

April 2017

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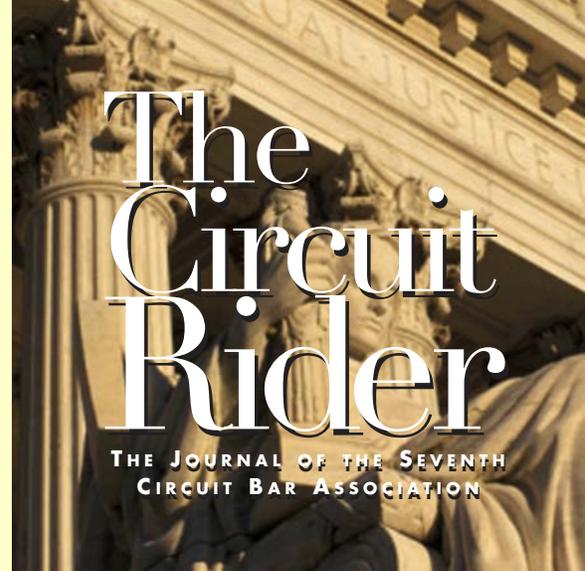
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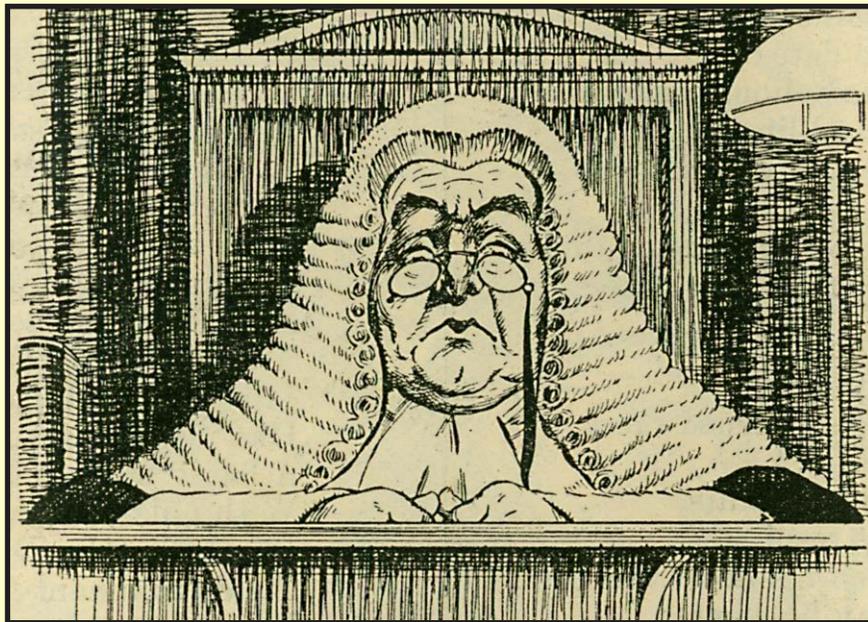
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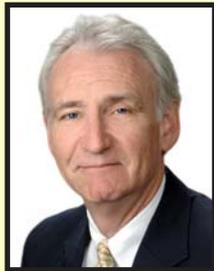
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Letter from the President

President Brian W. Welch
Bingham Greenebaum Doll, LLP

Welcome to another edition of *The Circuit Rider*. Thanks to Magistrate Judge Jeffrey Cole, Northern District of Illinois, and the contributing authors for their efforts towards another thoughtful publication. Please take time to view the articles; you will be glad you did. The 66th annual meeting of the Association is now upon us. It will be held in downtown Indianapolis April 30 through May 2, 2017, at the JW Marriott. The Sunday evening reception will take place at the Eiteljorg Museum of American Indians and Western Art and will include a presentation about the making of a feature film on the history of the federal court in the Southern District of Indiana and three cases of note that are part of that history.



Programming for Monday and Tuesday will include a panel regarding President Trump's nomination of Judge Neil M. Gorsuch and the future of the U.S. Supreme Court; the future of law school; the practical impact of data breach on businesses; recent developments in the law surrounding college sports; and trends in class action cases. In addition, there will be a panel addressing oral arguments before the 7th Circuit and panels on current topics in bankruptcy law and criminal law. We expect to be joined for dinner on Monday evening by the Honorable Elena Kagan, Associate Justice of the U.S. Supreme Court, and by Eva Kor, Indiana resident and Holocaust survivor, who will speak about her experience at Auschwitz and her message of hope and forgiveness.

Under the leadership of Tom Campbell, the Association's Foundation is also hard at work planning another in depth, full day program; this time exploring the many issues surrounding guns and gun violence. The day long program will take place on October 13, 2017, in Chicago and will include five sessions featuring national experts on the Second Amendment, the decision in *District of Columbia v. Heller*, recent legislation and litigation, and the many public health issues involved with gun violence. Stay tuned for more information on this important program.

In the meantime, please enjoy this edition of *The Circuit Rider*. We look forward to seeing you in Indianapolis.

Writers Wanted!

The Association publishes *The Circuit Rider* twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.



Editorial Note

By Jeffrey Cole – Editor-in-Chief

For more than 40 years there has been a debate about Originalism. Justice Scalia was perhaps its most famous champion. While even its most ardent adherents do not completely agree about the meaning and scope of Originalism, most agree that Originalist theory emphasizes the original public meaning of the Constitution and holds: (1) the linguistic meaning of each constitutional provision was fixed and decided at the time of its ratification; and (2) that original public meaning should constrain how judges decide concrete cases. *See generally*, Lawrence B. Solum, *What Is Originalism? The Evolution Of Contemporary Originalist Theory*, <http://scholarship.law.georgetown.edu/facpub/1353/>. (last visited on 4/6/17).

Given the age and the importance of our Constitution, it may come as a surprise that the phrase “original meaning” was not used in a constitutional context until 1938 in a law review discussing the controversy over “substantive due process.” *Edwin Borchard, The Supreme Court and Private Rights*, 47 *Yale L.J.* 1051, 1063 (1938). Judicial usage of the phrase “original meaning” first appeared in Justice Black’s dissenting opinion in *Harper v. Virginia State Bd. Of Elections* in 1966. Originalist theory is not accepted by those who believe that the Constitution is a “living organism” that should adapt to changing circumstances. *See* Posner, *Overcoming Law*, 199, 213, 218, 238–255, 391, 496–497 (Harvard University Press 1995).

With the appointment of Neil Gorsuch to the Supreme Court, Originalism will likely continue to influence how lawyers argue cases and judges decide them. With this in mind, *The Circuit Rider* offers as a starting point, the following pieces, one by Professor Solum of the Georgetown University Law Center and the other by Professor Gienapp of Stanford University. Each is a national authority on Originalism, and each has come to different conclusions about the theory. *The Circuit Rider* takes no position in the debate. Each person must decide for him or herself which side to take (if any) in the “clash of jarring rivalries” and “pretending absolutes.”



STATEMENT OF PROFESSOR LAWRENCE B. SOLUM
**Hearings on the Nomination
of the Hon. Neil M. Gorsuch**
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF
THE UNITED STATES

*By Professor Lawrence B. Solum**

What is Originalism?

Thank you for the opportunity to testify today. This statement is about Judge Gorsuch’s judicial philosophy. Judge Gorsuch is an originalist and a textualist, but what does that mean? The core of originalism is a very simple idea. In constitutional cases, the United States Supreme Court should consider itself bound by the original *public meaning* of the constitutional text. That simple idea can be broken down into its component parts.

Like Justice Scalia before him, Judge Gorsuch believes that the meaning of the constitutional text is its public meaning — the ordinary or plain meaning the words had to the public at the time each provision of the Constitution was framed and ratified. If the words employed are technical, the technical meaning must be accessible to the public. The original public meaning of the text is the

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Professor Solum submitted this Statement to the United States Senate Committee on the Judiciary in connection with the hearings on the nomination of Judge Neil M. Gorsuch to serve as an Associate Justice on the Supreme Court of the United States. The Statement is reprinted here with Professor Solum’s permission.

Hearings on the Nomination of the Hon. Neil M. Gorsuch

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words had then — and not necessarily the meaning that they have today. For example, Article Four of the Constitution refers to “domestic violence” but in the Eighteenth Century that phrase did not refer to spousal abuse. It referred to riots and insurrections within a state. When we interpret Article Four, we should understand the words as they were used at the time the Constitution was written. What is called “linguistic drift” is not a valid method of constitutional amendment.

The Supreme Court today should consider itself bound by the text. The Court does not and should not have the power to amend the text on a case-by-case basis. It should decide constitutional cases in a way that is consistent with the original public meaning of the text.

Originalist judges do not believe that they have the power to impose their own values on the nation by invoking the idea of a “living constitution.” Instead, they believe that the proper mechanism for changing the Constitution is by amendment through the process provided in Article Five — as has been done twenty-seven times.

Myths about Originalism

The basic idea of originalism is simple and intuitive. We have a written constitution that is the supreme law of the land. Why then would anyone oppose originalism? Some of the reasons for opposition to originalism are based on myths — misrepresentations of the actual practice of originalism by lawyers, judges, and scholars.

Myth Number One: Originalists Try to Channel James Madison

Originalism is about the constitutional text. No originalist thinks that we should decide contemporary constitutional bases by asking, “What would James Madison do?” What matters for originalists is what the constitutional text says. When Judge Gorsuch writes an opinion that applies the original public meaning of the constitutional text to a contemporary legal question, he does not need to know anything about the mental states of the Framers regarding that question.

Myth Number Two: Originalists Cannot Apply the Constitution to New Circumstances

There was no Internet when the First Amendment was written in 1791. Today, Americans can speak over the Internet. The application of the freedom of speech to a speech broadcast over the Internet is very simple. Speech is speech, whether it is in person, amplified by speakers, or transmitted over the Internet. The Constitution was written in language that can be applied to new circumstances. There was no state of Iowa when the Constitution was ratified, but there was no difficulty in applying the constitutional provision that grants each state two Senators to the new state Iowa.

Myth Number Three: Originalism Would Require that *Brown v. Board* be Overruled

In fact, there is very good historical evidence that segregation would have been struck down under the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. In fact, *Plessy v. Ferguson*, the decision that established the separate-but equal doctrine, was a living constitutionalist decision, one of many that nullified a now almost forgotten guarantee of equal basic rights.





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Myth Number Four: Originalism is Inconsistent with Precedent

In fact, the opposite is the case. The original meaning of the judicial power in Article III is entirely consistent with the ancient doctrine of *stare decisis*. Judge Gorsuch has consistently displayed a respect for precedent in his judicial career — as did Justice Scalia. It is true that an originalist Supreme Court would gradually move the law away from precedents that are inconsistent with the constitutional text, but great movements of this kind are gradual — and they give the democratic process an opportunity to react.

Originalism is in the Mainstream of American Jurisprudence

Is originalism somehow outside the mainstream of American jurisprudence? The answer to that question is an emphatic “no.” The idea that judges are bound by the constitutional text is very much in the mainstream of American legal thought.

For most of American history, originalism has been the predominate view of constitutional interpretation. There have been episodes in our history where fidelity to the constitutional text was neglected. One such episode occurred during the Reconstruction period when living constitutionalists of that era undermined important provisions of the Fourteenth Amendment. Another departure from the mainstream occurred during the Warren Court, when the Supreme Court sometimes issued opinions that decided constitutional questions without any reference to the constitutional text. But for most of our nation’s history, the Supreme Court has made a good faith effort to follow the constitutional text.

Originalism is in the mainstream for another reason. Originalism can and should be endorsed by both Democrats and Republicans and by progressives and conservatives. This point is especially important to me personally. I am not a conservative or libertarian, but I do believe in originalism. Why is that? It is because I am

convinced that giving judges the power to override the Constitution and impose their own vision of constitutional law is dangerous for everyone. If you are a Democrat, you should ask yourself the question: Given that the next Justice will be appointed by a Republican President and confirmed by a Republican Senate, would you prefer an originalist like Judge Gorsuch or would I prefer a conservative Justice who does not believe that she or he is bound by the constitutional text? The alternative to originalism is a Justice who believes that she or he is free to override the constitutional text in the name of her or his own beliefs about what the Constitution should be given changing circumstances and values.

There is a final reason that originalism is in the mainstream. The Supreme Court has never claimed that it has the power to override the original meaning of the constitutional text. There are cases where the Supreme Court has departed from the text, but in those cases, the Court either attempts to disguise the true nature of its decision with an implausible reading of the text, or it simply ignores the text altogether — usually by citing precedent. Indeed, if Judge Gorsuch had come before this Committee and testified that he believed that as a Supreme Court Justice, he would have the power to override the original meaning of the constitutional text, I think it is clear that he would not be confirmed.

The Case for Originalism

Originalism is the simple and highly intuitive idea that the Justices of the Supreme Court are bound by the constitutional text. The Justices, like all federal judges and the members of this Senate, take an oath to perform their duties under the Constitution of the United States. There are good reasons for the obligation of constitutional fidelity represented by the oath.

First and foremost is the rule of law. John Adams is famous for insisting on the “rule of law and not of men.”²¹ The commitment to the original meaning of the constitutional text is the best way to ensure that the awesome power entrusted to our Supreme Court — the power to have the ultimate say in constitutional cases and declare that statutes passed by Congress are unconstitutional — is the rule of constitutional law and not the rule of the men and women appointed to the Court.

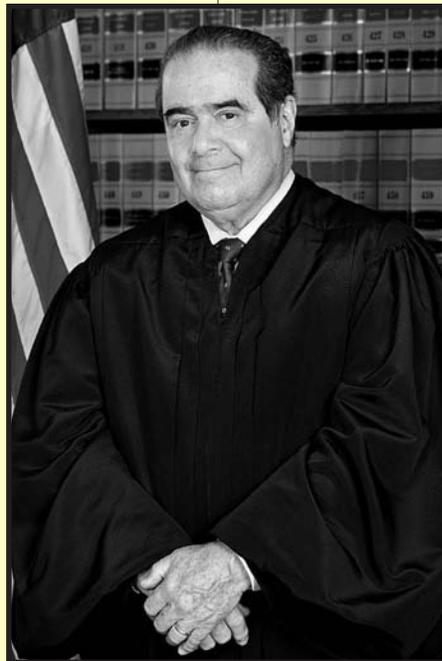
What is the alternative? Living constitutionalists believe that the Supreme Court has the power to amend the Constitution by



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judicial fiat. If the constitutional text does not limit that power, what does? You might say that it is precedent, but the Supreme Court has the power to overrule its prior decisions. I have the great privilege of authoring the volume of Moore’s Federal Practice that deals with the doctrine of stare decisis. In that capacity, I have read hundreds and hundreds of cases dealing with the role of precedent in the federal courts. My conclusion, and I think fair-minded scholars would agree, is that the Supreme Court has an inconsistent approach to precedent. When a majority of the Court believe that a prior decision is wrong, they have the power to overrule it, and that doctrine of precedent does not prevent them from so doing. Indeed, in recent years, critics of the Court have observed a pattern of what they call “stealth overruling.” Even when the Court pretends to adhere to precedent, it can nullify a prior decision by distinguishing it in a way that leaves it without any true precedential force.



If the Justices of the Supreme Court are neither constrained by the constitutional text nor by precedent, then how is the rule of law to be achieved? My day job is as a law professor. In that capacity, I study the constitutional theories that are propounded by my colleagues. One of the most distinguished living constitutionalists is Professor David Strauss of the University of Chicago. Professor Strauss is the leading proponent of what is called “common law constitutionalism”—the view that constitutional law should be made by judges. What I want to call to your attention now is his remarkable candor. Professor Strauss is willing to say things that no one who aspires to judicial office would say in public. Some constitutional amendments are passed to overrule Supreme Court decisions. The two most famous examples are the Eleventh Amendment which limits the ability of citizens to sue states and the Sixteenth Amendment which overruled the Supreme Court’s decision invalidating the federal

income tax. Professor Strauss believes even those amendments could be overruled by the Supreme Court through a common-law process — although he believes the Court should wait a few years before taking such a radical step.² It is no accident that Professor Strauss wrote a book entitled, *The Living Constitution*.³

The truth is that if the constitutional text does not bind the Supreme Court, then the Justices are the equivalent of a superlegislature. A committee of nine unelected judges has the power to reshape our Constitution as they see fit.

There is a second reason to prefer originalism over living constitutionalism. That reason is rooted in the idea of

democratic legitimacy. Each and every provision of the United States Constitution has been ratified by a supermajoritarian process. The original constitution was ratified by the representatives of “We the People” in convention assembled. Amendments must be proposed by two-thirds of the Senate and the House and ratified by three-fourths of the state legislatures. This supermajoritarian process confers democratic legitimacy on the provisions of the Constitution. It is important to acknowledge that this process has not been perfect. In the late eighteenth century, women, slaves and others did not have the vote. But the democratic legitimacy of the Constitution must be compared to some alternative. The Supreme Court consists of nine women and men. They are not elected.

They are appointed for life terms. In theory, they can be impeached by the House and tried by the Senate, but it is difficult to imagine that any Supreme Court Justice would be removed in this way on the basis that their living constitutionalist jurisprudence was out of step with popular opinion.

If we must choose between originalism and a constitutional text that has been ratified by the representatives of “We the People” and a living constitutionalist constitution that is ratified by majority vote of a committee of nine, there is no doubt in my mind about which constitution is the more democratic.

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Objections to Originalism

My final topic concerns objections to originalism. Let me begin by noting that many of the objections are based on the myths about originalism that I have tried to dispel. Consider some of the remaining objections.

The Dead Hand

It is argued that originalism involves the rule of a “dead hand.” Of course, it is true that most of the provisions of the Constitution were framed and ratified long ago. We have an old constitution that has survived the test of time. But is this a reason to reject its authority? Did the members of this august body make a mistake when they swore an oath to support and defend the Constitution? Some of my colleagues in the academy do believe that the Constitution is outmoded and outdated, but I believe they are wrong for two fundamental reasons.

First, the Constitution is not a code. The Constitution established a basic structure of government — this Senate, the House of Representatives, the President, and the judicial branch. It established procedures for legislation and appointment of judges and executive officials. There have been challenges and even periods of crisis, but the fundamental structure of government has worked well for generations. The Constitution also enshrines fundamental liberties like the Freedom of Speech and the Due Process of Law. Originalists are committed to the proposition that the meaning of these liberties does not change, but that does not mean that their applications must remain frozen in time. The whole point of originalism is to respect the text, and nothing could be less respectful than to refuse to apply the text to new circumstances.

Second, the Constitution can be amended. And it has been. Twenty-seven times. Our Constitution is properly changed through the amendment process when the American people form a consensus that change is necessary and desirable. The Constitution of 1789 was improved by the passage of the Bill of Rights. The

great evil of slavery was cured by the Thirteenth Amendment. The Fourteenth Amendment provided a great charter of liberty and equality, not just for the former slaves, but for all Americans. The right to vote was extended to women by the Nineteenth Amendment and to all citizens of the age of eighteen and over by the Twenty-Sixth Amendment. Constitutional amendment is not easy; it requires a consensus of most Americans. But it is not impossible.

In this regard, it is important to remember that living constitutionalism undermines the lawful process of constitutional amendment. These days if a social movement is seeking constitutional change, they have two alternatives. They can marshal their forces for a constitutional amendment; that is a hard road. Or they can attempt to eke out five votes from the Supreme Court, the easy path. It is hardly surprising that many choose the easy path over the hard road. But in this case, the hard road is also the high road. Constitutional change through the amendment process enables “We the People” to overcome the dead hand of the past through the rule of law.

Law Office History

Another objection to originalism is based on the idea that the Supreme Court is simply not capable of discovering the original public meaning of the constitutional text. And even if they were capable of that task in theory, they will fail in practice because their ideological preferences overcome the search for historical truth.

The first aspect of this objection is simply false. The constitutional text is old, but it is not the Rosetta Stone. Lawyers, judges, and scholars can work together to unearth the evidence of original meaning in the hard cases. And there are many easy cases, in which the original meaning is clear to any fair-minded reader who consults the historical record.

The second aspect of the objection goes to the virtue and integrity of the Justices. It is true that neither originalism nor any other constitutional theory can work if the Justices are corrupted by ideology. For originalism to work in practice, the President must nominate and the Senate must confirm Justices with the virtue of judicial integrity. They must be willing to subordinate their own political and ideological preferences to the law. They must set aside their preconceptions and desires and engage in a search for truth—with a willingness to reach outcomes as judges that would necessarily agree if they were lawmakers.

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In this regard, I take comfort from what I have read about Judge Gorsuch’s reputation for integrity. The job of this committee should be to examine the record carefully. If you believe that Judge Gorsuch has the virtue of judicial integrity and that he is committed to the principle that the Supreme Court is bound by the Constitution, then I believe that your duty is to vote for the nomination.

Taking Sides

Recent discussions of the nomination of Judge Gorsuch suggest another objection to originalism. If Judge Gorsuch is committed to the law — to the original public meaning of the constitutional text and the plain meaning of federal statutes — then he may rule against persons and groups about whom we care very much. One version of this objection is based on the idea that judges should favor the little guy (or gal), the common man (or woman) against big corporations or big government. The core idea is that judges should “take sides” and favor some groups over others.

