress. Yet, courts were skeptical and scrutinized arbitration clauses carefully, often finding that they were unconscionable.[9] Even when the contract was between sophisticated international businesses, they often refused to enforce them.[10] But then the U.S. Supreme

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[6] *Id.* at 861.
[7] *Id.* at 865.
[8] *Id.* at 859.
[9] *Arnod v. United Companies Lending Corp.,* 511 S.E.2d 854 (1998); *Carmona v. Lincoln Millenium Car Wash*, 226 Cal. App. 4th 74 (2014).
[10] *Sibcoimtrex, Inc. v. American Foods Group, Inc.*, 241 F. Supp. 2d 104, 110 (2003) (arbitration provision on reverse side of seller's invoice was not enforceable); *Coastal Industries, Inc. v. Automatic Steam Products*

Court heard several cases involving arbitration clauses, and with each of its rulings upholding a clause under the Federal Arbitration Act, the Court made it increasingly difficult for lower courts to invalidate arbitration clauses.[11]

The English word *arbiter* means judge and an arbitration is a private hearing where one acts as a judge, so the shared roots provide nourishment to words in the same family. Yet, as the trusty Merriam-Webster online dictionary notes, it also shares the same roots as *arbitrary*, which is "seemingly at random or by chance or as a capricious and unreasonable act of will."[12] The good people at Merriam-Webster find this puzzling as it is "quite a bit different in meaning from the two words" and thus, suspect the word has strayed off the genealogical path.

But evolution is aberration, so this divergence was only natural and even predictable. It was foreseeable that there would be arbiters in arbitrations who would issue inexplicable judgements and that eventually, their capricious decisions would result in a natural adaptation. Although sharing the same roots as its cousins, *arbiter* and *arbitration*, *arbitrary* evolved such that it became a criticism and a refutation of its origins, a shunning of its well-intentioned family. It was a flower that bloomed differently but which still shared the same root system with its cousins.

Not all flowers belong in the same garden, even when they come from the same family. Some flowers are weeds. A weed, of course, is simply a plant that is growing somewhere it is not wanted. What matters is *why* it is not wanted. Some weeds are unwanted simply because they are different from the other flowers; however, other weeds are unwanted because they are destructive, steal nutrients from other plants, harm grazing animals, and interfere with human activities.[13]

Corp., 654 F.2d 375, 379 (under New York law, for purposes of Section 2-207, "the unilateral insertion of an arbitration clause constitutes a per se material alteration of a contract."); *but see Aceros Prefabricados, S.A. v. TradeArbed, Inc.,* 282 F.3d 92, 100 (2nd Cir., 2002) (finding that arbitration agreements do not, as a matter of law, constitute material alterations but require examining materiality under a case by case basis.).

[11] AT& T Mobility, LLC v. Concepcion, 563 U.S. 333, 352 (2011) (finding that state law that found class arbitration waivers unconscionable was preempted by the Federal Arbitration Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612 (2018); *see also* David Horton, *Infinite Arbitration Clauses,* 168 U. of Penn. L. Rev. 633, 638-39 (2020) (noting that in the 1980s, the U.S. Supreme Court "dramatically expanded" the Federal Arbitration Act's application, and that since 2010, the Justices "have gone further, issuing a rash of opinions that encouraged businesses to use arbitration as a shield against class actions.").

[12] Arbitration Definition & Meaning, Merriam-Webster.

[13] Introduction to Weeds: What are Weeds and Why do we Care? (psu.edu); 10 Types of Flowering Weeds, Petal Talk (1800flowers.com).

In mass consumer form contracts, an arbitration clause is a weed. This is not to say that arbitration is always destructive or unwanted. To the contrary, arbitration can be efficient, fair, and provide a speedy and private resolution of a messy contractual dispute. In valid contracts between large companies engaged in a commercial transaction, arbitration clauses generally should be enforceable. There is nothing wrong with arbitration clauses *per se*, but the garden where they belong is a negotiated agreement between two sophisticated businesses. Like a wildflower in a rose garden, mandatory arbitration clauses and class action waivers simply do not belong in a unilaterally imposed, mass consumer adhesive form. This is essentially what the California Court of Appeal in *Long v. Provide Commerce* concluded — that a consumer who orders an arrangement of flowers does not have to accept a delivery of weeds.

Say it with flowers.

Society of American Florists

FOUR RECOMMENDATIONS

Stephen Dillard†

Ricks v. State
507 Mich. 387 (2021)
opinion for the court by Chief Justice Bridget Mary McCormack

Presidents typically keep the identities of the judges and justices on their Supreme Court shortlists close to the vest; and those lists are usually dominated by members of the federal judiciary. (The last state-court jurist named to the Supreme Court was Sandra Day O'Connor 40-plus years ago.) But if there are state judges on President Biden's SCOTUS short list for future vacancies, I strongly suspect Chief Justice Bridget Mary McCormack of the Michigan Supreme Court is one of them (or at least should be). Chief Justice McCormack is a judicial star; a well-respected scholar; a fervent champion of government transparency, access to justice, and criminal justice reform; and an extraordinary writer. Indeed, this is McCormack's second time appearing in these hallowed pages for her sparkling, conversational, and empathetic prose. And her considerable writing skills are on full display in *Ricks v. State*, a challenging (and interesting) statutory construction case involving an exception to Michigan's Wrongful Imprisonment Compensation Act. It's a fascinating read, and a perfect example of McCormack's Kaganesque ability to explain a complicated matter of statutory interpretation in a thoughtful and accessible manner.