I understand this objection. I have great sympathy for the plight of Americans who struggle against poverty, bias, discrimination, and oppression. I favor legislation that attacks injustice and prejudice. But I cannot endorse the idea that the Supreme Court should take sides, if by that, you mean that the Court should bend or break the constitutional text in order to favor one group over another. Taking sides is a “two-sided coin” — if you will excuse the pun. There is no guarantee that a Supreme Court armed with the awesome power of overriding the constitutional text will take “the right side.” More fundamentally, taking sides is dangerous, because it threatens the rule of law in a fundamental way.

If there is any lesson from the history of the judicial nomination and confirmation process over the past few decades, it is that there is a grave risk of the politicization of the judicial selection process. This Committee knows far better than I do that neither side of the aisle is blameless in this process. There has been a downward spiral of politicization, a process of escalating tit for tat that threatens the integrity and fundamental fairness of the great constitutional duty of the Senate to give advice and consent.

I cannot say what might stop the politicization of the court, but I do know this. The idea that we should select Supreme Court Justices because of what side they will take can only make the problem worse. Once we start selecting Supreme Court Justices explicitly based on ideology, it will become progressively more difficult to select women and men of integrity who respect the rule of law.

And this leads me back to originalism. The whole idea of the originalist project is to take politics and ideology out of law. Democrats and Republicans, progressives and conservatives, liberals and libertarians — we should all agree that Supreme Court Justices should be selected for their dedication to the rule of law. For this reason, I support the confirmation of Judge Gorsuch for the office of Associate Justice of the United States Supreme Court.

Notes:

- ¹ See John Adams, *Novanglus Papers*, Boston Gazette, no. 7 (1774).
- ² David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 57 (2015) (implicitly rejecting the Constraint Principle by stating that “original understandings are binding for a time but then lose their force”).
- ³ David A. Strauss, *The Living Constitution* (2010).





Constitutional Originalism *and* History

*By Professor Jonathan Gienapp**

Thanks to President Donald Trump’s nomination of Justice Neil Gorsuch — a self-identified “originalist”— to the Supreme Court, constitutional originalism is yet again at the forefront of American consciousness. Historians would do well to take special notice. Because while most forms of American constitutional jurisprudence have drawn on the history of the Constitution’s creation, only originalism — the theory that seeks to construe the Constitution today in accordance with its original meaning when it was first enacted — implicates the role of historical study in constitutional interpretation. Moreover, despite several assurances through the years that originalism’s death knell had sounded, the theory enjoys more champions, and more influential champions, than at any point previously.¹

Beyond the federal judiciary, leading originalists can be found on most esteemed law school faculties and in a growing network of influential constitutional law centers and think tanks. The thriving annual “Originalism Works In-Progress Conference” at the University of San Diego Law School’s Center for the Study of Constitutional Originalism (which just hosted its eighth iteration) is one prominent marker of popularity and influence; the well-funded annual “Originalism Boot Camp,” which hosts aspiring law students each summer at the Georgetown Center for the Constitution is another. A new mountain of originalist scholarship and new lines of influence linking this academic work with the

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**Jonathan Gienapp is an Assistant Professor of History at Stanford University. He received a Ph.D. and a Master of Arts degree from Johns Hopkins University and, before that, received a Bachelor of Arts from Harvard University. He is currently writing a book that explores the history of the earliest understandings of the United States Constitution and, in so doing, rethinks the conventional story of American constitutional creation.*

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world of political and judicial action, meanwhile, appears every year.² As Gorsuch’s selection illustrates, originalism is as powerful as ever, so its relationship to history remains as urgent as ever.

Despite that urgency, historians continue to show little interest in originalism. But in scoffing it off as quaint curiosity, outlandish absurdity, or both, they ignore how a largely one-sided and consequential debate has evolved. Fortunately, Gorsuch’s nomination offers a fresh opportunity to probe originalism’s relationship to history. It has evolved significantly since its emergence, around the time that Antonin Scalia — the theory’s most visible champion for the past three decades and the justice Gorsuch has been nominated to replace — first took his seat on the Supreme Court. But originalism’s development is not simply intriguing in its own right. By understanding how it has changed, we can appreciate the unique, little understood, and urgent threat it now poses to the practice of history.

Since few historians know how originalism has evolved, few appreciate how deeply it has come to challenge all historians, not merely those, like myself, who focus on the history of American constitutionalism and the political and intellectual history of Revolutionary America. Most historians will be surprised to learn that, increasingly, debates over originalism have gravitated away from constitutional history and the eighteenth century and towards the philosophical foundations of historical meaning. In the process, originalists have come to wage a steady war — one whose intensity has spiked in recent years — against the methods of history themselves. If historians care about what their discipline can offer, then they should answer originalists’ challenge. For it is hard to imagine any area of contemporary civic life where historical expertise could play a more consequential role.

1. Originalism 1.0: Doing History

Originalists’ retreat from history was not pre-ordained. Indeed, initially, to do originalism was to know history — at least in theory. Originalism first emerged in the 1970s and 1980s as a conservative response to the perceived activism and abuses of the progressive Warren and Burger Supreme Courts. Those on the political right complained that, under the auspices of a “living Constitution,” judges were substituting their own progressive preferences in place of what the Constitution actually licensed. In so doing, judges, rather than dutifully following the Constitution, were authoring it anew, an activity that subverted the

foundational relationship of constitutionalism — that those in power are subject to the Constitution and not the other way around. If justices were to be constrained from legislating from the bench, then they had to be stripped of their interpretive license. And the only way to do that, the thinking went, was to undermine the living Constitution.

The document’s meaning could not evolve with the times; barring formal amendments emanating from the sovereign people, its meaning had to remain fixed and constant over time. Combined, these theoretical presuppositions thus mandated that the Constitution’s operative meaning had to be its original meaning. And those who endorsed this constitutional vision began calling themselves originalists.³

Privileging original meaning was, thus, at its inception, driven by presentist aims. The theory’s main agenda was to recalibrate how judges, lawyers, and citizens related to the Constitution in the present. But no matter the primary goals, the theory necessarily required a methodological corollary; it was one thing to defend the notion that original meaning ought to constrain contemporary judicial behavior, it was quite another to explain how a committed interpreter might locate such meaning in the first place. Only in identifying original meaning credibly could originalists advance the second and altogether more important aspect of their agenda, one that directly implicated historical practice. For, on its face, recovering something like original constitutional meaning would seemingly require doing history.





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And, indeed, in the early years that was more or less true. Whatever else early originalists might have claimed, deciphering the original meaning of the Constitution seemed to turn on the conventional facts of eighteenth-century constitutional history. Straight-forward historical questions seemed to matter, such as: what were the Constitution’s framers, or at least James Madison and Alexander Hamilton, thinking when they wrote it? What were the document’s ratifiers thinking when they voted for or against it? Which political agendas shaped its construction? How did social relations shape people’s understandings and motivations?

Accordingly, when Edwin Meese, then attorney general under Ronald Reagan, declared in a 1985 speech that marked the official arrival of originalism as an identifiable interpretive theory for many, that the administration favored a jurisprudence of “original intention,” he supported his position with recognizably historical accounts about what the Constitution’s framers had intended.⁴ Others followed suit, and originalism, for a time, was primarily dedicated to recovering the original intent of the Constitution’s framers. Such intent was always conceptualized loosely, but, minus additional critical refinement, it served as the organizing interpretive target. This was Originalism 1.0.

But the method of Originalism 1.0 was subjected to powerful criticisms. For one, it was challenged on conceptual grounds, most famously by the constitutional lawyer Paul Brest, who claimed that it was nearly impossible to recover the framers’ intent because of the inherent complexity of group authorship — of the fifty-five delegates who had convened in Philadelphia in the summer of 1787, whose intent was to be privileged?⁵ The same question applied to the nearly 1,700 Americans who gathered in the special state ratifying conventions. Historians, themselves meanwhile, were quick to highlight this particular complexity. A careful look at the multitude of voices involved in the Constitution’s creation pointed only to “original meanings” in the plural.⁶

And then there was the matter of the Anti-Federalists (the Constitution’s earliest opponents); did their original understanding also merit consideration?⁷ Meanwhile, legal scholar Jefferson Powell, in one of the most cited law review articles of the decade, challenged originalism on empirical grounds, contending that the framers’ original intent was actually that the Constitution not be interpreted in accordance with original intent.⁸ Originalism, if followed faithfully, thus canceled itself out. In yet another line of attack, historians lambasted originalists’ shoddy historical work, for engaging in what was derisively called “law office history,” a term used to describe what lawyers did when they both cherry-picked evidence and otherwise ripped it from its operative historical context. The past, historians insisted, was deeply complex, requiring more careful study than originalists were willing to dedicate.⁹ Against the backdrop of these penetrating academic critiques, Judge Robert Bork, President Ronald Reagan’s appointment to the Supreme Court in 1987 and an outspoken originalist, was rejected by the Senate. Originalism 1.0 teetered on the brink.¹⁰

2. Originalism 2.0: Escaping History

But, contrary to the predictions of many, originalism did not pass quietly into the night. Instead, partly in response to these initial setbacks, originalism evolved. A prominent subset of its supporters, including Justice Scalia, began altering the theory’s methodological focus by abandoning original intent. Rather than attempting to recover the subjective intent or understanding of real eighteenth-century individuals — be it the framers who drafted the Constitution, the ratifiers who approved it, or the broader public who made sense of it — originalists began targeting the document’s so-called public meaning.¹¹ Public meaning has been understood in various ways, but, to quote leading originalists John McGinnis and Michael Rappaport, it references “how the words of the document would have been understood by a competent speaker of the language when the Constitution was enacted.”¹²

In singling out public meaning, interpreters no longer had to worry about parsing multiple intents or pinning down the elusive relationship between the Framers’ personal thoughts and what they wrote in the Constitution. There would be no more “channeling the Framers”— an inherently subjective exercise.

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Originalists could instead focus on deciphering something they claimed was “objective”: what the constitutional text would have meant to an average reader when it first went public.¹³ Ever since this conceptual transformation, what is variously called public meaning originalism, the “new originalism,” semantic originalism, original meanings originalism — or, for our purposes, Originalism 2.0 — has been ascendant.¹⁴ Even though not all originalists subscribe to Originalism 2.0, and even though important differences divide its followers, unquestionably it is the theory’s dominant mode.¹⁵ Not only was Scalia a fierce partisan during his time on the Court, but so too are a vaunted array of leading constitutional lawyers who command significant influence within and beyond the profession as well as a bevy of federal judges, Neil Gorsuch among them.¹⁶

In changing the target of originalist interpretation, public meaning originalists also fundamentally altered the method of originalism. With an eye towards respecting only what the sovereign people locked into the Constitution, they have dismissed most eighteenth-century historical evidence as irrelevant to their quest.¹⁷ Deciphering public meaning, according to originalists, requires simply elucidating what the Constitution’s words would have communicated to an ordinary reader at the time of enactment. And contrary to other kinds of historical inquiry, as leading originalist Randy Barnett has put it, “You don’t need a PhD. in history to discover this.”¹⁸

Since linguistic meaning is conventional (predicated on the arbitrary rules that determine the appropriate usage of words), to grasp what the Constitution originally communicated all one needs to pin down are the linguistic conventions operative when the Constitution or any of its amendments were

constructed. And because these conventions are embedded in linguistic usage, discovering them only requires studying word usage in the aggregate — by consulting period dictionaries or grammar manuals or by running keyword searches in digitized document databases to perform so-called “corpus linguistics.”¹⁹

For instance, if the goal is to know what “commerce” meant in the original Constitution, say, one should not consult the intellectual debates prior to or during the Philadelphia Convention about government regulation of interstate commerce, nor should one investigate the broader intellectual culture that informed



such a concept; one should simply collect all evidence of word usage at the time to decipher the public meaning of the word.²⁰ If, after consulting such linguistic usage, the meanings of certain words remain ambiguous, then such ambiguities can be resolved through context — context that can be supplied in two ways. First, one can look to the “publicly available communicative context” at the

time the Constitution was written to understand what ambiguous words actually referenced. Such context — which in originalists’ hands is persistently vague and seems to amount to little more than common sense — that would supposedly enable an eighteenth-century reader to know that Article IV’s pronouncement that the government could protect against “domestic violence” originally referenced internal uprisings rather than spousal abuse. Second, by probing the nature of language itself, and in particular a very narrow brand of philosophy of language with which originalists have become uniquely obsessed, one can understand how ambiguity works generally in language use.²¹

More important, though, is what it does not require — knowledge of the broader contexts of eighteenth-century constitutionalism. Whether it be the various political, social, or economic contexts from which the Constitution developed, the motivations of the participants involved in its construction, or the broader purposes that constitutional partisans hoped to achieve through its enactment,

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none of these have much bearing on the Constitution's purely linguistic public meaning.

In short, Originalism 2.0 was a neat trick: it had the imprimatur of history without the actual work and, in fact, asserted that the work was wholly unnecessary. This turn towards public meaning has enabled originalists to claim, as they now frequently do, that they and historians, by targeting categorically distinct kinds of meaning, are simply engaged in fundamentally different tasks. The Constitution's legal and historical meaning are simply different in kind. If historians claim otherwise, it is because they are guilty of conceptual confusion; because they have made—not a historical error — but a philosophical one.²² Rather than pledging to do history — as Originalism 1.0 did — Originalism 2.0 claims instead to have escaped history.

In other words, originalists have stopped trying to beat historians at their own game — by rewriting the very rules by which that game is played. They seem to have realized that they will never know as much as historians about the Constitution's origins or historical development, so instead of fighting a losing empirical battle why not stake out different conceptual foundations altogether? That way, most disputes can turn on philosophy of language, interpretive method, and legal doctrine (as they now do) without dwelling on the details of the historical past. And if historians wish to object, they dare not mention the Framers' thoughts or agendas or the broader political, social, or intellectual contexts of the late eighteenth century; they must, instead, offer a series of methodological and philosophical arguments targeting originalists' conceptual formulations. In other words, historians must fight originalists on their own non-historical turf. So even while those few historians who have engaged Originalism 2.0 have leveled a persuasive bevy of criticisms against it — Jack Rakove has correctly called it “tone deaf to the past” and Saul Cornell has appropriately labeled it “thin description” — champions of Originalism 2.0 have easily sidestepped such assessments.²³

For, in appealing to precisely the kinds of historical materials that originalists have studiously circumvented, historians have played into originalists' hands. Originalists have not engaged

this historical work on its merits, but simply dismissed it as irrelevant, mocking historians' conceptual confusion in the process. After being criticized by historians for years, originalists have built Originalism 2.0 such that no amount of historical empiricism can ever challenge it. It has enabled them seemingly to speak with authority about the past without being subject to historians' judgment. Charges of “law office history” no longer apply. In fact, not only is it inapt when historians level them, but it actually reveals what originalists claim is the more pressing issue: historians' penchant to practice “history office law,” or what happens when historians weigh in on legal matters without a law degree.²⁴

How originalists have exploited their new fortifications to repel historical expertise is best captured in their reaction to the so-called historians' amicus brief filed for the Supreme Court in conjunction with the controversial Second Amendment case from 2008, *District of Columbia v. Heller*.²⁵ That case — which centered on a D. C. handgun ban — ultimately turned on the original meaning of the amendment. And historians reached the diametrically opposite conclusion from the one advanced by Justice Scalia in the Court's majority opinion.²⁶ Since, public meaning originalists have not so much disputed the historical arguments advanced in the historians' brief; instead they have dismissed the historians for failing to understand what constitutes original meaning in the first place. In probing the amendment's drafting history and the deeper intellectual and political context from which it arose, and, relatedly, by *not* dwelling on the conventional, semantic meaning of the amendment's words, historians simply missed the point.²⁷ This was Originalism 2.0 personified.

3. Rising to the Challenge: Historians' Obligation

The battle between originalists and historians has thus evolved from an empirical to a methodological one. The dispute is no longer over historical knowledge of the Founding era. It is now over what methods are needed to identify the original meaning of a historical text. And it is particularly over whether champions of Originalism 2.0 are right that historical methods are, as originalist Lawrence Solum has put it, merely “supplementary and complementary to the methods employed by originalists.”²⁸ Are originalists justified in claiming that, in targeting a certain kind of historical meaning, they are in fact immune from historical critique? Is it true that historical methods are not useful for discovering the original public meaning of a historical text?

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Originalism 1.0 was an affront to Founding-era American historians. But Originalism 2.0 is an affront to *all* historians. For its advocates contend that they can acquire exactly what they would like to know about history without behaving like historians; they insist that historical methods are only incidental to their chosen historical inquiry. Here originalists make a common mistake, one that all historians should challenge: they fundamentally fail to understand what historians do. They effectively concede that if other forms of original meaning mattered (like those important to Originalism 1.0), historical expertise would indeed be relevant; but they also presume that historical expertise has little bearing on the recovery of public meaning.²⁹



They draw this distinction because they assume that historical knowledge is a form of knowing *that* rather than a form of knowing *how*. They assume that historians know that this or that happened in the past in this or that way; they assume that historians' contribution is that they have scoured the archives and have assembled and organized the relevant facts; they assume that what historians principally offer is empirical knowledge. But this characterization largely misses the mark. *Of course*, historians have vast empirical knowledge of the past and, *of course*, it is critical to what they do. But, at base, historians' expertise is that they know *how* to read historical sources and properly decipher their historical meaning — that is, the meaning such sources had in their original historical context.

The foundational skill of historical practice is knowing how to think historically. As all historians appreciate, this gestures towards something far greater than mastery of facts; it means knowing how to abstract oneself from the present to navigate an alien, past world. It means knowing how to bracket the assumptions, values, and logics that shape contemporary consciousness in order to replace them with the assumptions, values, and logics that framed the very different mental universe of those living in a different time and place. No matter the text

in question (be it a formal treatise, a law, a novel, a painting, a riot, a slave's freedom suit, a political speech, or a material object), the skill is common to all historical investigations. This knowhow is the defining attribute of historical expertise, organizing the profession and guiding its training.

No doubt historians investigate a plethora of historical meanings, often privileging exactly the kinds of subjective intents and understandings that public meaning originalists disparage — such as, for instance, the authorial intent that shaped a text's production, the intellectual purposes that a text served, or the broader intellectual or cultural context from which a text emerged. But that choice is irrespective of knowing how to think historically. If the goal happens to be deciphering the public meaning of a historical text, then this foundational historical skill remains every bit as essential. The reason why is what originalists' favored keyword searches (detailed above) fail to take into account: that, as Bernard Bailyn has put it, "the past is a different world."³⁰

Words and concepts that appear in historical sources often bear a superficial similarity to our own, but grasping what they actually meant in their original historical context requires first reconstructing the foreign conceptual world from which they issued. Keyword searches can never disclose this world (in fact, such searches presuppose that this world is immediately accessible and virtually identical to our own). But, as all historians know, bringing this world into focus requires a much deeper level of immersion. It requires a version of what is needed to decode early modern French cat massacres, crowd activity in eighteenth-century Britain, or early nineteenth-century New York ordinances on pig-keeping.³¹

It requires taking up residence with the natives of the historical past, engrossing oneself in their logics, tracing the patterns made by their thoughts and meanings, and learning how to think and reason as they once did. In the case of the American Constitution, it requires knowing how to think and reason as Founding-era Americans did, knowing how to see the world as an original constitutional reader would have. It requires learning how to speak eighteenth century. It requires knowing how to think historically. It requires, in short, behaving like a historian.³²

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Historians should keep all of this in mind when Neil Gorsuch — the latest spokesman for Originalism 2.0 — answers questions in the United States Senate about his interpretive approach to the Constitution. As citizens or interested residents, historians should ask whether originalism makes sense as a constitutional theory. But specifically as historians, they should appreciate that Gorsuch speaks for a powerful and growing intellectual movement whose goal is to decipher the Constitution’s original meaning and whose assumption is that historians have little to contribute to that enterprise. Champions of Originalism 2.0 assume they have escaped history because they fundamentally misunderstand what historians do.

If, as historians, we fail to explain why this is misguided, unless we articulate and defend the value and applicability of our unique scholarly knowhow, then the discipline of history will be weaker for it. Because it would be hard to find a better example of the practical consequences of history than the practice of constitutional originalism. It is the stuff of power, in the deepest sense; and people’s lives are fundamentally impacted by the rulings made in its name. If those judgments are based, in part, on the interpretation of historical sources and reached through methods that violate historians’ accepted practices, then historians must respond. For this debate transcends mere method. It is ultimately about authority, legitimacy, and integrity — about who can credibly explicate the meaning of a historical text and why. And the answers to these questions impact the character of our civic culture. Historians should not cede the ground.

Notes:

¹ Regarding originalism’s endurance in the face of such pronouncements, see Jack N. Rakove, “Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism,” *San Diego Law Review* 48 (May 2011), 575-576; and Randy E. Barnett, “An Originalism for Nonoriginalists,” *Loyola Law Review* 45 (Winter 1999), 611-620.

² For an entry point to recent scholarship, see two prominent, oft-cited law review forums, “Symposium: Original Ideas on Originalism,” *Northwestern University Law Review* 103 (Spring 2009), 491-1006; and “Symposium: The New Originalism in Constitutional Law,” *Fordham Law Review* 82 (Nov. 2013), 371-826. For arguments that originalism pervades American constitutional culture and judicial reasoning, see William Baude, “Is Originalism Our Law?,” *Columbia Law Review* 115 (Dec. 2015), 2349-2408; and Randy Barnett, “The Gravitational Force of Originalism,” *Fordham Law Review* 82 (Nov. 2013), 411-432.

³ The best historical account of the emergence of early originalism is Johnathan O’Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: The Johns Hopkins University Press, 2005); also see Daniel T. Rodgers, *Age of Fracture* (Cambridge: Harvard University Press, 2011), 232-242; and Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008). The crucial early work that paved the way for originalism included, Robert H. Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (Fall 1971), 1-35; William H. Rehnquist, “The Notion of a Living Constitution,” *Texas Law Review* 54 (May 1976), 693-706; and Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977). The term “originalism” was coined by Paul Brest in an influential law review article otherwise critical of the theory, “The Misconceived Quest for the Original Understanding,” *Boston University Law Review* 60 (Mar. 1980), 204-238.

⁴ Edwin Meese, III, “Speech Before the American Bar Association,” in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington, D. C.: Regnery, 2007), 47-54, quote 54.

⁵ Brest, “Misconceived Quest for the Original Understanding.”

⁶ For the leading work of constitutional history that explicitly engaged originalism, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996).

⁷ Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America* (Chapel Hill: University of North Carolina Press, 1999).

⁸ H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (Mar. 1985), 885-948. Powell’s findings were subjected to vigorous criticisms from many sides. But, the merits of his conclusions withstanding, they played a profound role in recalibrating the defense of originalism.

⁹ For the leading work of constitutional history that explicitly engaged originalism, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996).

¹⁰ For a good compilation of early originalist arguments and criticisms, see Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990).

¹¹ On the rise of public meaning originalism and what has differentiated and defined it, see the recent introductions, Lawrence W. Solum, “What is Originalism? The Evolution of Contemporary Originalist Theory,” in *The Challenge of Originalism: Theories of Constitutional Interpretation*, ed. Grant Huscroft and Bradley W. Miller (New York: Cambridge University Press, 2011), 12-41; and Keith E. Whittington, “Originalism: A Critical Introduction,” *Fordham Law Review* 82 (Nov. 2013), 378-387.

¹² John M. McGinnis and Michael Rappaport, *Originalism and the Good Constitution* (Cambridge: Harvard University Press, 2013), 8. For other representative, influential definitions, see, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, updated ed. (Princeton: Princeton University Press, 2004; 2009), 393; Lawrence B. Solum, “*District of Columbia v. Heller* and Originalism,” *Northwestern University Law Review* 103 (Spring 2009), 952; Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011), 6-13; and Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: West, 2012).

¹³ Barnett, “Gravitational Force of Originalism,” 412, 415.

¹⁴ On the “new originalism” and how it emerged out of so-called first-wave originalism, see Keith E. Whittington, “The New Originalism,” *Georgetown Journal of Law and Public Policy* 2 (2004), 599-614; and Barnett, “An Originalism for Nonoriginalists,” 620-629.



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¹⁵ For examples of originalists who have clung to original intent, see, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999) — although his account effectively bridges any difference between the two; Larry Alexander and Saikrishna Prakash, “‘Is that English You’re Speaking?’ Why Intention Free Interpretation is an Impossibility,” *San Diego Law Review* 41 (Aug. 2004), 967-996; William Michael Treanor, “Against Textualism,” *Northwestern University Law Review*, 103 (Spring 2009), 983-1006; Richard S. Kay, “Original Intention and Public Meaning in Constitutional Interpretation,” *Northwestern University Law Review* 103 (Spring 2009), 703-726; and Stanley Fish, “The Intentionalist Thesis Once More,” in *Challenge of Originalism*, 99-119. Public meaning originalists also divide over the issue of construction — the idea that certain portions of the Constitution are irredeemably ambiguous, vague, or indeterminate and thus must be given operative meaning by contemporary political actors. For more on the concept, see Keith E. Whittington, “Constructing a New American Constitution,” *Constitutional Commentary* 27 (Fall 2010), 119-138; and Lawrence B. Solum, “Originalism and Constitutional Construction,” *Fordham Law Review*, 82 (Nov. 2013), 453-537.

¹⁶ In addition to those works cited in f.n. 13, for additional leading work see, Antonin Scalia, “Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Guttmann (Princeton: Princeton University Press, 1997), 3-47; Ronald Dworkin, “Comment,” in *A Matter of Interpretation*, 115-129; Akhil Reed Amar, “Intratextualism,” *Harvard Law Review* 112 (Feb. 1999), 747-802; and Lawrence B. Solum, “Semantic Originalism,” *Illinois Public Law Research Paper* No. 07-24 (2008), 1-173.

¹⁷ For why public meaning originalism better accords with popular sovereignty, see esp. Scalia, “Common Law Courts”; Barnett, *Restoring the Lost Constitution*, ch. 2; and Balkin, *Living Originalism*, ch. 3. While a great deal of historical knowledge would be needed to elucidate other kinds of constitutional meaning — be it the document’s original intent (what the framers were thinking), original understanding (what the ratifiers were thinking), or original expected applications meaning (what either group thought would follow from the Constitution’s words)—hardly any of that knowledge would be needed, the argument goes, to discover original public meaning. Perhaps historical evidence might be found that a framer applied an idiosyncratic meaning to a portion of the text, but this subjective understanding cannot change the document’s public meaning. And because an average reader would not have had access to the secret proceedings of the Philadelphia Convention and most likely would have been separated by great distances (geographic and contextual) from the document’s authors, all that reader could have drawn upon was the text. See Vasan Kesavan and Michael Stokes Paulsen, “The Interpretive Force of the Constitution’s Secret Drafting History,” *Georgetown Law Journal*, 91 (2003), 1113-1187; and Lawrence B. Solum, “Communicative Content and Legal Content,” *Notre Dame Law Review* 89 (Dec. 2013), 479-519.

¹⁸ Randy Barnett, “Another Oblivious Critique of Neil Gorsuch and Originalism,” March 14, 2017 *Washington Post*, available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/14/another-oblivious-critique-of-neil-gorsuch-and-originalism/?utm_term=.a532c13a1828.

¹⁹ Hence originalists’ current fascination with corpus linguistics, see Solum, “Originalism and History,” 12-13; James C. Phillips, Daniel M. Ortner, and Thomas R. Lee, “Corpus Linguistics and Original Public Meaning: A New Tool to Make Originalism More Empirical,” *Yale Law Journal Forum* (2016), 21-32; Lawrence M. Solan, “Can Corpus Linguistics Help Make Originalism

Scientific?,” *The Yale Law Journal Forum* 126 (2016), 57-64.

- ²⁰ Randy Barnett, “The Original Meaning of the Commerce Clause,” *University of Chicago Law Review* (2001), 101-147.
- ²¹ For public meaning originalists’ multi-step method, see the tidy synopsis in Barnett, *Restoring the Lost Constitution*, 389-391, quote 390; and for a fuller explication, see Solum, “Semantic Originalism.” For more on “corpus linguistics,” or the searching of databases, see Solum, “Originalism and History,” 12-13. Public meaning originalists endlessly draw upon the language philosophy of Paul Grice, see, e.g., Solum, “Originalism and History,” 14, 25-27; Solum, “Intellectual History as Constitutional Theory,” 1129-1132, 1134-1136, 1137, 1151-1153, 1155; Barnett, *Restoring the Lost Constitution*, 390; Larry Alexander, “Originalism, the Why and the What,” *Fordham Law Review*, 82 (Nov. 2013), 540-541; and John Mikhail, “The Constitution and the Philosophy of Language: Entailment, Implicatures, and Implied Power,” *Virginia Law Review* 101 (Jun. 2015), 1069-1084, 1091-1097.
- ²² See Solum, “Intellectual History as Constitutional Theory,” 1155-1158, 1163-1164; Lawrence B. Solum, “Originalism and History” (unpublished manuscript on file with the *Virginia Law Review*); and Barnett, “An Originalism for Nonoriginalists,” 621-622.
- ²³ Jack Rakove, “Tone Deaf to the Past: More Qualms About Public Meaning Originalism,” *Fordham Law Review* 84 (Dec. 2015), 969-976; Saul Cornell, “Originalism as Thin Description: An Interdisciplinary Critique,” *Fordham Law Review Res Gestae* 84 (2015), 1-10. Also see, e.g., Rakove, “Joe the Ploughman”; Saul Cornell, “Heller, New Originalism and Law Office History: ‘Meet the New Boss, Same as the Old Boss,’” *UCLA Law Review* 56 (2009), 1095-1125; and the recent forum, “Forum: Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning,” *Fordham Law Review* 84 (Dec. 2015), 905-976.
- ²⁴ For use of this label, see Barnett, “Another Oblivious Critique of Neil Gorsuch and Originalism”; Solum, “Originalism and History,” 27-29.
- ²⁵ “Brief of Amici Curiae Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schworer et al. In Support of Petitioners,” *District of Columbia v. Heller*, 554 U.S. 570 (2008).
- ²⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008). Following the ruling, leading historians subjected the Court’s opinion to merciless criticism, see Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal* 69 (2008), 625-640; David Thomas Konig, “Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America,” *UCLA Law Review*, 56 (2009) 1295-1342.
- ²⁷ See, e.g., Solum, “Originalism and History,” 27-29; and Barnett, *Restoring the Lost Constitution*, 397.
- ²⁸ Solum, “Intellectual History as Constitutional Theory,” 1155.
- ²⁹ These assumptions have become clear in a recent exchange between a historian and an originalist. For the historical challenge to originalist methodology, see Saul Cornell, “Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism,” *Fordham Law Review*, 82 (Nov. 2013), 721-755; and for the originalist response, see Solum, “Intellectual History as Constitutional Theory”; and Solum, “Originalism and History.”
- ³⁰ Bernard Bailyn, *Sometimes an Art: Nine Essays on History* (New York: Alfred A. Knopf, 2015), 22.
- ³¹ Robert Darnton, *The Great Massacre and Other Episodes in French Cultural History* (New York: Basic, 1984), 75-106; E. P. Thompson, “The Moral Economy of the English Crowd in the Eighteenth Century,” *Past & Present* 50 (Feb. 1971), 76-136; Hendrik Hartog, “Pigs and Positivism,” *Wisconsin Law Review* (1985), 899-935.
- ³² For more on thinking historically and its relationship to originalism, see Jonathan Gienapp, “Historicism and Holism: Failures of Originalist Translation,” *Fordham Law Review* 84 (Dec. 2015), 935-956.



My Life's Rules —

TEN COMMANDMENTS FOR BEING A BETTER PERSON AND A BETTER LAWYER

*By Hon. Lawrence J. Vilaro
United States District Judge for the Western District of New York**

It really is an honor and a privilege for me to have the opportunity to talk with you for a few minutes on this momentous occasion. Today, you do more than simply start a career. Today, you join a profession. And I congratulate all of you on having the intelligence, the perseverance, and the commitment to get to where you are.

I also congratulate those who have come to celebrate with the newly admitted attorneys — their parents and siblings, their spouses and children, their families and friends. On behalf of the newly admitted attorneys, I thank you for putting up with them while they wrote their undergraduate papers, studied for their law school finals, and — especially — prepared to take the bar exam. They probably were pretty unbearable when they were studying for the bar. I know I was. And so I know that they are grateful for your patience, your love, and your support.

If you came here hoping to hear a scholarly and erudite address on the legal profession or some cutting-edge legal issue, boy are you going to be disappointed. But most of you are probably glad to hear that I am not going to talk about property or criminal law or contracts. Even though I am very excited about my new job as a federal judge, I am not going to talk about civil procedure or federal courts. And I certainly am not going to talk about secured transactions or antitrust. I couldn't talk about those last two even if I wanted to.

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**Judge Vilaro was nominated to be a United States District Judge by President Obama on the recommendation of Senator Schumer. He was unanimously confirmed by the United States Senate on October 26, 2015. Judge Vilaro is a graduate of Canisius College, summa cum laude, and the Harvard Law School, magna cum laude, where he served as an Editor of the Harvard Law Review. In 1980-1981 he clerked for the Honorable Irving Goldberg of the United States Court of Appeals for the Fifth Circuit. Before becoming a federal judge, he was a Partner in Connors & Vilaro, LLP, in Buffalo, New York. He is a former Editor-in-Chief of LITIGATION, the journal of the American Bar Association, Section of Litigation. Judge Vilaro is a frequent speaker at legal seminars and a contributor to several law journals.*

The Article is taken from the keynote address given by Judge Vilaro at the bar admission ceremony in Rochester, NY in 2016. It has received widespread recognition and is reprinted here with Judge Vilaro's kind permission.

My Life's Rules

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I am, however, going to talk about what you need to know in order to become a successful attorney. I am going to talk about things that you learned not in law school or in college or even in high school. Instead, I am going to talk about the really important stuff — the stuff I learned from my parents and that you may have learned from yours. Legal rules can be looked up in a book. But life's rules you need to know, to remember, and to live every minute of every day.

So here are my life's rules — ten commandments that have helped me be a better person and a better lawyer.

Number 1: Treat everyone with the same respect. We are all different. Some of us are more gifted physically. Some have better personalities. Some are more intelligent. Some have better hair. But every one of us is a person, an individual, and therefore entitled to the same respect as everyone else.

I was blessed to start my legal career as a law clerk for one of our nation's truly great lawyers, judges, and legal minds — Judge Irving Goldberg of Dallas, Texas. Before he became a judge, Irving Goldberg was Lyndon Johnson's personal attorney. He was the first person President Johnson called after President Kennedy was assassinated. He was one of the founding partners of the law firm that would grow to become Akin Gump. By any definition, Judge Goldberg was a great man. But — more important than that — he also was a very good man. I saw him interact with the Chief Justice of the United States and with the crew of workers who cleaned our office every day. Judge Goldberg treated all of them the same. He was patient with those who were not as smart as he was. I know because I was one of them. And he taught me that one gains respect as a lawyer and a judge not by showing off how much you know and making others feel small in the process, but by the exact opposite — by being humble and showing respect for everyone.

That lesson served me well when I began my career as a lawyer. When I was assigned to file papers in a clerk's office or some other basic task, I would politely tell the person behind the desk what I was supposed to do and that I really had no idea how to do it.

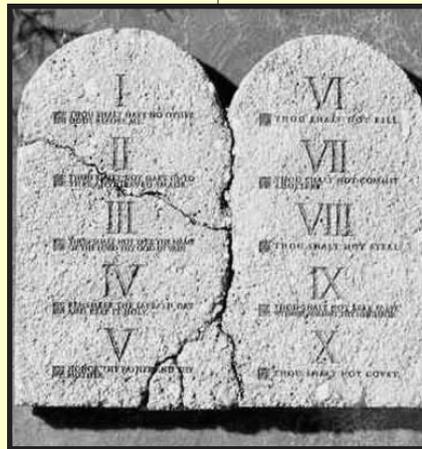
More often than not, that humility earned me a kind lesson from a patient bureaucrat. Even more important, it made a friend who would go the extra mile for me if I needed help years later. Of course, that's not why you should be humble and respectful. But it is a nice benefit of not being full of yourself and instead treating others the way you'd like them to treat you.

Number 2: When you borrow something, give it back in better shape than it was when you took it. When I was young, we did not have a car. To visit family or run errands, my dad would have to borrow a car from a friend or family. And whenever he did, he always would return it with a full tank of gas. In the same way, whenever we stayed with friends or family out of town, my mother would make sure that the beds were made and the rooms cleaned a little more neatly than when we arrived. My parents were always grateful for what others had given us, and they showed that gratitude by leaving things a little better than they found them.

That lesson translates well into what you do as a young lawyer. When you use a form pleading that has been drafted by someone else, don't just go through the motions of filling in the blanks. Instead, take some time to make it a little better. Proofread that notice of motion and fix the typos. Add a question to that deposition script. Show your gratitude. And make yourself a better lawyer in the process.

Number 3: Share what you have. This is one that we learned, or that we should have learned, in kindergarten or before. And it applies to much more than just your professional life.

Of course, just as you will benefit from those form pleadings that a partner or associate shares with you, it stands to reason that you should share your work with others. But that is just the start. Those of us who have been blessed with the opportunity to practice law owe a debt to society. Try to repay that debt — by representing those who cannot afford legal services; by volunteering to serve on boards of charitable or educational institutions; by donating your time — and your dollars — to serve those who are less fortunate. I don't know about you, but I would rather have my tombstone read "He left the world a better place" than "He had a lot of stuff."





My Life's Rules

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Number 4: Don't be a bully. This one can be especially tough for young lawyers. You want to be Joe or Josephine Lawyer. You want to show the world how much you learned in law school. You want to show the judge how smart you are. When you have the better of the argument, you want to rub your opponent's nose in it.

Don't do it. Resist the temptation. No matter how smart you are, I promise you that there are lawyers smarter than you out there. And no matter how good your case is this time, there will be times when your opponent will have the better of the argument.

My dad taught me a valuable lesson about life on the West Side of Buffalo that applies equally to life in the courtroom. Always leave the other guy a graceful way to exit, he would say. If you back him into a corner and leave him no choice, you will force him to fight. And even if you think you can take him, you might lose when you fight a desperate opponent.

I have put that lesson into practice many times in my legal career. I never tried to embarrass an opponent. Even when fighting hard for my client, I never lost sight of the dignity of my opponent and the client on the other side. And I like to think that is why I was never embarrassed in a courtroom by opposing counsel even when she had the chance to embarrass me.

Number 5: Don't ever start a fight; but if someone else starts one, don't back down. At trial, during depositions, and even in difficult negotiations, tempers can get short. And while fist fights between lawyers are thankfully rare, verbal fights can be just as nasty and hurtful.

But that does not mean that you should back down when your adversary throws the first verbal blow or even when a judge tries to push you around. Instead, it means that you should keep your wits about you and find ways to fight back without resorting to the same tactics.

Several years ago, my mentor, my former partner, and the best lawyer I know, Terry Connors, was involved in a very long and

heated trial. As the trial approached its conclusion, Terry was arguing a point that the judge just did not want to hear. In fact, the judge told Terry exactly that and tried to bully him out of making the point that Terry wanted to make on behalf of his client. Instead of raising his voice and insisting as many lawyers might have done — and instead of sitting on his hands and meekly shutting his mouth as many others might have done — Terry said this: “Your Honor, this has been a very long trial. I'm sure you are exhausted. I know that I am. But I have a job to do on behalf of my client, and I'm going to do that. I'm going to make this argument on the record so that an appellate court can consider it later on, if necessary. And I am going to do that regardless of how difficult the court makes it for me to do my job.”

“What else could the judge do other than let him argue his point? So if you are in a deposition a few years from now and your opponent is badgering you with objections, or the witness is avoiding answering your questions or baiting you with insults, try this: Ms. Attorney or Mr. Witness, it's my job to ask questions and get answers. I plan to do that. I've tried to do that respectfully, and I will continue to try to do it respectfully. But I am going to ask the questions — some of them hard questions — and I am going to get answers. If that means we have to stay here hours longer, we'll do that. And if I have to get the court to help me get the answers to my questions, we'll do that too. But your objections or insults or dirty looks are not going to stop me from doing my job — from asking the questions and getting the answers — that I need to do on my client's behalf.”

You'd be surprised at how often that will disarm your opponents and get you to where you need to go. And if it doesn't — if the other side is simply intent on starting a fight — the judge who decides who wins that fight will be impressed with your efforts to resolve it reasonably.

Number 6: Never take more than you give. I'll bet when some of you were kids, you saw “The Lion King” at the movies. I'll bet all of you have seen it on the big or small screen or on stage.

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My Life's Rules

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And I'll bet you all know the song "The Circle of Life." But there is a verse from that song that's been cut from the version most often played on the radio:

Some say eat or be eaten;
Some say live and let live.
But all are agreed, as they join the stampede:
You should never take more than you give.

The lesson is simple and obvious: To keep the stampede going, all have to give at least as much as they take. Otherwise, the stampede is diminished and eventually falls apart.

Substitute "legal profession" – or, even better, "world" – for "stampede," and you get the point.

Number 7: If it has your name on it, try to make it perfect. My dad was a printer. The name of his print shop was Vilardo Printing. My first job, when I was a teenager, was working in the print shop. When my dad would print letterheads or business cards or invitations, they not only had to *look* straight, they had to *be* straight. That meant measuring what you printed by using your fingernail on a metal rule to make sure that the line on one end of the card or page was the same distance from the edge of the paper as the same line at the other end. And in my dad's shop, you had to use a brass rule, not a lead rule, to measure. That's because lead is a soft metal and your fingernail might make a slight indentation in the lead, which would cause the measurement to be off slightly. Brass was hard so your measurement would be more precise.