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† Presiding Judge, Court of Appeals of Georgia. Copyright 2022 Stephen Dillard.

Kokesh v. Curlee
14 F4th 382, 398 (5th Cir. 2021)
dissenting opinion by Judge Don R. Willett

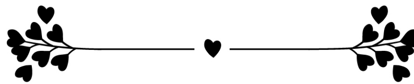
Judge Don Willett of the U.S. Court of Appeals for the Fifth Circuit appears yet again in the *Almanac and Reader*. In fact, Willett — a finalist to fill the Scalia vacancy on the Supreme Court — is singlehandedly building a strong case for *The Green Bag* to issue an SNL-inspired satin and velvet smoking jacket to its most frequent honorees. By my count, this is Willett's *seventh* recognition for exemplary writing. As I've noted before, he's just that good. Judge Willett has a distinctive, engaging, and breezy writing style, and his judicial opinions are often lauded as examples of splendid writing by appellate judges and lawyers of all stripes. One such opinion is Willett's dissent in *Kokesh v. Curlee*, in which he respectfully, but firmly disagrees with the majority's decision to grant qualified immunity to a Louisiana state trooper. In doing so, Willett describes *Kokesh* "as a strange case, even by New Orleans' standards," and then goes to explain his compelling reasoning for why "a jury of Trooper Curlee's peers should decide if he acted constitutionally — not us." This dissent is another of Willett's important and thoughtful contributions to the nation's ongoing, hotly contested debate over the appropriate scope and application of qualified immunity — a debate in which Willett has become the status quo's most prominent and influential judicial critic.

Kowall v. Benson
18 F4th 542 (6th Cir. 2021)
opinion for the court by Judge Amul R. Thapar

In his fourteen-year judicial career, Judge Amul Thapar of the U.S. Court of Appeals for the Sixth Circuit has established himself as one of the most well-respected jurists in the nation. Judge Thapar was appointed as a federal district court judge in 2008 at the tender age of 38, and his performance swiftly vaulted him to Supreme Court short-lister status. Thapar has authored almost 200 majority opinions and numerous concurrences and dissents (in addition to the countless opinions he wrote while sitting by designation as a district court judge), and he is widely considered to be one of the most thoughtful and scholarly judges in the federal judiciary. His exceptional writing prowess is evident in *Kowall v. Benson*, a case involving a claim by a bipartisan group of veteran legislators that "Michigan's Constitution violates their federal First and Fourteenth Amendment rights by barring experienced candidates from running for state legislative office." It's a succinct and erudite opinion, bursting with crisp, elegant prose, and yet another example of Thapar's prodigious writing skills.

Judge Patrick J. Bumatay
Rojas v. Federal Aviation Administration, 989 F3d 666, 693 (9th Cir. 2021)
opinion concurring in part and dissenting in part

It's a considerable achievement to be appointed as a federal appellate judge at any age, but to receive such an honor at 41 is nothing short of remarkable. Judge Patrick Bumatay of the U.S. Court of Appeals for the Ninth Circuit did just that in 2019, and he's wasted no time in establishing himself as one of the federal judiciary's most outstanding young jurists. In just over two years, he has authored 20 majority opinions and a slew of concurrences and dissents. Bumatay has a pithy, conversational, and eminently readable writing style, and he is already having a significant impact on the nation's largest federal circuit court. Indeed, his steadfast commitment to textualism is notable in a circuit that has often been out of step with the Supreme Court and known for going its own way on such matters. Consider, for example, Judge Bumatay's recent dissent in *Rojas v. Federal Aviation Administration*, in which he takes the majority to task for ignoring the plain meaning of Exemption 5 of the Freedom of Information Act,[1] and rewriting it to "bestow[] on us a supposedly better law." It's a textualist masterpiece with a myriad of well-turned quotes for statutory interpretation enthusiasts.



Consider the lilies of the field, how they grow;
they toil not, neither do they spin:
And yet I say unto you, That even Solomon in
all his glory was not arrayed like one of these.

Matthew

[1] 5 U.S.C. § 552 (b)(5).

Credits

(See also the table of contents at the front of this book.)

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243: Rakesh Kilaru, Kendall Turner, and Sarah L. Nash.

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286-97: U.S. Supreme Court Building (details). Collection of the Supreme Court of the United States.

298: Lee Epstein.

303: Charmiane G. Claxton.

309: Showing posies before the judges at the Old Bailey in 1750. Charles Gordon, The Old Bailey and Newgate 166 (1902).

313: G. Edward White.

320: Cedric Merlin Powell.

343: Femi Cadmus and Ariel Scotese.

347: James C. Ho.

359: Jed S. Rakoff and Lev Menand.

364: Susan Phillips Read.

376: "Flower-sellers in the market at Washington, D.C." Harper's Weekly (June 4, 1870) (drawn by A.L. Jackson)

392: Harold E. Kahn.

402: Stephen Dillard.

passim: The flowers scattered throughout this volume are a mix of excerpts from Margaret Armstrong, Field Book of Western Wild Flowers (1915) and commercial clip art.