Of course, no one's eye is good enough to have noticed any difference between a line measured with a brass rule and a line measured with a lead rule. Regardless, my dad wanted it to be perfect. Especially because the business name was Vilardo Printing, he refused to take even minor short cuts because he wanted people to associate our name with only the highest quality. When you practice law, every letter you write, every pleading you sign, every brief you submit has your name on it. Make sure it is perfect — or at least as close to perfect as you

can get it. Proofread everything, and then proofread everything again. Check and double-check your citations. Don't ever send a letter, sign a pleading, or file a brief unless and until you are proud of it. Remember: that's your name on it.

Number 8: And remember that reputations are hard to earn but easy to lose. The quality of your work is not the only thing that others will associate with your name. More important, others will judge you by your integrity. So be scrupulously honest in everything you do. Never make a factual statement in a brief or at oral argument unless you are sure it is true. It will take many years to build and earn a reputation for honesty and integrity, but it will take only one lie to an opponent or one false statement in a brief to destroy that reputation. A lawyer's reputation may be her most valuable asset.

There are lots of jokes about dishonest lawyers. Don't be the punch line for one of them.

Number 9: Understand that your character is what you do when no one is watching. Temptations are everywhere for all of us. No one will ever know that you worked only six-tenths of an hour on that letter even though you billed a point seven. Why actually work on those motion papers when you can get by with — and bill your client for — a set of papers that someone did already? And I can do a passable cross-examination without preparing. Who will ever know?

You will. Even when you're alone in your office, do what you would do if the whole world were watching. Do it for yourself. And if that's not enough reason, do it because if you fudge and take shortcuts, all that will eventually catch up with you. Karma is not something to take lightly.

All that leads us to the tenth commandment — sort of a summary of the first nine — and that's The Golden Rule: Do unto others as you would have them do unto you. Do the kind of work for your partners that you will want an associate to do for you someday. Work as hard for every client as you would want a lawyer to work for your mother or your brother or yourself. Treat opposing counsel the way you want them to treat you. Do all that and you will have a long and rewarding career in a fabulous profession in the greatest legal system in the world.

Welcome to the Bar.



Modernize Litigation by *Ending Discovery*

By Mark Neubauer*

“*[P]rotracted discovery, [and isn't it always, is] the bane of modern litigation.*” *Rossetto v. Pabst Brewing Co., Inc.*, 217 F.3d 539, 542 (7th Cir.2000). *Just ask any trial lawyer, client or judge.*

No other change in the law has contributed more to the death of the trial than our current system of discovery. The transactional expense of getting to a just result has become too cost prohibitive. It precludes trials of small disputes. Countless lawyers were once trained by trying these small cases. Now with those cases obsolete, too few lawyers develop trial skills. Instead, discovery has made them professional “litigators”, pushing the discovery paper. Discovery has also eliminated most large trials where, bludgeoned by millions in discovery costs, both sides exhaust themselves and come to a pretrial settlement unrelated to the merits, rather than continue to incur millions upon millions in legal fees and costs for mountains of discovery.

The simple fact is by eliminating discovery and harkening back to the old days of just trying the cases, lawyers would be more fulfilled, judges happier, clients overjoyed, and the results would not be materially different. Discovery has become not just a cottage industry, but a behemoth, serving its own ends rather than the search for truth.

Most discovery is no longer relevant nor necessary in light of the changes in our society, our technology and our behavior. Take depositions. No longer do you have to ask each witness what they said to another because no one talks to one another anymore. They simply text or exchange emails. If you have the witnesses’ emails and texts, you can cross-examine almost any witness. Instead of being

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confident of what questions will be thrown by the lawyer after the long hours of discovery depositions, the undeposed witness on the stand shows his or her fear of the unexpected.

It is far more effective. Indeed, the witness often learns more from the lawyer in a deposition than the lawyer learns from the witness. Again, the curse of discovery.

How many times has an interrogatory or request for admission response been introduced into evidence in a trial? Yet, think of the millions spent on those useless forms of discovery in too many cases. Document requests remain useful, but only if carefully circumscribed. The avalanche of e-discovery has created its own

problems. But that can be controlled by reasonable restrictions upon the number of custodians to be searched and the number of search terms, ceilings which too often the federal rules and courts fail to address. Simply put, the effectiveness of our civil justice system can be dramatically improved by going backwards in time to the “old days” when lawyers simply picked up the file, went into court and tried their case without the crutches we call “discovery”. To understand where we are, you have to look at how we got here.

There was no discovery in the old English common law trial system we inherited. The notion of discovery first appeared in the United States in 1848 with enactment of the New York Civil Practice Law and Rules. Even that early pronouncement had no provision for interrogatories and depositions were only taken in open court and limited to merely deposing a party, not a third party witness.

Federal courts had no rules of civil procedure until they were first adopted in 1938. Justified by the notion that they would

reduce litigation costs by exposing the strength and weaknesses of the other side, the initial Federal Rules allowed depositions, both orally and in writing, interrogatories, requests for admission, and requests for production of documents.

However, the drafters wisely kept a barrier to the avalanche of discovery by only allowing document requests for “good cause” in the original Rule 34. Discovery therefore was not self-actuating but restricted to a demonstrable need.

That all changed in *Hickman v. Taylor*, 392 U.S. 495 (1947), where the U.S. Supreme Court adopted a “broad and liberal

treatment” to the Rules of Civil Procedure and said:

“No longer can the time-honored cry of ‘fishing expeditions’ serve to preclude a party from inquiring to the facts underlying his opponent’s case.”

392 U.S. 495 at 507. The floodgates were now open. Although giving token lip-service to limitations from discovery employed to “annoy, embarrass or oppress” an adversary, any real barrier to widespread discovery was gone.



The last vestige of restriction to discovery – the “good cause” requirement – died in the 1979 amendments to the Federal Rules of Civil Procedure. Harkened by the litigation in the Civil Rights Movement and the increase of civil liberties from the Great Society, the elimination of “good cause” under Rule 34 put the onus and burden of resisting discovery on the party who was subject to it. The propounder of discovery was free to not only discover the strengths and weaknesses of their opponent’s case, but to use the weapon of discovery to force a resolution without trial by settlement or capitulation.

The 1980 and 1983 amendments tried to address the problem of unfettered discovery by adding the notion of proportionality, but the wave of discovery and its attack on the trial process continued undeterred.



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The Civil Justice Reform Act of 1990 tried to look for alternatives to trial and discovery by pursuing alternatives such as mediation.

In 1993, the federal discovery rules were further amended to impose a “meet and confer” on a proposed discovery plan early in the case, and also limit the number of depositions and interrogatories, subject to modification by the court or stipulation by the parties. Those reforms could not stem the tide either, and the march of the discovery avalanche continued.

In the 21st Century with the advent of email, the discovery process encountered a new feeding frenzy. First in the hundreds, then in the thousands, and now in the billions, everyone began communicating by email. Email discovery became a key focus of every case. With the *Zubulake* series of decisions (e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D. N. Y. 2003)), the threat of email became not only the emails you produced, but those you didn’t. Spoliation became the name of the game. Trapping your adversary into spoliation and then an adverse instruction to the jury, evidentiary presumption or worse an issue preclusion became fatal, even to the innocent litigant.

Email discovery created an unequal playing field. An individual plaintiff has a relatively limited and small universe of emails to search and produce. A large corporation, however, has massive stores of data with sometimes tens of thousands of custodians or computer seats to search. Add to the email clutter which appears in all of our lives, the unthinking soul who replies all on a mass email, saying merely, “thank you,” – and all of those emails result in a “hit” in an email search. Millions upon millions of emails. Each to analyze and categorize. A new industry was created. Large companies began their lives, all focused on e-discovery, e-management and email control. Thousands of lawyers and paralegals reviewed these mountains of emails, looking for the proverbial needle in the haystack, the smoking gun that may determine the case. Again, this avalanche provided relatively little usefulness. Yes, a stray key email appears now and then, but a

more limited controlled email search would, in the overwhelming number of cases, produce the very same evidence. But, as a result of the *Zubulake* cases, and the fear of spoliation, parties became fearful, not only of the emails they produced, but those that they couldn’t.

In this strategic chess game of e-discovery, the gambit became not just getting the evidence to prove your case, but trapping your opponent into spoliation and either an order of issue preclusion or special instruction to the jury of your failure to preserve an email.

The 2000 amendments to the Federal Rules attempted to control the avalanche of discovery by evoking a two tier approach. While discovery was previously open to “any matter relevant to the subject matter involved in the action” (Rule 26), the 2000 amendment restricted discovery initially to only material “relevant to the claim or defense of any party.” Litigants could only resort to the broader standard of subject matter relevancy on “good cause.” But those amendments, coupled with the imposition of pretrial disclosures and exchanges, still failed to stem the tide. No court would be reversed by allowing discovery but only by denying it, so judges commonly allow the discovery avalanche to continue. “The claimant or defense” standard was so broadly determined that it rarely forced litigants to seek leave to explore matters “relevant to the subject matter.” Moreover, pretrial disclosures at the beginning of the case barely allowed parties the full exchange the drafters contemplated.

In 2006, the amendments to the Federal Rules tried to deal with the still growing importance and cost of electronic discovery by renewed emphasis on “proportionality.” Again, the simple fact that cases are not reversed for allowing discovery but are reversed for precluding it became a commonplace theme and over discovery continued effectively unabated. At the same time, client satisfaction with trials declined.

Statistics bear this out. According to the Administrative Office of the U.S. Courts, from 2011 through 2015, the total number of trials has fallen 16 percent. Civil trials have decreased 12 percent, while criminal trials have declined 19 percent and longer trials – either criminal or civil – lasting four days or longer had fallen



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17 percent since 2011. The loss of trials has contributed to substantial lawyer dissatisfaction. In 2008, the American College of Trial Lawyers and the University of Denver’s Institute for the Advancement of the American Legal System did a study where 71 percent of the respondents believed that “discovery is used as a tool for force settlement,” and nearly half of the respondents believed that discovery was abused in every case. Similarly, in a survey of attorneys in Chicago, lawyers estimated that 60 percent of discovery materials did not justify the cost associated with obtaining them.

At the same time discovery was growing, so was the use of emails. Since emails first appeared in 1971, the number of email users has grown to 2.6 billion in the world, with an estimated 269 billion emails sent daily. The average office worker receives 121 each day and the most incredible statistic is that 42 percent of Americans check their email in the bathroom, while 50 percent check their email while in bed. It is literally a 24/7 process. No longer are emails limited to a computer. Texting from our cell phones has surpassed talking. For example, 99 percent of the Americans who have cell phones spend 26 minutes per day texting and only 6 minutes on actual calls. Indeed, global mobile voice use declined in 2013 for the first time, and is expected to continue to decline.

Look at our own lives. How many voicemails do you now receive? It used to be scores a day and now has trickled down to perhaps one or two a week. It is far more effective to text or email someone a message than engage in telephone tag. Faxes? A thing of the past. Letters have equally declined. The Post Office reports first class, single piece mail has declined over 50 percent in less than ten years, from 44.4 billion in 2006 to just 20.6 billion in 2015. Emails and text messages are the overwhelming manner of human interaction. And because of emails and text messages’ ease and accessibility, more immediate sensory perceptions

are recorded that way than by earlier modes and we are less dependent on human memory for the historical record that plays such an important role in every lawsuit.

Yet our discovery system has not adapted to the realities of this change in communication. We still engage in discovery as if the old modes of communication and human interaction applied. They don’t and we need to modify our discovery rules to reflect that.

The solution is a relatively simple one. Dramatically limiting discovery with a more aggressive form of mutual disclosures of evidence which, while keeping the playing field level, eliminates the extensive cost which has so curbed the use of trials.

Depositions. Most cases do not need depositions and they should only be allowed by mutual stipulation or court order. The greatest beneficiary from a deposition is the witness. He or she learns what would be asked in the examination and how to fend off questions. Virtually no question at trial – if the case reaches that far – is unanticipated since it was already asked ten times and ways in the deposition. Moreover, given the focus on emails and text messages as a mean of human intercourse, it is no longer important to find out what a witness heard or saw. In virtually every case, those perceptions are captured in the witness’s emails and text messages. Therefore, witness examination is merely confronting them with their electronic communication and confirming their veracity under penalty of perjury. “Were you telling the truth when you wrote that email?” It almost doesn’t matter what the answer is. Both juries and judges rely with confidence on contemporaneously made statements such as emails. Unlike after the fact testimony, they are not written with an agenda, but are contemporaneous utterances. Unlike witnesses, emails do not have a memory that fades with time. Unlike witnesses, emails do not lie. Therefore, depositions should be used only in rare cases where the witness will be unavailable at trial by illness, or out of the court’s jurisdiction to compel personal attendance or where there is some unusual event that requires a witness examination. Most depositions are done out of trial lawyer insecurity rather than a real need.

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The old days involved what is called “blind cross examination.” But with the advent of written email exchanges, that examination is really not so blind anymore. Depositions should exist only by stipulation of the parties or a court finding of good cause, apart from any normal witness in a case.

Interrogatories/Requests for Admission. As stated earlier, these discovery devices have virtually no value except in the rarest of occasions. Interrogatories and requests for admission should only be propounded with prior court approval or stipulation of the parties.

Requests for Production of Documents. This is one discovery device that retains some utility. However, it needs control, especially in the realm of e-discovery. First, there should be mandatory cost shifting, so that you have to pay any cost for your opponent’s retrieving emails. Second, absent court order or stipulation between the parties, the playing field needs to be evened out between the individual plaintiff and a large corporation. Searching an individual’s email library is relatively simple and cheap. Doing the sweep of a large corporation with literally thousands or tens of thousands of users and millions upon millions of emails is totally different and regularly abused. Most cases do not require such exhaustion. Instead, the parties should be required to limit the email search to 10 seats or users and to 10 search terms. It will require parties to use rifle shots instead of buck shots to assemble the documents they really need.

Mutual Disclosures. The initial disclosures of Rule 26 need to have greater teeth and be broadened. Each party should be required to provide a list of potential witnesses both at the beginning, and 30 days before the end of discovery. Each party should be required to produce at the same time any document they intend to use at trial, including documents for the purpose

of impeachment. Such a change in disclosures tempers those who fear the “sport” of litigation by ambush. By pretrial conference, everyone knows who the witnesses are and what the document evidence will be.

Changing our rules will recognize the dramatic change in how we interact. It also ends discovery’s unreasonable burden that has so harmed the art of trial. Yes, it will reduce the use of summary judgments and result in more trials. And short of rule changes, trial judges should exercise their very considerable discretion to adopt measures that in most cases will streamline pretrial preparation and the trial, itself. Trial judges should not leave those expedited measures to be prompted by requests from the lawyers, who fear by asking for streamlining they are creating the seeds of a malpractice claim by clients who will second guess the decision to forego a deposition. Forcing naturally insecure lawyers to work without the “safety net” of massive discovery needs to come as much from the judges as the lawyers or even the clients. Remember that discretion is not bound by rigid rules. In fact, on the same set of facts two judges can arrive at opposite results and yet both still be sustained on appeal. *Mejia v. Cook County, Ill.*, 650 F.3d 631, 635 (7th Cir.2011).

Yet trial is the classic form of dispute resolution. Witness versus witness. Advocate versus advocate. Each presenting the facts of the case before a neutral fact finder who searches for truth and justice. Isn’t that what our judicial system is about?

The Devil *is in* The Details:

COMPLYING WITH LOCAL RULE REQUIREMENTS FOR MOTIONS FOR SUMMARY JUDGMENT

*By Tiffany Fordyce and Elizabeth Ralph**

It is a frequent source of consternation for the Courts that parties all too often do not comply with Federal Rule of Civil Procedure 56 and related local rules governing motions for summary judgment. The Seventh Circuit has consistently held that, due to the high volume of summary judgment motions and the benefits of clear presentation of relevant evidence and law, District Court judges can enforce strict compliance with local rules designed to promote the clarity of summary judgment filings. *Stevo v. Frasor*, 662 F.3d 880, 886–87 (7th Cir. 2011). Where parties fail to comply, they risk having important arguments disregarded entirely. *See Princeton Industrial Prods., Inc. v. Precision Metals Corp.*, 120 F.Supp.3d 814-15 (N.D.Ill. 2015)(collecting Seventh Circuit cases). Therefore, litigants must be knowledgeable of the applicable requirements and take care to avoid those common pitfalls that plague summary judgment motions and may prove costly for clients.

Local Rule Requirements

Most District Courts within the Seventh Circuit have promulgated similar local rules relating to motions for summary judgment. Generally, a moving party is required to submit three separate documents: a motion, a memorandum of law, and a statement of material facts that sets forth facts which the movant claims are not in dispute and determinative of an issue raised in the motion. Each paragraph of the statement of material facts must cite and attach as an exhibit the specific portions of the factual record on which the party relies.

Most District Courts also require that a responding party file three separate documents: (1) a response brief; (2) a response to the moving party’s statement of material facts that, in the case of any disagreement,

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citesto and attaches as an exhibit the specific portions of the factual record the party relies upon; and (3) a statement of additional material facts the responding party contends require denial of the motion that cites to and attaches as exhibits specific portions of the factual record. Most courts then require that, where a responding party has filed a statement of additional material facts, the moving party submit a response to the additional statement of material facts along with its reply brief. The local rules apply equally to cross motions for summary judgment.

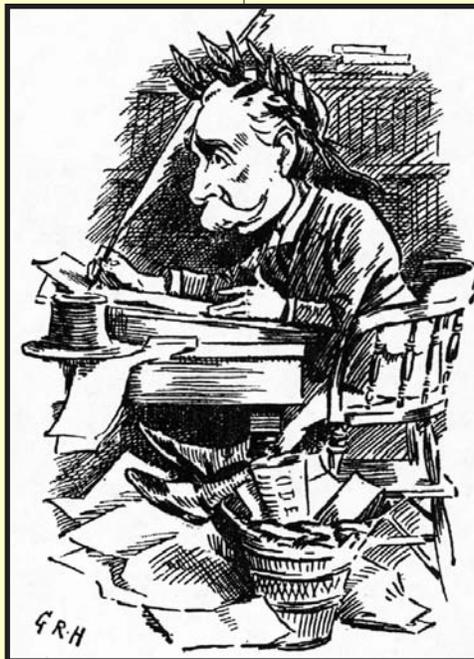
Duehning v. Aurora East Unified School Dist. 131, 102 F.Supp.3d 968, 975 (N.D.Ill. 2015).

Consequences of Failure to Comply with Local Rules

Courts in this Circuit have not minced words when it comes to compliance with local rule requirements. “Judges are not like pigs, hunting for truffles buried in briefs.” *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003). “Nor are they archaeologists searching for treasure. It is simply not the court’s job to sift through the record to find evidence to support a party’s claim.” *Jeralds ex rel. Jeralds v. Astrue*, 754 F. Supp. 2d 984, 986 n. 1 (N.D. Ill. 2010). It is an “[a]n advocate’s job is to make it easy for the court to rule in his client’s favor.” *Dal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 613 (7th Cir. 2006).

Thus, the consequences of a party’s failure to comply with local rule requirements are significant. A District Court may wholesale deny a motion for summary judgment where a party has failed to comply with the local rule. *See FirstMerit Bank,*

N.A. v. 2200 N. Ashland, LLC, No. 12 C 572, 2014 WL 6065817, at *4 (N.D. Ill. Nov. 13, 2014). Where a party fails to properly respond to a moving party’s statement of material facts or fails to properly submit additional material facts, a court may deem those facts admitted for purposes of summary judgment, or may refuse to consider the additional facts submitted. *See Smith*, 321 F.3d at 683; *Cady v. Sheahan*, 467 F.3d 1057, 1061 (7th Cir. 2006). In any of these cases, a party’s otherwise successful legal arguments may fail simply due to an attorney’s lack of attention to detail.



Avoiding Common Pitfalls

Beyond the basic requirements as to the documents that should be filed, litigants seeking or opposing summary judgment must ensure that the presentation of evidence set forth in its statement of material facts, or a response thereto, is sound. Even the most thoughtful legal argument is doomed to fail on summary judgment where a party has not properly supported its position with citations to the record. Litigants should be mindful to avoid these common pitfalls.

Ensure the statement of material facts is organized and accurate.

Detailed and conscientious preparation of the statement of material facts is time well spent. Though the Court may be familiar with a party’s

legal precedent, the Court will not be familiar with the factual record. Thus, the statement of material facts should be well-organized and user-friendly, and the citations to supporting exhibits must be accurate. Each paragraph in the statement of material facts should be short and concise. The paragraphs should not contain a lengthy recitation of facts relating to multiple issues. *See FirstMerit Bank*, 2014 WL 6065817, at *6. While it is easy to focus on preparation of the legal arguments set forth in the memorandum of law, moving parties should consider preparing the statement of material facts first, as the statement of material facts should guide the motion.



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Cite specific evidence. A party should cite to specific portions of the factual record that support its position. Citations to an entire transcript of a deposition or to a lengthy exhibit are inappropriate as a court “should not be expected to review a lengthy record for facts that a party could have easily identified with greater particularity.” *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 818 (7th Cir. 2004). A court may strike and refuse to consider a statement of material facts or a response thereto that fails to cite specific evidence in the record. *Id.*; *Packer v. Trustees of Indiana Univ. Sch. of Med.*, 800 F.3d 843, 848 (7th Cir. 2015) (affirming summary judgment where a responding party failed to comply with Southern District of Indiana’s Local Rule 56–1, which requires that any citation to record materials “must refer to a page or paragraph number or otherwise similarly specify where the relevant information can be found in the supporting evidence”).

Cite admissible evidence. A party must support a motion for summary judgment with citations to the record that constitute admissible evidence. *McGreal v. Village of Orland Park*, 850 F.3d 308, 312 (7th Cir. 2017); Andrew Polovin and Andrew MacNally, *Practical and Strategic Considerations for Addressing Evidentiary Issues at Summary Judgment*, The Circuit Rider 21 (April 2013). Common examples of inadmissible evidence that a Court may strike or refuse to consider are statements that constitute hearsay or that are not based on personal knowledge. *See Phillips v. Quality Terminal Servs., LLC*, 855 F. Supp. 2d 764, 772 (N.D. Ill. 2012); *Boyd v. City of Chicago*, No. 13 C 7152, 2016 WL 7157354, at *5 n. 8 (N.D. Ill. Dec. 6, 2016).

Do not include irrelevant facts. The statement of material facts should include only those facts that are material to the legal issues to be resolved by summary judgment. “The Statement should not contain mere background facts which a party feels puts the case in perspective – that can be done in an introduction or background section of the brief.” S.D. Ind. L.R. 56-1, Local Rules Advisory Committee Comments Re:

2002 Amendment; *see also Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D. Ill. 2000) (“[T]he 56.1(a) statement should be limited to *material* facts, that is, facts pertinent to the outcome of the issues identified in the summary judgment motion.”)

Do not mischaracterize the record. Though it may seem obvious, far too many litigants fail to properly support assertions of facts with citations to the record. Where a party states facts that are not supported by the record or misstates evidence within the record, courts may strike and refuse to consider those portions of the statement of material facts or a response thereto. *See Nat’l Inspection & Repairs, Inc. v. George S. May Int’l Co.*, No. 03 C 5529, 2008 WL 4389834, at *2 (N.D. Ill. Sept. 24, 2008), *aff’d*, 600 F.3d 878 (7th Cir. 2010); *Freight Train Advert., LLC v. Chicago Rail Link, LLC*, No. 11 C 2803, 2012 WL 5520400, at *2 n. 4, 5 (N.D. Ill. Nov. 14, 2012).

Avoid argument in the statement of material facts. A Statement of Material Facts should be just that – facts that are material to the issues raised in the motion. The statement of material facts “is to identify for the Court evidence supporting a party’s factual assertions in an organized manner: it is not intended as a forum for factual or legal argument.” *Malec*, 191 F.R.D. at 585; *see also* S.D. Ind. L.R. 56-1, Local Rules Advisory Committee Comments Re: 2002 Amendment (“[T]he Statement of asserted material facts is to state facts, not the party’s argument which should be in the argument portion of the brief.”) Again, a District Court may strike or refuse to consider argumentative allegations within a statement of material facts. *See Freight Train Advert.*, 2012 WL 5520400, at *2 n. 4; *Boyd*, 2016 WL 7157354, at *5 n. 7.

Assert well-founded objections only when proper and avoid evasive denials. A party must respond to each statement of material fact in an opposing party’s papers. Local rule requirements are “not satisfied by evasive denials that do not fairly meet the substance of the material facts asserted.” *Bordelon v. Chicago Sch. Reform Bd. of Trustees*, 233 F.3d 524, 528 (7th Cir. 2000). A party also may not rely on

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improper objections to challenge a party’s assertion of material facts. *See Hill v. Tangherlini*, 724 F.3d 965, 967 (7th Cir. 2013) (“As we have repeatedly emphasized over the past decade, the term ‘self-serving’ must not be used to denigrate perfectly admissible evidence through which a party tries to present its side of the story at summary judgment.”) In fact, the Seventh Circuit has eliminated “self-serving” as a proper basis for objection in all contexts. Jeffrey Cole, *The Seventh Circuit Inters "Self-Serving" as an Objection to the Admissibility of Evidence*, *The Circuit Rider* 14 (Nov. 2013). That said, where objections are well founded, they should be asserted or the party risks waiving the objection.

Litigants should consider the best method of raising objections to an opponent’s statement of material facts. In some jurisdictions, it may be proper to file a separate motion to strike. However, some Courts strongly prefer that a party state objections in its response to the statement of material facts in order to streamline the Court’s review of the issues.

Pay attention to the Court’s specific requirements. Although most District Court local rules are similar, each Court may impose its own specific requirements on motions for summary judgment. Therefore, litigants must consult the applicable local rules and standing orders before filing or responding to a motion for summary judgment. For example, the Northern District of Illinois requires that a party should cite to its accompanying statement of material facts in its memorandum of law, and not to the record itself. *See FirstMerit Bank*, 2014 WL 6065817, at *4. Further, certain courts within the Northern District impose requirements above and beyond those set forth in the Local Rules. *See Schwingel v. Elite Prot. & Sec., Ltd.*, No. 11 C 8712, 2015 WL 7753064, at *1 (N.D. Ill. Dec. 2, 2015) (“This Court’s summary judgment procedures differ from Local Rule

56.1, in that this Court requires the parties to submit a joint statement of undisputed facts.”)

Moreover, as detailed above, the Southern District of Indiana requires that parties not only cite to “specific” portions of the record, but that the citation refer to a page or paragraph number or otherwise similarly specify where relevant information can be found. S.D. Ind. L.R. 56-1(e). Failure to comply may result in waiver of a critical argument. Because the Courts are granted broad discretion in imposing and enforcing requirements for summary judgment motions, litigants must familiarize themselves with all applicable requirements, whether set forth in the Federal Rules of Civil Procedure, local rules, or an individual Court’s case management procedures.

At the summary judgment stage, there is simply no substitute for careful attention to detail. Summary judgment submissions that are sloppy and fail to comply with local requirements waste significant time and resources. More importantly, failure to meet the challenge of properly preparing or responding to a motion for summary judgment could have dire consequences for a client, including dismissal of a potentially meritorious claim.

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“Trendy” Psychology

FOR ATTORNEYS AND JUDGES

By Alexandra L. Newman*

Certain theories of human judgment, rational decision-making, and behavioral economics are currently enjoying a moment in the spotlight. These newly “trendy” theories were first developed beginning in the late 1960s by the esteemed Israeli psychologists Daniel Kahneman and Amos Tversky. In developing their prize-winning theories over the course of three decades, Kahneman and Tversky famously rejected the predominant view in the field of human judgment that humans are rational actors; in general, their theories expose the systematic errors made by humans in uncertain situations, and they posit that psychological biases frequently lead consumers to make bad economic decisions.

The psychological theories of Kahneman and Tversky have garnered significant and sustained interest among academics and policymakers for decades, but recent events signal a new interest in the theories by both the general public and the courts. First, the theories are the subject of an intriguing new book titled *The Undoing Project: A Friendship That Changed Our Minds* (W.W. Norton & Co. 2017) by the popular author Michael Lewis (known for *The Big Short*, *Moneyball*, and *Flash Boys*, among other best-selling works).¹ Second, the particular theory known as “loss aversion bias” was at issue in a high-profile case that was recently decided in March 2017 by the U.S. Supreme Court. In that case, *Expressions Hair Design v. Schneiderman*,² the petitioners contended that behavioral economics is relevant to interpreting the Constitution (and in particular, the First Amendment). It is noteworthy that Kahneman himself — along with other scholars of behavioral economics — was an *amici* supporting the petitioners in that case, and the scholars’ brief cited to *The Undoing Project*.³ (As discussed

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below, the Supreme Court vacated the Second Circuit’s decision and remanded the case without deciding whether the statute at issue survives First Amendment scrutiny — that question now remains for the Second Circuit to analyze on remand.⁴)

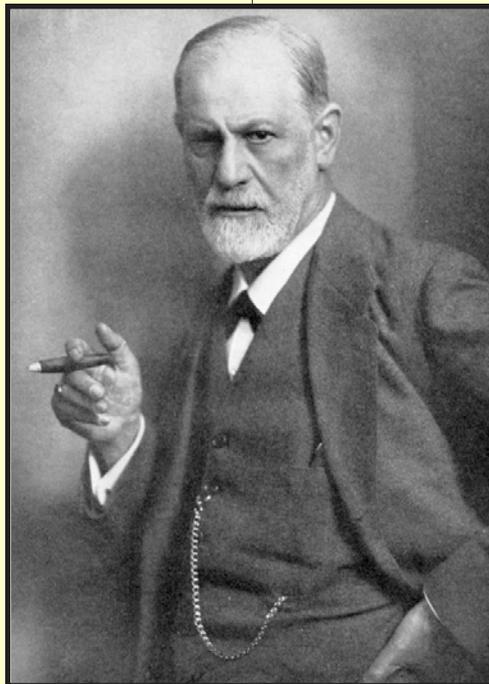
This article provides a brief introduction to the work of Kahneman and Tversky and explores how courts historically have considered the psychologists’ theories in judicial opinions. Thoughtful attorneys and judges should learn about these “trendy” theories and consider their potential application in litigation and judicial decision-making.

A. A Brief Introduction to Kahneman and Tversky

In *The Undoing Project*, Lewis admits that he had never heard of Kahneman and Tversky until after he had published *Moneyball* in 2003.⁵ *Moneyball*, as Lewis summarizes, concerned “the Oakland Athletics’ quest to find new and better ways to value baseball players and evaluate baseball strategy” through the use of novel data analytics.⁶ Soon after *Moneyball* was published, the University of Chicago economist Richard Thaler and law professor Cass Sunstein reviewed the book for *The New Republic*.⁷ In their review, Thaler and Sunstein observed that the inefficiencies in the market for baseball players that Lewis had exposed in *Moneyball* were grounded in psychological biases discovered and analyzed years earlier by Kahneman and Tversky.⁸ “My book wasn’t original,” Lewis now laments, but was rather “simply an illustration of ideas that had been floating around for decades and had yet to be fully appreciated by, among others, me.”⁹

Upon learning about Kahneman and Tversky, Lewis became fascinated by the pair. He first met Kahneman — who won the

2002 Nobel Prize in Economic Sciences — in 2007. (Tversky had died in 1996 at age 59.) Over the next ten years, Lewis conducted extensive interviews and research into the psychologists’ friendship as well as the fields of judgment, rational decision-making, and behavioral economics before finally publishing *The Undoing Project*.¹⁰ Lewis was intrigued by the personal histories of both Kahneman and Tversky: Kahneman had fled to British Palestine (now Israel) from Nazi-occupied France as a child; Tversky had been born in Haifa, British Palestine (now Israel); and both men had served important roles in the Israeli Defense Forces.¹¹ Lewis observed that the two brilliant scholars had a great deal in common:



“Both were grandsons of Eastern European rabbis, for a start. Both were explicitly interested in how people functioned when they were in a ‘normal’ unemotional state. Both wanted to do science. Both wanted to search for simple, powerful truth. . . . Both men were blessed with shockingly fertile minds. And both were Jews, in Israel, who did not believe in God.”¹² Despite these similarities, Lewis noted that Kahneman and Tversky were also profoundly different in their characters. Whereas Kahneman was an introvert who exuded empathy and was often gripped by self-doubt, Tversky was an extrovert who expressed self-confidence and sometimes impatience for those with lesser minds.¹³ *The Undoing Project* is, in

essence, Lewis’s heartfelt tribute to the platonic love and near-telepathic working relationship between Kahneman and Tversky, as well as an exploration of the psychologists’ groundbreaking theories of the mind.

B. Kahneman and Tversky’s Key Theories of Psychology and the Courts

Kahneman and Tversky are considered the “fathers of behavioral economics,” and most of their 200+ papers concern psychological concepts with implications for behavioral economics.¹⁴ (Interested readers should also explore Kahneman’s

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own recent best-selling book *Thinking, Fast and Slow* (Farrar, Straus & Giroux 2011), which summarizes his research with Tversky and others.) Their novel theories of judgment, rational decision-making, and behavioral economics are so powerful that they have permeated our psychological culture and have influenced policymakers.¹⁵ Indeed, litigants and courts have begun to invoke their theories to support positions taken in litigation. To survey these developments, this article offers simplified and condensed descriptions of a few of the major psychological concepts that were pioneered by Kahneman and Tversky, as well as an introduction to how courts have considered and applied these theories in the judicial context. While Kahneman and Tversky’s work may need “to be applied with some skepticism in the courtroom setting,” as Judge Weinstein of the Eastern District of New York once cautioned, the psychologists “do identify a number of common biases” that are “not restricted to laymen” but “affect professional decision-makers as well.”¹⁶ Fact finders who are aware of such biases can “make valuable efforts at correction.”¹⁷



1. Prospect Theory and Loss Aversion

Theory. Despite their training as psychologists (not economists), Kahneman and Tversky introduced the world to “prospect theory” and the notion of “loss aversion” in a revolutionary paper published in the prestigious economics journal *Econometrica* in 1979; their paper is now the most-cited work ever to appear in that journal.¹⁸ In this paper, the psychologists critiqued expected utility theory — the then-favored theory of economists — as a descriptive model of decision-making under risk, and they proposed prospect theory as an alternative.¹⁹

“Prospect theory” is an empirical finding that people value gains and losses differently and will base decisions on perceived gains

rather than perceived losses. Under this theory, if a person is given two equal choices — one expressed in terms of possible gains and the other in terms of possible losses — the person will choose the former even when she achieves the same economic end result.²⁰ Loss aversion is, simply put, “the tendency to attach greater value to losses than to foregone gains of equal amount.”²¹

For example, prospect theory and the loss aversion bias posit, as an empirical matter, that if a person is given the choice between (1) receiving \$25 or (2) receiving \$50 and then losing \$25, the person is more likely to choose the first option, even though the utility of the \$25 is the same in both options. Under prospect theory, the person will prefer the first option because a single gain is generally observed as more favorable than initially having more money and then suffering a loss.²² Kahneman and Tversky proposed that the reason for this outcome is that a loss causes greater emotional impact on a person than does an equivalent amount of gain, so given choices presented two ways — with both offering the same result — a person will pick the option offering the perceived gain.

From a technical perspective, Kahneman and Tversky explained that, under prospect theory, people underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty (*i.e.*, the “certainty effect”). This tendency, they wrote, “contributes to risk aversion in choices involving sure gains and to risk seeking in choices involving sure losses.”²³ They also posited that “people generally discard components that are shared by all prospects under consideration” (*i.e.*, the “isolation effect”). This tendency “leads to inconsistent preferences when the same choice is presented in different forms.”²⁴ Under prospect theory, as opposed to expected utility theory, value “is assigned to gains and losses rather than to final assets” and “probabilities are replaced by decision weights.”²⁵ Kahneman and Tversky explained that the value function is defined on deviations from a reference point and is normally concave for gains (implying risk aversion), commonly convex for losses (risk seeking), and generally steeper for losses than for gains (loss aversion).²⁶ Decision weights, they posited, are generally lower than the corresponding probabilities,

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except in the range of low probabilities. As a result, they concluded, “Overweighting of low probabilities may contribute to the attractiveness of both insurance and gambling.”²⁷

Judicial Application. The petitioners in the recently decided Supreme Court case *Expressions Hair Design v. Schneiderman* are merchants who presented a novel First Amendment application of Kahneman and Tversky’s loss aversion theory by asserting that this bias is relevant to interpreting the Constitution. As framed by the petitioners, the question presented was the following:

New York, like all states, allows merchants to charge higher prices to consumers who pay with a credit card instead of cash. But New York’s no-surcharge law, N.Y. Gen. Bus. Law § 518 [“Section 518”], requires merchants to label that price difference as a cash “discount” and makes it a crime — punishable by up to one year in jail — to label it as a credit-card “surcharge.” The question presented is whether New York’s no-surcharge law unconstitutionally restricts speech.²⁸

The petitioners in *Expressions Hair Design* — who were asking the Court to reverse the Second Circuit’s ruling against them — argued that Section 518 violates the First Amendment’s provision that “Congress shall make no law . . . abridging the freedom of speech”²⁹ because the statute “seeks to control how merchants may communicate the price difference to consumers: It allows merchants to offer ‘discounts’ to those who pay in cash, but makes it a crime to impose equivalent ‘surcharges’ on those who pay by credit card.”³⁰ In other words, the petitioners argued that the New York statute “regulates speech, not conduct, because it restricts only what merchants may say about their prices, not what they may charge,”³¹ and the petitioners contended that this result violates the First Amendment.

The distinction between a “surcharge” and a “discount,” the petitioners in *Expressions Hair Design* urged, is “just two ways of framing the same price information.”³² Yet consumers — due to loss aversion bias³³ — “react very differently to the two labels, perceiving a surcharge as a penalty for using a card.”³⁴ The

petitioners maintained that, by imposing liability upon merchants who describe a credit card fee as a “surcharge” but no liability for calling a cash-payment a “discount,” New York’s statute imposes liability that “turns on the speech used to describe identical conduct” in violation of the First Amendment.³⁵ As a result, the petitioners argued, merchants “lose their most effective means of informing consumers of the cost” of using a credit card.³⁶ This result, the petitioners maintained, incentivizes merchants to “not even attempt to offer dual pricing [*i.e.*, a higher price for those who pay by credit card, a lower one for those who pay in cash], even though the law allows it, to avoid accidentally subjecting themselves to criminal prosecution.”³⁷

“The upshot,” the petitioners concluded, “is that merchants pass on swipe fees to *all* consumers by raising the prices of goods and services across the board. Because they will pay the same price regardless, consumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use. As a result, swipe fees soar.”³⁸ This is significant, the petitioners asserted, because the credit-card swipe fees paid by American consumers are among the highest in the world — often between 2% and 3% of the purchase amount — resulting in credit-card issuers receiving over \$50 billion in swipe fees annually.³⁹ Indeed, the petitioners argued that the credit-card industry vigorously lobbied for the “discount” versus “surcharge” distinction because, as set forth in research by Kahneman and Tversky, once the industry became aware that how information is presented can affect consumer behavior, the industry “insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge.”⁴⁰

It is noteworthy that Kahneman himself was an *amici* in the *Expressions Hair Design* case, and he — along with other scholars of behavioral economics — filed one of twelve *amici curiae* briefs in support of the petitioners.⁴¹ Citing Kahneman and Tversky’s own research about loss aversion, along with studies from other prominent scholars and a newly commissioned empirical study,⁴² these *amici* scholars argued that behavioral-economics research shows that framing a choice as either a prospective loss or gain materially influences people’s decisions.⁴³ They further maintained that, consistent with the predictions of prospect theory, no-surcharge laws have a measurable impact on consumer preferences.⁴⁴ They concluded that “[c]onsumers are more likely to prefer paying with credit card when the price

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differential is framed as a cash discount rather than as an economically equivalent credit-card surcharge,” and therefore, “[n]o-surcharge laws thus limit merchants’ ability to convey material information to their customers.”⁴⁵

For their part, in asking the Supreme Court to affirm the Second Circuit’s ruling, the respondents argued that the New York statute’s surcharge prohibition is a direct regulation that is not subject to First Amendment scrutiny.⁴⁶ They contended that the surcharge prohibition regulates merchants’ conduct — not their speech — by preventing them from collecting money from credit-card customers above the regular price, and that the prohibition does not regulate speech or target any protected speech.⁴⁷ The respondents further argued that, even if the surcharge prohibition were viewed as a regulation of speech, it would be permissible under the First Amendment and the prohibition is not unconstitutionally vague.⁴⁸

Ten *amicus curiae* briefs were filed in support of the respondents, including a brief by a different collection of scholars of behavioral economics.⁴⁹ These scholars attempted to undermine the impact of Kahneman and Tversky’s loss aversion bias theory in the *Expressions Hair Design* case by arguing that “[t]he reality is that, despite their intuitive appeal, behavioral theories — and loss aversion, in particular — often fail to stand up to scrutiny when evaluated and tested against available evidence.”⁵⁰ They contended that “[t]he theory of loss aversion is so malleable it can be invoked to explain even opposite outcomes,” and they asserted that, “[i]n the realm of consumer credit regulation, numerous behavioral economic theories have been found wanting once the empirical evidence is carefully examined.”⁵¹ These *amici* scholars concluded, “Petitioners’ behavioral hypothesis that consumers will react more strongly to surcharges than to discounts of equivalent value is purely speculative and lacks empirical confirmation. In the absence of sound empirical evidence, this Court should not rely upon malleable behavioral economic theories in crafting constitutional law.”⁵²

In its March 2017 opinion that was authored by Justice Roberts and that was unanimous in the judgment,⁵³ the Supreme Court did not wade into Kahneman and Tversky’s theory of loss aversion bias or analyze the arguments advanced by the two groups of behavioral economics *amici* scholars. Instead, the

Court first determined that Section 518 does prohibit the surcharge-pricing regime that the petitioners wished to employ.⁵⁴ The Court also determined that, contrary to the Second Circuit’s ruling, Section 518 does regulate speech (not conduct) because the statute “tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer” and instead regulates “how sellers may communicate their prices.”⁵⁵ The Court asserted that, because the Second Circuit had concluded otherwise, the Second Circuit did not determine whether Section 518 survives First Amendment scrutiny, and therefore on remand the Second Circuit should analyze Section 518 as a speech regulation.⁵⁶ Finally, the Court determined that Section 518 is not vague as applied to the petitioners because Section 518 proscribes their intended speech.⁵⁷ In light of the Court’s decision, the question whether behavioral economics is relevant to Constitutional interpretation will remain for another day.

2. Representativeness Heuristic

Theory. “Representativeness” is “the degree to which [a thing or event] (i) is similar in essential characteristics to its parent population, and (ii) reflects the salient features of the process by which it is generated.”⁵⁸ According to the “representativeness heuristic,” when people rely on representativeness to make judgments, they compare whatever they are judging to some model in their minds.⁵⁹ The thesis, in other words, is that “in many situations, an event *A* is judged to be more probable than an event *B* whenever *A* appears more representative [of the mental model] than *B*.”⁶⁰ Or, as summarized by Lewis, “The more the basketball player resembles your mental model of an NBA player, the more likely you will think him to be an NBA player.”⁶¹

Kahneman and Tversky invoked the representativeness heuristic to explain the “base rate fallacy,” which is the mind’s tendency to ignore general or generic information relating to all cases when confronted with specific information pertaining only to a certain case.⁶² In their view, the base rate fallacy could be explained by the mind’s tendency to judge likelihood or cause-and-effect based on how representative one thing is of another or of a category.⁶³

Judicial Application. Judge Hamilton of the Seventh Circuit invoked the representativeness heuristic in a dissenting opinion in *United States v. Gomez*.⁶⁴ In *Gomez*, a jury found Gomez guilty of several drug-related crimes.⁶⁵ On appeal, Gomez contended that the district court had abused its discretion under Federal Rule of Evidence 404(b) — which allows evidence of other crimes under limited circumstances — when it admitted evidence of his subsequent possession of cocaine a few weeks after the charged crimes.⁶⁶ In affirming Gomez’s conviction, the majority determined that

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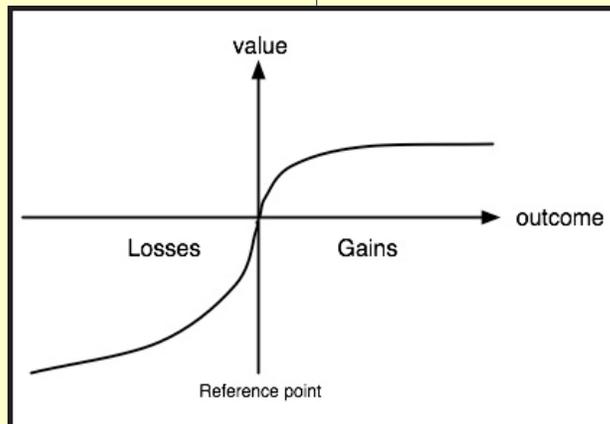
while the admission of the uncharged cocaine possession was “questionable,” it was not an abuse of discretion because the district court had instructed the jury on the “limited use” to which the evidence of subsequent cocaine possession could be put.⁶⁷ The majority “assume[d] juries ordinarily follow limiting instructions, so that instruction reduces the risk that the jury would consider the [subsequent] [] evidence as proof of Mr. Gomez’s propensity to be involved with drugs.”⁶⁸

Citing research by Kahneman and Tversky, Judge Hamilton argued that there is “good reason to question the effectiveness of limiting instructions when it comes to Rule 404(b) evidence, particularly in a case like this.”⁶⁹ He explained, “Social science experiments using mock jurors find that jurors are more likely to convict when they have heard evidence of a prior conviction and that limiting instructions are often ineffective at guiding jurors’ use of such evidence.”⁷⁰ In so explaining, Judge Hamilton cited social science and psychology research studies including a paper by Kahneman and Tversky that, in Judge Hamilton’s words, demonstrated that “individuals do not properly adjust their probability estimates upon receiving new information, especially when [the] original information resembles [the] issue in question.”⁷¹ Continuing this line of argument, Judge Hamilton found it “particularly troubling” that studies by other scientists “show jurors are especially influenced by evidence of other bad acts that resemble the case before them.”⁷² He noted that limiting instructions “work best when the instructions arouse jurors’ suspicions as to the problems with considering such evidence (e.g., reliability).”⁷³ For this reason and others, Judge Hamilton stated that he would find that the admission of the Rule 404(b) evidence was an abuse of discretion requiring a new trial.⁷⁴

3. Anchoring Heuristic

Theory. The “anchoring heuristic” posits that when a person uses a specific target number or value as a starting point (*i.e.*, an anchor), and subsequently adjusts that information until an

acceptable value is reached over time, those adjustments are often inadequate and remain too close to the original anchor.⁷⁵ In other words, anchoring is the “the tendency to stick too closely to initial estimates of probability, after contrary evidence has been introduced.”⁷⁶ Kahneman and Tversky illustrated this heuristic with an experiment: they gave one group of people five seconds to guess the product of $8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1$, and another group five seconds to guess the product of $1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8$. Although both groups’ answers should have been the same (40,320), the first group consistently guessed a significantly higher number. According to the anchoring heuristic, this tendency occurred because the first group had used 8 as a starting point, whereas the second group had used 1.⁷⁷



Judicial Application. Recent opinions from the Second Circuit and the Seventh Circuit illustrate that judges are recognizing the applicability of the anchoring heuristic in the context of criminal sentencing under the federal sentencing guidelines. For example, in his concurring opinion in *United States v. Ingram*, Judge Calabresi cited a paper by Kahneman and Tversky to explain that the “so-

called ‘anchoring effects’ long described by cognitive scientists and behavioral economists show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point.”⁷⁸ Judge Calabresi summarized the anchoring effect upon judges in the context of criminal sentencing, explaining that “[w]hen people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to ‘anchor’ their subsequent judgments — as to . . . what sentence a defendant deserves — to the initial number given.”⁷⁹

Applying the anchoring heuristic, Judge Calabresi concluded, “Because anchoring effects influence our judgments, we cannot be confident that judges who begin at [a particular] criminal category [] and thence depart to whatever below-guidelines sentence they think appropriate would end up reaching the same ‘appropriate’ sentence they would have reached had they, instead, started from [a different] [] category [] guideline range and departed from there.”⁸⁰ Building off of Judge Calabresi’s analysis, the Seventh Circuit in *United States v. Navarro* ordered resentencing in part because the court acknowledged the role that



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the anchoring heuristic plays in sentencing decisions — the court concluded that “had the government’s initial recommendation started at a lower point, [the defendant] likely would have received a lower sentence.”⁷⁸¹

4. Conjunction Fallacy

Theory. In one famous experiment, Kahneman and Tversky presented study participants with a description of a fictional person, “Linda.” Linda, they explained, was “31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.” Study participants were then asked to evaluate the probability of Linda being a bank teller versus the probability of her being both a bank teller and a feminist.

The result — now labeled the “conjunction fallacy”— was that study participants, illogically, judged it more probable that Linda was both a bank teller and a feminist rather than simply a bank teller, even though “Linda is a bank teller and a feminist” is just a special case of “Linda is a bank teller” (*i.e.*, the latter necessarily includes the former). In other words, one description is entirely contained by the other, and a conjunction cannot be more probable than one of its constituents. Kahneman and Tversky concluded based on this conjunction fallacy — which recurred in a number of experimental contexts — that people are blind to logic when it is embedded in a story, and in general the rules of thumb that people use to evaluate probability lead to misjudgments.⁸²

Judicial Application. In a majority opinion authored by Judge Gorsuch, the Tenth Circuit explored the “cumulative error doctrine” and Kahneman and Tversky’s conjunction fallacy in *Grant v. Trammell*.⁸³ In that case, a state prisoner (Grant) petitioned for a federal writ of habeas corpus after being convicted of murder, sentenced to death, and denied post-

conviction relief.⁸⁴ The district court denied Grant’s petition but granted him a certificate of appealability.⁸⁵ On appeal, Grant contended that even if the state court errors that he had identified in his petition did not warrant reversal individually, they did when considered cumulatively.⁸⁶

In affirming the denial of Grant’s petition, the Tenth Circuit determined that an accumulation of state court errors did not warrant reversal of the death sentence. The court considered a prior case, *Cargle v. Mullin*, in which it had found cumulative error to warrant reversal where the errors had “an inherent synergistic effect.”⁷⁸⁷ The *Grant* court explained that the errors

that had occurred at the trial in *Cargle* all went to “two absolutely critical witnesses” for the government, and at sentencing those errors “greatly inflated” the government’s case for the petitioner’s guilt, such that counsel’s ineffectiveness meant there was a “conspicuous absence of counterbalancing mitigation evidence.”⁷⁸⁸ In contrast to the situation in *Cargle*, the court in *Grant* concluded that there was

not a “synergistic effect” in Grant’s case that “undermined a particular key question in the government’s case.”⁷⁹⁰ Accordingly, the court affirmed the trial court’s denial of Grant’s petition.⁹¹

At the same time, the *Grant* court relied upon Kahneman and Tversky’s research into the conjunction fallacy to *reject* the idea that there is necessarily a need for some “synergistic effect” in order to prevail on a claim of cumulative error.⁹² The *Grant* court explained that the reason why a “synergistic effect” is *not* always necessary to prove cumulative error “becomes clear if we understand the prejudice in terms of probabilities.”⁷⁹³ The court explained, “One might ‘accumulate’ probabilities by adding them together, taking into account the *disjunctive* probabilities of each error. One might also ‘accumulate’ probabilities by multiplying them and finding reversible error only in the space where all errors are *conjunctively* appearing all at once.”⁷⁹⁴ The court continued, “If the cumulative error doctrine means anything, it must be that prejudice can be accumulated *disjunctively* — that all a defendant needs to show is a strong likelihood that the several errors in his case, when considered additively, prejudiced him. If it were otherwise, the cumulative error doctrine would be a nullity. A finding that one error wasn’t prejudicial would necessarily preclude a finding that all of the errors were prejudicial.”⁷⁹⁵ In reaching this conclusion, the court cited a paper by Kahneman and





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Tversky that described, in the court’s words, “the intuition that a conjunction is more probable than its constituents as the ‘conjunction fallacy.’”⁹⁶ The court summarized, “So while one error may make another error in the same direction more egregious, a defendant can still show cumulative error by accumulating unrelated errors if their probabilistic sum sufficiently undermines confidence in the outcome of the trial.”⁹⁷

C. Conclusion

The examples discussed above show that attorneys and judges have begun educating themselves about Kahneman and Tversky’s groundbreaking theories of psychology. (Perhaps not surprisingly, the Seventh Circuit’s own Judge Posner was the first federal appellate judge to cite to Kahneman and Tversky’s research in an opinion, observing in a 1986 decision that their research indicates that “unscientific people (judges and jurors, for example) may give too much weight to mere coincidence.”) When taken together, the recent publication of Lewis’s *The Undoing Project* and the recent Supreme Court case of *Expressions Hair Design v. Schneiderman* are sure to introduce even more attorneys, judges, and others to these influential theories.

Notes:

¹ MICHAEL LEWIS, *THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS* (W.W. Norton & Co. 2017).

² *Expressions Hair Design v. Schneiderman*, No. 15-1391, 2017 WL 1155913, 581 U.S. __ (Mar. 29, 2017), available at SCOTUSBLOG.COM, https://www.supremecourt.gov/opinions/16pdf/15-1391_g31i.pdf; see also *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 439 (S.D.N.Y. 2013), judgment entered, No. 13-CV-3775 JSR, 2013 WL 7203883 (S.D.N.Y. Nov. 4, 2013), and vacated, 803 F.3d 94 (2d Cir. 2015), vacated, 808 F.3d 118 (2d Cir. 2015).

³ Brief of Scholars of Behavioral Economics as *Amici Curiae* in Support of Petitioners, *Expressions Hair Design v. Schneiderman*, No. 15-1391 (U.S. Nov. 21, 2016), available at SCOTUSBLOG.COM, <http://www.scotusblog.com/wp-content/uploads/2016/11/15-1391-tsac-Scholars-of-Behaviorial-Economics.pdf>.

⁴ *Expressions Hair Design v. Schneiderman*, No. 15-1391, 2017 WL 1155913, 581 U.S. __ (Mar. 29, 2017), available at SCOTUSBLOG.COM, https://www.supremecourt.gov/opinions/16pdf/15-1391_g31i.pdf.

⁵ LEWIS, *supra* n.1, at 17.

⁶ *Id.* at 1.

⁷ *Id.* at 17-18.

⁸ *Id.*

⁹ *Id.* at 18.

¹⁰ LEWIS, *supra* n.1, at 361.

¹¹ *Id.* at 52-115.

¹² MICHAEL LEWIS, *How Two Trailblazing Psychologists Turned the World of Decision Science Upside Down*, VANITY FAIR, Nov. 14, 2016, available at <http://www.vanityfair.com/news/2016/11/decision-science-daniel-kahneman-amos-tversky>.

¹³ LEWIS, *supra* n.1, at 52-115.

¹⁴ Albert Phung, *Behavioral Finance: Background*, INVESTOPEDIA, http://www.investopedia.com/university/behavioral_finance/behavioral2.asp (last visited Mar. 26, 2017).

¹⁵ LEWIS, *supra* n.1, at 342-44.

¹⁶ *United States v. Shomubi*, 895 F. Supp. 460, 486 (E.D.N.Y. 1995) (Weinstein, J.) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974)), vacated, 103 F.3d 1085 (2d Cir. 1997).

¹⁷ *Id.* at 487.

¹⁸ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47(2) ECONOMETRICA 263, 263-91 (1979).

¹⁹ LEWIS, *supra* n.1, at 268-90.

²⁰ Kahneman & Tversky, *Prospect Theory*, *supra* n.18, at 263-91; see also Albert Phung, *Behavioral Finance: Key Concepts—Prospect Theory*, INVESTOPEDIA, http://www.investopedia.com/university/behavioral_finance/behavioral11.asp (last visited Mar. 26, 2017).

²¹ *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1016 (10th Cir. 2004) (en banc) (Murphy, J., concurring in part and dissenting in part), *aff’d and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

²² *Prospect Theory*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/prospecttheory.asp> (last visited Mar. 26, 2017).

²³ Kahneman & Tversky, *Prospect Theory*, *supra* n.18, at 263.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Brief of Petitioners at i, *Expressions Hair Design v. Schneiderman*, No. 15-1391 (U.S. Nov. 14, 2016), available at SCOTUSBLOG.COM, <http://www.scotusblog.com/wp-content/uploads/2016/11/15-1391-Petitioner-Merits-Brief.pdf>.

²⁹ U.S. CONST. amend. I.

³⁰ Brief of Petitioners, *supra* n.28, at 1.

³¹ *Id.* at 26; see also *id.* at 27-34.

³² *Id.* at 1.

³³ *Id.* at 6 (citing Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199 (1991)).

³⁴ *Id.*

³⁵ *Id.* at 1-2.

³⁶ Brief of Petitioners, *supra* n.28, at 7.

³⁷ *Id.* at 1, 7.

³⁸ *Id.* at 7.

³⁹ *Id.* at 5 (citations omitted).

⁴⁰ *Id.* at 9 (citing Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S261 (1986)); see also *id.* at 14-16.

⁴¹ See Brief of Scholars of Behavioral Economics as *Amici Curiae* in Support of Petitioners, *supra* n.3.

⁴² See *id.* at ii-iii (Table of Authorities).

⁴³ *Id.* at 4-8.



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⁴⁴ *Id.* at 8-11.

⁴⁵ *Id.* at 11.

⁴⁶ Brief of Respondent Eric T. Schneiderman at 22-38, *Expressions Hair Design v. Schneiderman*, No. 15-1391 (U.S. Dec. 14, 2016), available at SCOTUSBLOG.COM, <http://www.scotusblog.com/wp-content/uploads/2016/12/15-1391-respondent-merits-brief.pdf>.

⁴⁷ *Id.*

⁴⁸ *Id.* at 39-59.

⁴⁹ Brief by *Amici Curiae* International Center for Law & Economics and Scholars of Law and Economics in Support of Respondents, *Expressions Hair Design v. Schneiderman*, No. 15-1391 (U.S. Dec. 21, 2016), available at SCOTUSBLOG.COM, <http://www.scotusblog.com/wp-content/uploads/2016/12/15-1391-amicus-respondent-ICLE.pdf>.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 6.

⁵² *Id.* at 24. The United States filed a brief as *amicus curiae* in support of neither party but arguing that the New York statute does indeed regulate merchants’ speech because the merchants’ potential liability under the statute turns solely on how they would present a lawful pricing differential to consumers. See Brief for the United States as *Amicus Curiae* Supporting Neither Party at 15-20, *Expressions Hair Design v. Schneiderman*, No. 15-1391 (U.S. Nov. 21, 2016), available at SCOTUSBLOG.COM, <http://www.scotusblog.com/wp-content/uploads/2016/11/15-1391-amicus-neither-party-U.S.pdf>. Nonetheless, the government’s brief urged that the case should be remanded for further consideration by the Second Circuit of the scope of, and justifications for, Section 518. *Id.* at 33-35.

⁵³ Justice Breyer and Justice Sotomayor (who was joined by Justice Alito) both separately wrote concurring opinions. See *Expressions Hair Design v. Schneiderman*, No. 15-1391, 2017 WL 1155913, 581 U.S. ___ (Mar. 29, 2017) (Breyer, J., concurring in judgment) (opining that Section 518 should receive a deferential form of review and that the Second Circuit, on remand, should ask the New York Court of Appeals to clarify the nature of the obligations that Section 518 imposes); (Sotomayor, J., concurring in judgment) (opining that the judgment below should be vacated and remanded with directions to certify the case to the New York Court of Appeals for a definitive interpretation of Section 518 that would permit the full resolution of the petitioners’ claims), available at SCOTUSBLOG.COM, https://www.supremecourt.gov/opinions/16pdf/15-1391_g31i.pdf.

⁵⁴ *Expressions Hair Design v. Schneiderman*, No. 15-1391, 2017 WL 1155913, 581 U.S. ___ (Mar. 29, 2017), available at SCOTUSBLOG.COM, https://www.supremecourt.gov/opinions/16pdf/15-1391_g31i.pdf, at 6-8.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 10-11.

⁵⁸ Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3(3) COGNITIVE PSYCH. 430, 430-54 (1972).

⁵⁹ LEWIS, *supra* n.1, at 183.

⁶⁰ *Id.* at 184.

⁶¹ *Id.*

⁶² Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCH. REV. 237, 237-51 (1973).

⁶³ *Id.*

⁶⁴ *United States v. Gomez*, 712 F.3d 1146, 1162-63 (7th Cir. 2013) (Hamilton, J., dissenting), *reh’g en banc granted, opinion vacated* (June 14, 2013), *on reh’g en banc*, 763 F.3d 845 (7th Cir. 2014).

⁶⁵ *Id.* at 1148.

⁶⁶ *Id.* at 1148, 1150.

⁶⁷ *Id.* at 1148, 1150-55.

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Id.* at 1162.

⁷⁰ *United States v. Gomez*, 712 F.3d at 1162-63.

⁷¹ *Id.* at 1163 (citing Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* n.16, at 1124-25).

⁷² *Id.* (citations omitted).

⁷³ *Id.* (citations omitted).

⁷⁴ *Id.* at 1163. The majority’s opinion affirming the district court in *Gomez* was later vacated; the case was heard by the Seventh Circuit *en banc*; the majority *en banc* affirmed by ruling that the district court’s admission of evidence under Rule 404(b) was harmless error; and Judge Hamilton again wrote a separate opinion, this time concurring with the majority’s conclusion that the district court had erroneously admitted evidence under Rule 404(b), dissenting from the conclusion that such error was harmless, and urging that the appellate court “should reverse the conviction and remand for a new trial without the highly prejudicial evidence admitted erroneously under Rule 404(b).” *United States v. Gomez*, 763 F.3d 845, 850, 864-65 (7th Cir. 2014) (*en banc*).

⁷⁵ LEWIS, *supra* n.1, at 192-93.

⁷⁶ *United States v. Shonubi*, 895 F. Supp. 460, 486 (E.D.N.Y. 1995) (Weinstein, J.), *vacated*, 103 F.3d 1085 (2d Cir. 1997).

⁷⁷ LEWIS, *supra* n.1, at 193.

⁷⁸ *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring).

⁷⁹ *Id.* (footnote and citations omitted).

⁸⁰ *Id.* (footnote and citations omitted).

⁸¹ *United States v. Navarro*, 817 F.3d 494, 501-02 (7th Cir. 2016) (Ellis, J.) (citing *Ingram*, 721 F.3d at 40, and Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* n.16, at 1124).

⁸² LEWIS, *supra* n.1, at 323-28.

⁸³ *Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (Gorsuch, J.).

⁸⁴ *Id.* at 1010.

⁸⁵ *Id.* at 1011.

⁸⁶ *Id.* at 1025.

⁸⁷ *Id.* at 1025-27.

⁸⁸ *Id.* at 1026 (citing *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003)).

⁸⁹ *Grant*, 727 F.3d at 1026 (citing *Cargle*, 317 F.3d at 1221, 1224-25).

⁹⁰ *Id.* at 1026.

⁹¹ *Id.* at 1027.

⁹² *Id.* at 1026.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Grant*, 727 F.3d at 1026.

⁹⁶ *Id.* (citing Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293 (1983)).

⁹⁷ *Id.*

⁹⁸ *Backes v. Valspar Corp.*, 783 F.2d 77, 80 (7th Cir. 1986) (Posner, J.) (citing Tversky & Kahneman, *Judgment Under Uncertainty*, *supra* n.16).



Opening *the* Question:

ON THE QUESTION YOU ASK DEPENDS
THE ANSWER YOU GET

*By Laura McNally**

As litigators, we're in the question-asking business. Trials and depositions are the most obvious settings, but questioning is (or at least should be) a pervasive part of a lawyer's practice. We investigate underlying facts. We interview witnesses. We explore alternative solutions. A lawyer who isn't curious, who doesn't ask questions, is not a lawyer who can expect success.

This article is about the bread and butter skill of asking good questions in daily practice. Because I'm focusing on framing questions to learn *new* information, this is emphatically not an article about trial skills. By the time of trial, it is my most sincere hope that you are no longer in the fact-development stage of your case.

By all appearances, children come hard-wired with the ability to bedevil adults with their ceaseless Whys. Soon, that repertoire expands to include How Come and Why Not. When we were training to be good litigators, we were told to ask questions using the journalist's Who, What, When, Where, Why, and How. Tell, Describe, and Explain were probably also on the list of good words to use to get to the bottom of things. And as the three-year old pestering her parents with Why Why Why quickly learns, these interrogative words are magical at getting people to keep talking. But solid, reliable, slightly-frumpy journalist questions have competition: the more flashy Didyas.

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Did You, Would You, and Could You, as well as Were You, Are You, and Will You are different ways of getting information, and ah, they feel so much better to ask. Before I say more, let me tell you one of my favorite jokes:

Knock Knock.
Who's there?
Control freak.
Control fr —
— Now you say,
“Control freak who?”

That's the beauty of the Did You questions. You're in the driver's seat. You, as the asker, can load up the question with all of the facts and then just get a yes or no in response. (We all know it's going to be a Yes, right?) You can frame the topic with your own artisanally-curated vocabulary. There's no risk your question will give the impression that you're uninformed. Indeed, you can demonstrate your mastery of the subject with your preamble.

Even better, by limiting the answers to yes or no, these questions avoid the risk of prompting long, rambling answers filled with non-responsive blabbering. If there is one thing law school teaches well, it's impatience with irrelevancies. Let's stay on point here.

But like the best teen movie cliché, sometimes the dowdy friend from childhood is actually the one you should be spending time with, rather than that flashy show-off who actually lacks much depth.

With Did Yous, you're doing the talking, but that's the downside too. “On the question you ask depends the answer you get.” Bay

Ridge Operating Co. v. Aaron, 334 U.S. 464, 484 (1948) (Frankfurter, J., dissenting). You come into the question with a view of what is happening, and the answer you receive either confirms or rejects that view. If it's confirmation you receive, you haven't advanced your basic understanding; you've simply obtained verification. If the answer is no, you have a small bit of new information. Something in your question was incorrect, but you might not know exactly what it is, or why, prompting another round of questions. Although the best follow-up is often Why, all too often, the follow-up is another round of Did You. How else to right the ship and show that you actually do know what you're talking about? Or at least that's the temptation.



The journalist questions, on the other hand, offer the potential for surprise. Who else was present for the conversation? What did you consult before making the decision? When are you planning to sell the company? How did you reach that decision? Where did you look for the documents? Questions like these can provide the treasures that you'll never find through a series of Did Yous.

My guess is that none of this is news to the reader. We all know the merits of Who, What, When, Where, Why, How (and Tell, Describe, Explain), and my guess is that we honestly believe this is how we frame our questions. I encourage you to

double check. I predict that you will hear yourself playing Twenty Questions much more often than you realize.

Challenge yourself to spend an entire day asking only open-ended, journalist questions (with Yes/No questions permitted solely for clarification). You are likely to find an internal resistance that you didn't expect. To help you anticipate reactions:

- You might feel like you're being intrusive. Asking “Why did you leave your job?” feels much different than “Did you leave your job for a better opportunity?”



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By their very nature, open-ended questions are more exploratory and often more personal. But that's the point. The best way to minimize concerns about intrusiveness is to first build rapport with the person you're questioning. Against a backdrop of trust, all communication is easier. A more direct option, to use in conjunction with rapport, is to address the concern directly. "I understand this may be a sensitive area, but it's important that I have a full understanding. Why did you leave your job?"

- You might feel like your question will be heard as an accusation – a particularly sensitive issue when you're interviewing your own client. "How did you decide to omit this fact from the final report?" is surely more likely to prompt defensiveness than "Did you only include materials in the final report that you thought were essential?" but your answer is far less likely to bring you closer to a true understanding of what happened. With this concern, it is critical to pay attention to your tone of voice. A neutral or curious tone can do wonders to calm the paranoid.
- You might hear the evidence devil on your shoulder saying "Objection, foundation!" Yes, open-ended questions are far more likely to assume facts not in evidence. "Where do you want to go to dinner?" assumes a desire to eat out. In ordinary human interactions, we do not need to lay foundation at every turn. Yet so many lawyers live their lives with a knee-jerk habit of avoiding a Rule 602 objection. Don't be that person.
- You might feel vulnerable. Open-ended questions don't include any obvious signal to the listener that you know

what you're talking about. You might worry that you look ignorant. In truth, the more you ask the interviewee to contribute to the conversation, the more you will be appreciated for making an effort to truly understand. You're paradoxically more likely to hear "What a great question" after an open-ended question than after another Did You. Show your mastery of the subject by being insightful, not through thinly-veiled speeches.

- You might feel impatient. When you ask an open-ended question, you're going to hear some actual sentences in a row from your conversation partner. Be not afraid. Check not your phone. The impatient interrupters among us (myself included) can have a very difficult time with this one. Part of the solution involves addressing your impatience, and that's a subject far beyond this article. But another part of the solution is narrowing your open-ended question. For example, rather than asking, "What happened at the meeting?" and then suffering through twenty minutes of play-by-play, you can use a headline ("Let's talk about the meeting") and then take it in pieces: Who was there? When did it start and end? Who spoke first? What did that person say?

Start by substituting open-ended questions for easy yes/no questions. At this point, it's just about building muscle memory. Rather than asking "Is the call at 10 or 11?" try "When is the call?" Instead of asking, "Was the general counsel at the meeting today?" ask "Who was at the meeting?" This stage is just about getting into the habit.

Once these open-ended questions have started becoming second nature, start branching out a bit. Ask for descriptions. Ask for explanations. And then remember that young child you once were. Ask Why, along with How Come and Why Not. And if you feel a bit strange, remember these words from C. S. Lewis, "When I became a man, I put away childish things, including the fear of childishness and the desire to be very grown up."



IS IT TIME TO . . .

Re-think *the* *Local* Patent Rules?

By Justin Weiner*

The Northern District of Illinois adopted Local Patent Rules in 2009. The Rules specify certain basic procedures for patent cases. They require initial (*i.e.*, pre-discovery) and final (*i.e.*, post-discovery) disclosures of the basic positions of plaintiffs and defendants regarding infringement and invalidity. Those disclosures replaced the practice of serving what were known as “contention interrogatories” — interrogatories requesting a party’s basis for its contention that a patent was infringed or not infringed, valid or invalid. Following the exchange of those disclosures, the Rules set out particular procedures and timing for claim construction proceedings.

The Local Patent Rules serve two basic purposes. *First*, they promote early disclosure of infringement and invalidity positions. Because patent “[c]omplaints and counterclaims in most patent cases [were] worded in bare-bones fashion,” the Local Patent Rules mandate “early disclosures” of infringement and invalidity positions. N.D. Ill. L.P.R., preamble at 1. The idea is to force disclosure of basic positions that the initial pleadings often lacked. *Second*, the Local Patent Rules aim to make scheduling of patent litigation more efficient. “The ... intention is to eliminate the need for litigants and judges to address separately in each case procedural issues that tend to recur in the vast majority of patent cases.”

Recent developments in federal procedural law call into question one of the underlying reasons for the Local Patent Rules: the need for early disclosure. Oddly, the developments began just before the Local Patent Rules went into effect, when the Supreme Court held in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) that Federal Rule of Civil Procedure 8 requires a litigant to plead “plausible” claims. How much *Twombly* and *Iqbal* changed Federal pleading standards is a matter of some debate, but at the very least, bare legal conclusions no longer suffice to state a claim.

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To adequately plead a claim, a plaintiff must do more than recite elements and state conclusions; she must plead “factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 566 U.S. at 678.

Twombly and *Iqbal* had no immediate effect on patent cases. The Appendix to the Federal Rules of Civil Procedure contained a series of Forms, which included form complaints. Rule 84 provided that the Forms “suffice[d] under these Rules to illustrate the simplicity and brevity that these rules contemplate.” Fed. R. Civ. P. 84 (2007). Form 18 contained only bare notice pleading, and the Federal Circuit interpreted its existence to mean that many claims for infringement could be pleaded with “an allegation of jurisdiction; ... a statement that the plaintiff owns the patent; ... a statement that defendant has been infringing the patent ... and ... a demand for an injunction and damages.” *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1333-35 (Fed. Cir. 2012); see also *K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282-85 (Fed. Cir. 2013) (noting that Form 18 “effectively immunize[d] a claimant from attack regarding the sufficiency of the pleading”).

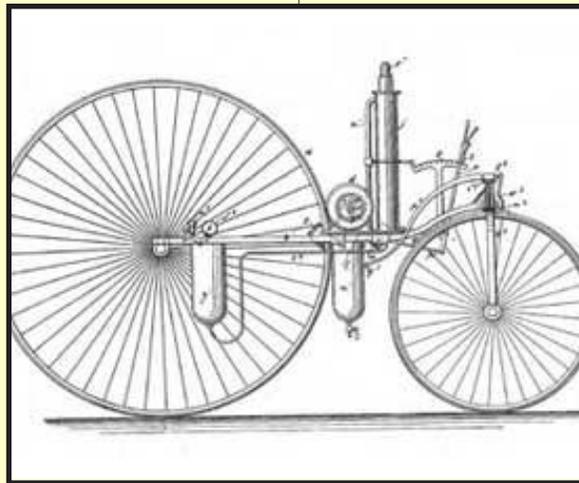
Infringement claims can no longer find sanctuary from *Twombly* and *Iqbal* in Form 18. In 2015, the Supreme Court adopted amendments to the Federal Rules that removed the Appendix of Forms and abrogated Rule 84, explaining that they were “no longer necessary.” Fed. R. Civ. P. 84 advisory committee’s note to 2015 amendment. Since the 2015 Amendments went into effect, courts have *uniformly*

concluded that *Twombly* and *Iqbal* apply to direct infringement claims. See, e.g., *Windy City Innovations, LLC v. Microsoft Corp.*, No. 16-CV-01729-YGR, 2016 WL 3361858, at *4-5 (N.D. Cal. June 17, 2016) (Form 18 “no longer provides the proper measure for the sufficiency of a complaint and that the *Twombly* and *Iqbal* pleading standards apply”); *Tannerite Sports, LLC v. Jerent Enterprise, LLC*, No. 15 Civ. 00180, 2016 WL 1737740, at *3 (D. Ore. May 2, 2016) (“[T]he salient fact is *Twombly/Iqbal* dictates direct-infringement pleading standards as of December 1, 2015.”); *Atlas IP LLC v. Pacific Gas & Elec. Co.*, No. 15

Civ. 05469, 2016 WL 1719545, at *2 (N.D. Cal. Mar. 9, 2016) (“Under the amended rules, allegations of direct infringement are now subject to the pleading standards established by *Twombly* and *Iqbal*, requiring plaintiffs to demonstrate a ‘plausible claim for relief.’”); *Mayne Pharma Int’l PTY Ltd. v. Merck & Co.*, No. 15 Civ. 438, 2015 WL 7833206, at *2 n.1 (D. Del. Dec. 3, 2015) (“Under the new rules, allegations of direct infringement will be subject to the pleading standards established by

Twombly and *Iqbal*, requiring plaintiffs to demonstrate a ‘plausible claim for relief.’”).

Although the Federal Circuit has not yet weighed in on the effect of the 2015 Amendments, there is little doubt it will reach the same conclusion. Even before the 2015 Amendments, judges sitting on the Federal Circuit had already started to signal their discomfort with applying different pleading standards to claims for direct infringement than to all other causes of action. See *In re Bill of Lading*, 681 F.3d 1323, 1347 (Fed. Cir. 2012) (Newman, J., dissenting) (The Supreme Court “reiterate[ed] that ‘*Twombly* expounded the pleading standard for all civil actions,’” including claims for direct patent infringement.). See also *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J. dissenting-in-part) (calling for rule change eliminating Form 18 because “a bare



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allegation of literal infringement using [Form 18] is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement.”).

In the Northern District, *Twombly* and *Iqbal* reach invalidity defenses too: Judges in this district hold that counterclaims and affirmative defenses must also meet the plausibility requirement. See, e.g., *Massenberg v. A & R Sec. Servs., Inc.*, 10 C 7187, 2011 WL 2909364 (N.D. Ill. July 18, 2011) (affirmative defenses); *Sarkis’ Café, Inc. v. Sarks in the Park, LLC*, 55 F. Supp. 3d 1034, 1040 (N.D. Ill. 2014) (counterclaims). Hence, defendants must also state plausible claims of invalidity when answering a complaint.

With *Twombly* and *Iqbal* in full effect in patent cases, at least some of the infringement disclosures required by the Local Patent Rules must be made at the pleading stage. A complaint for infringement must set forth “a tentative but nonetheless coherent theory” of infringement and an explanation of “how the accused products” infringe the patent’s claims. *Atlas IP LLC v. Pacific Gas & Elec. Co.*, No. 15 Civ. 05469, 2016 WL 1719545, at *2 (N.D. Cal. Mar. 9, 2016). In other words, the patentee needs to link the accused products to the elements of the patent’s claims. That requirement tracks Local Patent Rule 2.2’s requirements for infringement contentions: identification of the claims, accused products, and “where each element of each asserted claims is found within each” accused product. L.P.R. 2.2.

The requirement of more detailed infringement pleading *should* result in earlier disclosure of non-infringement positions as well.

Federal Rule 8 requires that a denial in an answer “fairly respond to the substance of an allegation.” Fed. R. Civ. P. 8(b)(2). If a patentee provides detailed infringement allegations in a complaint, the defendant must answer in kind, thereby teeing up the specific claim elements that the defendant believes are not infringed.

Twombly and *Iqbal* similarly require that a defendant put some of the disclosure that would be made in her Local Patent Rule invalidity contentions in her answer or counterclaim. How much disclosure is required for invalidity defenses or counterclaims

is not settled. For example, for §103 (obviousness) defenses, some courts require a general description of prior art, see *Helperich Patent Licensing, L.L.C. v. J.C. Penney Corp, Inc.*, No. 11-cv-9143, 2012 WL 3776892 (N.D. Ill. Aug. 28, 2012), whereas other courts require a specific list of prior art, see *Tannerite Sports, LLC v. Jerent Ent., LLC*, No. 15-cv-00180, 2016 WL 1737740 (D. Or. May 2, 2016). Regardless, *Twombly* and *Iqbal* require a defendant to put at least some of what is required by Local Patent Rule 2.3 in the answer or counterclaim.

With more disclosure front-loaded into the pleadings, some of the information that must be disclosed during the iterative back-and-forth timeline of the Local Patent Rules is actually disclosed even earlier. The Local

Patent Rules require four Initial disclosures (Infringement Contentions, Non-Infringement Contentions, Invalidity Contentions, and Responses to Invalidity Contentions) and four Final disclosures. But most of what comes with the Initial Contentions may now be in the pleadings, and to the extent it is not, the more detailed pleadings *ought* to lead to more targeted discovery. It may now be possible to streamline the number of disclosures (and perhaps the content of early disclosures) and thereby save litigants time and money.



Re-think the Local Patent Rules

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To be sure, the disclosure requirements of the Local Patent Rules will always serve a valuable function: They strictly control the content of infringement and invalidity disclosures and related discovery. Maintaining standard content in patent discovery is critical to avoiding wasteful discovery fights and ensuring that litigants disclose key theories and facts. Plausible patent pleading should not affect the content of the Local Patent Rules' disclosure requirements — only their timing and number.



Even if plausible pleading does not result in changes to the Local Patent Rules, litigants can attempt to streamline patent cases themselves. The procedures in the Rules are default requirements, subject to modification by the Court. *See* L.P.R. 1.1 (“The Court may modify the obligations and deadlines of the LPR based on the circumstances of any particular case.”). Nothing prohibits the parties from proposing a schedule that mandates fewer disclosures exchanged at a time that best suits the needs of a case. No rational party would give up the right to receive information from the opposition without receiving something in exchange, but a mutual agreement to dispense with or streamline initial disclosures may entice each party to give up their respective right to those disclosures under the Local Patent Rules — particularly if each already received similar information in the pleadings.

Problems remain. The inconsistency with which courts have applied the plausibility standard — particularly to pleading defenses — creates some uncertainty for litigants, and faced

with uncertainty, most will resort to the default Local Patent Rules. Procedural standards in case law develop in fits and starts, particularly compared to the smooth, bull-doing effect of a new set of rules. The final effect of plausible pleading on early patent disclosures will only become clear with a slow, sometimes painful development of case law.

It is, however, not too early to start thinking about how plausible pleading will affect our approach to patent cases. The Local Patent Rules sought early disclosure; plausible pleading provides

it — at least in part. Watching the development of pleading standards and adapting the Local Patent Rules accordingly will be critical to maintaining efficient patent case procedures in the Northern District of Illinois.

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REVISITING THE SEVENTH CIRCUIT’S
DECISION IN *PEPSICO*:

Inevitable Disclosure Injunctions

IN THE WAKE OF THE FEDERAL DEFEND
TRADE SECRETS ACT OF 2016

By *Kenneth J. Vanko**

Introduction

Trade secrets theft is big business, with some estimating losses to American firms at more than \$300 billion a year. *See* 2013 Report of the Intellectual Property Commission, at 1, available at www.ipcommission.org/report/ip_commission_report_052213.pdf. But despite the increasing importance of trade secrets to American businesses, state law traditionally has governed enforcement of this branch of intellectual property law. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 493 (1974) (stating “Congress, by its silence over these many years, has seen the wisdom of allowing the States to enforce trade secret protection.”). The States have done so either by adopting some version of the Uniform Trade Secrets Act or through applying common-law principles. *Compare* IND. CODE § 24-2-3-1 *et seq.* (enacted in 1982 and based on original 1979 Uniform Act); *with* 765 ILL. COMP. STAT. 1065/1 (enacted in 1988 and based on 1985 amendments to Uniform Act); and *Ashland Management, Inc. v. Janien*, 82 N.Y.2d 395, 407 (1993) (analyzing trade secrets claim under section 757 of *Restatement of Torts*).

Last year, Congress enacted the Defend Trade Secrets Act, which created a federal civil cause of action for trade secrets misappropriation. Section 2(c) provides that federal courts “shall have original jurisdiction of civil actions” brought under the DTSA. 18 U.S.C. § 1836(c). Federal courts’ jurisdiction, however, is not exclusive. As a result, the DTSA does not preempt state law. Although the DTSA mirrors many aspects of state trade secret law, one important difference stands out. It is Congress’ apparent rejection of the controversial “inevitable disclosure” doctrine, first brought to prominence in the Seventh Circuit case of *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

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This legislative judgment provides an opportunity to reevaluate and revisit *PepsiCo* itself after more than twenty years of guidance.

Emergence of a Doctrine: Inevitable Disclosure in the Seventh Circuit

The theory of inevitable disclosure carves a narrow slice off the Uniform Trade Secrets Act’s enabling language that allows a plaintiff to enjoin a “threatened” trade secret misappropriation. *See, e.g.,* 765 ILL. COMP. STAT. 1065/3(a). Put differently, courts in Illinois and elsewhere recognize the theoretical possibility that the risk of trade secret disclosure under certain circumstances may be so acute as to reveal an actual, overt threat of misappropriation.

Teradyne, Inc. v. Clear Communications Corp., 707 F. Supp. 353, 356 (N.D. Ill. 1989).

The real value in the inevitable disclosure theory is the broad scope of injunctive relief it affords: a judicially crafted, prophylactic injunction that operates just like a restrictive covenant agreement. Indeed, *PepsiCo* drew widespread attention precisely because it recognized a court’s ability to restrain an employee’s competitive activities in the absence of an underlying restrictive covenant agreement. *See* William Lynch Schaller, *Trade Secret Inevitable Disclosure: Substantive, Procedural & Practical Implications of an Evolving Doctrine* (Part I), 86 J. PAT. & TRADEMARK OFF. SOC’Y 336, 341 (2004)(stating “[i]nevitable disclosure moved to the mainstream following the Seventh Circuit’s influential decision in *PepsiCo v. Redmond*.”). To be sure, Illinois state and federal courts are ground-zero for this controversial theory.

The *PepsiCo* Case. PepsiCo sought a preliminary injunction against Bill Redmond, a high-level executive who oversaw a \$500 million business unit. The trade secrets to which Redmond had been exposed involved strategic-level “attack plans” for particular markets, including sports and “new age” drinks.

PepsiCo, 54 F.3d at 1264-66. PepsiCo had argued that its own trade secrets would inform Redmond’s executive, policy-making position at his new employer, Quaker. *Id.* at 1267-68. At the time, PepsiCo’s All Sport drink and Quaker’s Gatorade beverage were “fierce” competitors. *Id.* at 1263-64. Redmond, notably, had no restrictive covenant agreement under which he agreed not to work for a PepsiCo competitor after termination. *Id.* at 1264. All he had was a generic confidentiality agreement that all employees signed. *Id.*

The Seventh Circuit, reviewing for an abuse of discretion, accepted the district court’s conclusion that a preliminary injunction was appropriate under the inevitable disclosure

theory. *Id.* The court stated that under the Illinois Trade Secrets Act, “a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant’s new employment will inevitably lead him to rely on the plaintiff’s trade secrets.” *Id.* at 1269. The court further noted how PepsiCo’s claim for injunctive relief was not traditional, and that it was claiming Redmond could not help but rely on high-level, strategic trade secrets in working with Quaker. *Id.* at 1270.

Crucially, the Seventh Circuit cited a particular factual finding in the district court, which suggested the need for injunctive relief: Redmond’s lack of candor both before and after accepting the Quaker position. *Id.*

One often overlooked aspect of the district court’s injunction order is the limited relief PepsiCo actually obtained; Redmond was barred from working for Quaker for a little more than five months. *Id.* at 1267. By the time the Seventh Circuit ruled, the injunction had only a few weeks left until it expired. And the Seventh Circuit was cautious in its remarks on the merits, stating at one point that the relatively close facts did not “ineluctably dictate” the injunctive relief PepsiCo sought. *Id.* at 1271.

Other Courts’ Response to *PepsiCo*. Reaction to *PepsiCo* was predictable: inevitable disclosure cases spiked. More reported cases, though, didn’t produce uniformity or a clear sense of how courts even would apply the doctrine. Some district courts applied the inevitable disclosure theory of





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misappropriation by requiring the plaintiff to show some evidence that the defendant would be unwilling to preserve confidentiality. *H&R Block Eastern Tax Svcs., Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1075 (W.D. Mo. 2000). Others simply demanded a “stricter standard” of proof from the employer when it sought injunctive relief. *Barilla America, Inc. v. Wright*, No. 4:02-cv-90267, 2002 WL 31165069 at *9 (S.D. Iowa July 5, 2002). Still other courts rejected the doctrine outright, often citing the employee’s credibility and the lack of any improper acquisition of documents. *Del Monte Fresh Produce Co. v. Dole Food Co.*, 148 F. Supp. 2d 1326, 1336-38 (S.D. Fla. 2001).

Even in those jurisdictions that initially adopted the doctrine, like New York, courts almost immediately began to narrow the inevitable disclosure doctrine’s reach. One widely cited case after *PepsiCo* remarked that the inevitable disclosure rule “treads an exceedingly narrow path through judicially disfavored territory,” which courts should apply “in only the rarest of cases.” *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999). And now, more than twenty years after *PepsiCo*, courts are as split as ever with regard to inevitable disclosure’s place in trade secret injunction practice. Compare *LeJeune v. Coin Acceptors*, 849 A.2d 451 (Md. Ct. App. 2004) (rejecting doctrine) and *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002) (same) with *Cardinal Freight Carriers v. J.B. Hunt Transport Svcs., Inc.*, 987 S.W.2d 642 (Ark. 1999) (adopting doctrine).

Treatment in the District Courts. *PepsiCo*’s influence also resulted in a surge of district court decisions that addressed inevitable disclosure claims. As one might expect, those decisions typically involved a challenge to the claim’s plausibility on a *Rule 12(b)(6)* motion or an evidentiary presentation on a *Rule 65* preliminary injunction application.

A canvass of those decisions yields a truism: plaintiffs generally do well in stating an inevitable disclosure claim but almost invariably fail to establish a right to preliminary injunctive relief – particularly when plaintiffs seek to have that injunction operate as if the parties entered into a non-compete agreement. But from the case law emerged some further principles that have helped define the inevitable disclosure theory and limit *PepsiCo*’s reach.

Motions to Dismiss. District courts, for instance, have suggested the type of facts a plaintiff must plead to state a claim under the inevitable disclosure theory. To survive a *Rule 12(b)(6)* motion to dismiss, a plaintiff generally must allege something in addition to: (1) an ex-employee’s knowledge of the business; (2) his or her entering the same occupational field; (3) the apprehension that trade secret disclosure will occur; and (4) the solicitation of employees or customers. *Teradyne*, 707 F. Supp. at 357; *Complete Business Solutions, Inc. v. Mauro*, No. 1:01-cv-0363, 2001 WL 290196 at *5-6 (N.D. Ill. Mar. 16, 2001). *PepsiCo* and Judge Zagel’s influential *Teradyne* decision all but suggest a plaintiff pursuing a claim for inevitable disclosure must allege the defendant could not operate, or at least must incorporate, the former employer’s trade secrets in a new job or business. *PepsiCo*, 54 F.3d at 1270; *Teradyne*, 707 F. Supp. at 356-57. The level of factual details a plaintiff must provide to give color to that conclusion are still unknown.

The *Rule 12(b)(6)* inevitable disclosure opinions also reveal something more nuanced in the challenged pleadings. Despite invoking the inevitable disclosure theory of misappropriation, plaintiffs tend to allege facts that suggest the defendant already had wrongfully acquired trade secrets. This would appear to undercut the very need to invoke the doctrine in the first place, since improper acquisition (as opposed to use or disclosure) of a trade secret is itself an act of misappropriation. *Traffic Tech, Inc. v. Kreiter*, No. 1:14-cv-7528, 2015 WL 9259544 at *12 (N.D. Ill. Dec. 18, 2015). And at a minimum, facts showing surreptitious copying, downloading, or self-emailing of sensitive documents plausibly suggest a threatened misappropriation – removing “inevitability” from the equation entirely. See *Barilla America*, No. 4:02-cv-90267, 2002 WL 31165069 at *9 (stating “[t]he inevitable disclosure doctrine appears to be aimed at preventing





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disclosures despite the employee’s best intentions, and the threatened disclosure doctrine appears to be aimed at preventing disclosures based on the employee’s intentions.”).

These factual allegations, which suggest bona fide trade secret threats, typically reflect employees’ increased use of digitized documents and the prevalence of forensic tools to aid firms in pre-litigation discovery. See *CDM Media USA, Inc. v. Simms*, No. 1:14-cv-9111, 2015 WL 1399050 at *5 (N.D. Ill. Mar. 25, 2015) (denying Rule 12(b)(6) motion and noting employee allegedly downloaded information from company database and failed to return documents); *Luminate Techs., LP v. Integrated Data Storage, LLC*, No. 1:13-cv-3767, 2013 WL 5974731 at *5 (N.D. Ill. Nov. 11, 2013) (describing allegation that employees downloaded files to external drives and databases when they left their employment); *Mobile Mark, Inc. v. Pakosz*, No. 1:11-cv-2983, 2011 WL 3898032 at *2 (N.D. Ill. Sept. 6, 2011) (noting allegation that defendant copied its proprietary information). It is not surprising to see courts deny *Rule 12(b)(6)* motions with these supporting facts.

Motions for Preliminary Injunction. Pure inevitable disclosure cases – ones in which the employer attempts to enjoin future work based entirely on an ex-employee’s knowledge, memory, or industry experience – generally fare poorly at the injunction stage. A persuasive example from the Northern District of Illinois is Judge Chang’s opinion in *Saban v. Caremark Rx, LLC*, 780 F. Supp. 2d 700 (N.D. Ill. 2011). There, the court found the ex-employer, Caremark, was unlikely to succeed on its inevitable disclosure claim, and it relied on the following facts:

- (1) the employee hadn’t provided his new employer any trade secret information from Caremark;
- (2) the competition level at the new company was unrelated to the employee’s prior trade secret access at Caremark;
- (3) the employee’s new duties were different from those he previously had; and
- (4) the employee and his new employer took steps to ensure Caremark’s information was protected.

Id. at 735.

Subsequent cases in the Northern District of Illinois relied on these *Saban* factors, but it doesn’t appear they comprise a rigid analytical framework. The court in *Triumph Packaging Group v. Ward*, 834 F. Supp. 2d 796 (N.D. Ill. 2011), for instance noted that the current and ex-employer were not fierce competitors, along the lines of the *PepsiCo* case, and shared no customers at all. *Id.* at 810. Significantly, *Triumph Packaging Group* then distinguished the crucial fact that appeared to cause the district court in *PepsiCo* to enjoin Redmond’s employment in the absence of a non-compete clause: his lack of candor. *Id.* According to Judge Pallmeyer, the employee’s lack of candor in *Triumph Packaging Group* was secondary to the lack of direct competition between his current and former companies. *Id.* at 813. This decision illustrates courts’ understandable reluctance to extend *PepsiCo*.

Seventh Circuit Judge David F. Hamilton, while a district court judge, also addressed inevitable disclosure in *Dearborn v. Everett J. Prescott, Inc.*, 486 F. Supp. 2d 802 (N.D. Ind. 2007). That case arose in the context of a departing sales employee. But similar to *Saban*, the ex-employer had no evidence the employee removed documents when leaving and no evidence he was using any of the company’s information. *Id.* at 820. Judge Hamilton described *PepsiCo* as a case involving “extreme facts” reflective of an employee’s “bad faith.” *Id.* Also citing an Indiana case with unusual facts, Judge Hamilton concluded the inevitable disclosure “theory should remain limited to a rare and narrow set of circumstances in which the departing employee has acted in bad faith in taking or threatening to take valuable confidential information from the employer.” *Id.* The *Dearborn* case resembles other earlier, thoughtful decisions like *Barilla America* that attempted to confine *PepsiCo*’s reach – if not solely on that decision’s facts, then at least by crafting a model that raised the employer’s burden of proof. *Dearborn* also shows how difficult it is for courts to separate the concept of inevitability from that of a true threat.

Singing Inevitable Disclosure’s Dirge. But perhaps no inevitable disclosure case illustrates the theory’s wobbly foundation quite like Ohio’s *Polymet Corp. v. Newman*, No. 1:16-cv-734, 2016 WL4449641 (S.D. Ohio. Aug. 24, 2016). For fifteen years, Newman worked for Polymet, a manufacturer of hot extruded wire, in a variety of roles from shipping-and-receiving, to purchasing, and then sales. *Id.* at *2. He never signed a confidentiality or non-compete agreement. *Id.* Newman left to start his own business (Element Blue), but Polymet lacked any evidence Newman took anything with him. *Id.* at *5. And Newman offered several plausible explanations to show Element Blue’s

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production process was different than Polymet’s. *Id.* The court then granted Polymet’s motion for injunctive relief under the inevitable disclosure doctrine, effectively relying on the fact that Newman sold hot extruded wire to some of Polymet’s customers and used a few Polymet vendors. *Id.*

The confusing aspect to *Polymet* comes, however, when the district court attempted to *apply* the inevitable disclosure doctrine to the plaintiff’s requested injunction order. Instead of limiting Newman’s work and barring Element Blue from selling hot extruded wire, the court instead entered a vague non-use order that prohibited Newman from using “Polymet’s confidential, proprietary or trade secret parameters, processes, or procedures, and Polymet’s confidential pricing and product development strategies for [his] own benefit.” *Id.* at *9. (Such a vague, indeterminate order likely would violate the specificity requirements of *Rule 65(d)*, at least in the Seventh Circuit. *Patriot Homes, Inc. v. Forest River Housing, Inc.*, 512 F.3d 412, 415 (7th Cir. 2008).) And the court rejected the call to issue broader conduct-based relief that girds the *entire purpose* of the inevitable disclosure doctrine, stating: “prohibiting Element Blue from making hot extruded wire, which would effectively shut down the company, is a bridge too far given the current lack of any direct evidence of misappropriation.” *Id.* at *8 (emphasis added).

That statement actually might describe the inevitable disclosure theory best: “a bridge too far.” In reality, the court in *Polymet* saw the superficial appeal of the doctrine, and then when it came time to apply it, simply couldn’t pull the trigger. It backed off ordering the very injunctive relief that justified the doctrine’s existence in the first place, thereby proving its inherent shortcomings.

The Defend Trade Secrets Act: Limiting Injunctive Relief

It is against this backdrop of split authority, confusion, and uneven doctrinal application that the Defend Trade Secrets Act of 2016 takes center stage. The DTSA, 18 U.S.C. § 1831, *et seq.*, overlaps significantly with the various state versions of the Uniform Trade Secrets Act. That parallelism spans important definitions (such as that of a “trade secret” itself) to the availability of multiple forms

of damages, including reasonable royalties. However, the DTSA’s provision on injunctive relief contains a crucial limitation absent from every State’s trade secrets statute. That remedial carve-out addresses, though not in name, the inevitable disclosure doctrine.

The DTSA’s injunction provision is superficially straightforward but analytically nuanced. It states that a district court may grant an injunction to “prevent any actual or threatened misappropriation” as long as the order does not:

- (I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or
- (II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business.

18 U.S.C. § 1836(b)(3)(A)(i)(I-II). Each limitation on injunctive relief merits further exploration.

Sub-section (I) and Inevitable Disclosure. The Senate Report describes sub-section (I) as a reinforcement of “the importance of employment mobility.” S. Rep. No. 114-220 at p. 9, 114th Cong., 2d Sess. 3 (2016). It further notes the inevitable disclosure doctrine, but does not outright suggest sub-section (I) eliminates its applicability. And, to be sure, Section 2(f) of the DTSA makes clear that the statute does not “preempt any other provision of law.” *Id.* Despite the Senate Report’s opaque treatment of sub-section (I), the provision is a direct attack on the inevitable disclosure doctrine against employees.

That said, sub-section (I) does not render the inevitable doctrine entirely inapplicable. Two other factual scenarios are, by implication, excluded from this DTSA provision. The first implicates the factual matrix presented by the *Polymet* case, for recall that Newman there left to start his own business, Element Blue. Assume a hypothetical DTSA suit, rather than one actually brought under Ohio law. Under a plain reading of sub-section (I), an inevitable disclosure injunction in *Polymet* would not have prevented Newman from “entering into an employment relationship.” He was the owner of Element Blue, not a prospective employee. At least one federal court applying sub-section (I) already has concluded the same in the “employee-turned-entrepreneur” scenario. *Engility Corp. v. Daniels*, No. 1:16-cv-2473, 2016 WL 7034976 at *10 (D. Colo. Dec. 2, 2016).

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The second scenario concerns a failed business transaction, where a potential acquirer gains access to the target’s confidential or trade secret information during negotiations or due diligence. Sub-section (I) would not apply to this fact-pattern either. However, inevitable disclosures cases like this tend to go nowhere, with the Fifth Circuit offering a sound policy rationale for rejecting the inevitable disclosure theory:

Certainly, “misappropriation” of a trade secret means more than simply using knowledge gained through a variety of experiences, including analyses of possible target companies, to evaluate a potential purchase. To hold otherwise would lead to one of two unacceptable results: (i) every time a company entered into preliminary negotiations for a possible purchase of another company’s assets in which the acquiring company was given limited access to the target’s trade secrets, the acquiring party would effectively be precluded from evaluating other potential targets; or (ii) the acquiring company would, as a practical matter, be forced to make a purchase decision without the benefit of examination of the target company’s most important assets – its trade secrets.

Omnitech Int’l, Inc. v. Clorox Co., 11 F.3d 1316, 1325 (5th Cir. 1994); see also *Destiny Health, Inc. v. Conn. Gen. Life Ins. Co.*, 39 N.E.3d 275, 285 (Ill. App. Ct. 2015) (adopting *Omnitech* rationale to affirm summary judgment on trade secrets claim).

Applying Sub-section (I) to *PepsiCo*. It helps to revisit *PepsiCo* as if the employer brought it under the DTSA. Applying sub-section (I) to the facts of that case, the district court could not have restrained Redmond from working at Quaker. Nor could it have imposed any restraints on his employment at Quaker absent some factual finding under *Rule 65* that his specific work directly correlated to a threat of trade secret disclosure. *PepsiCo*’s apprehension of harm, combined with Redmond’s direct competition and

overlapping job duties, simply would not rise to the level of a *threat* sufficient to enjoin any particular work (unless one now views Redmond’s lack of candor as an actual threat). Under a hypothetical DTSA claim, *PepsiCo* would have come out differently.

Sub-section (II) and State Non-Compete Law. The tougher nut for courts to crack may be the second limitation on district courts’ ability to issue injunctive relief. The DTSA also bars injunctions that “conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business.” 18 U.S.C. § 1836(b)(3)(A)(i)(II). While sub-section (I) places the inevitable disclosure doctrine squarely in its crosshairs, sub-section (II) focuses on employment-based restrictive covenants.



Determining “Applicable State Law.” The first step in analyzing sub-section (II) involves a determination of “applicable state law.” In trade secret misappropriation cases, courts look to “the law of the place where the alleged wrong was committed” or where the benefit of the misappropriation was obtained. See *Wilson v. Electro Systems, Inc.*, 915 F.2d 1110, 1117 (7th Cir. 1990); *Zucker v. American Greetings Corp.*, 1:94-cv-1844, 1995 WL 398933 at *2-3 (N.D. Ill. June 30, 1995); *Mergenthaler Linotype Co. v. Leonard Storch Enterprises, Inc.*, 383 N.E.2d 1379, 1389 (Ill. App. Ct. 1978). Determining which State’s law applies to a misappropriation claim is no simple task, particularly if an employee’s work crosses state lines, if the claimed trade secrets are useful in multiple jurisdictions, or alleged acts of misappropriation took place in different states.

The most robust choice-of-law discussion in trade secrets cases comes from *Flavorchem Corp. v. Mission Flavors and Fragrances, Inc.*, 939 F. Supp. 593, 596-97 (N.D. Ill. 1996). There, the court noted that in a multi-state trade secrets

dispute, the choice-of-law question can be a “tricky issue.” *Id.* at 597. Ultimately, the court applied section 145(2) of the *Restatement (Second) of Conflicts of Laws* and its “most significant contacts” approach, relying on the following factors: (1) where the plaintiff suffered injury; (2) where the alleged misappropriation occurred; (3) the parties’ residence; and (4) the “center of the parties’ relationship.” *Id.* at 596-98. The tie-breaker seemed to be the first factor – the place where the plaintiff felt its injury. *Id.*



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Assessing the Restraint as a “Hypothetical Contract.” Once the court resolves the choice-of-law analysis, it must look to the State’s subsisting law governing non-compete agreements. That qualitative assessment will inform a federal district court whether a requested DTSA injunction bumps up against a State public policy against restraints on trade.

Four States ban non-compete agreements outright, even though some of these allow for narrow restrictive covenants that prohibit work with certain employer clients. CAL. BUS. & PROF. CODE § 16600; MONT. CODE ANN. § 28-2-703; N.D. CENT. CODE § 9-08-06; OKLA. STAT. TIT. 15, §§ 217, 219A. To be sure, many States assess non-compete agreements under a familiar rule-of-reason framework. But beyond this high-level consistency, some crucial, case-dispositive rules differentiate the States in how they treat particular contractual restraints. See, e.g., *Tradesman Int’l, Inc. v. Black*, 724 F.3d 1004, 1017-19 (7th Cir. 2013) (Hamilton, J., concurring) (discussing State differences in willingness to blue-pencil or modify overbroad non-competes, even though noting consistency of basic non-compete principles at a “superficial level”).

Permutations in State non-compete law could pose a challenge for federal courts in issuing DTSA-based injunctions. The text of sub-section (II) suggests the court must examine a hypothetical restrictive covenant agreement under applicable State law to determine if the proposed injunction order violates public policy. Put another way, a district court, when evaluating a proposed trade secrets injunction, should ask whether State law would enable the court to issue the same order through enforcement of a restrictive covenant.

This is precisely the approach Judge Martinez of the District of Colorado took in *Engility Corp. v. Daniels*, where the ex-employee in that case had no restrictive covenant agreement. *Engility*, 2016 WL 7034976 at *10-11. Colorado law permitted enforcement of non-competes to protect trade secrets, and the court found that Daniels (the former employee) had indeed misappropriated valuable trade secret information before starting his own business. *Id.* at *4-6, 8-9. The court’s injunction order was, therefore, consistent with Colorado statutory law. *Id.* at *10-11.

The “hypothetical contract” approach appears textually consistent with sub-section (II) and certainly works well when the plaintiff (like the employer in *Engility*) establishes a clear nexus between the identified trade secrets and the defendant’s ongoing business activities. On that score, courts always have had the ability to issue more robust injunctions – in effect preventing business activity beyond just the use of a trade secret – to remediate misappropriation. See *Schulenburg v. Signatrol, Inc.*, 212 N.E.2d 865, 869-70 (Ill.1965) (holding proper scope of production-based injunction, arising from misappropriated blueprints, should be consistent with time that defendants could reverse-engineer the product). The harder cases for courts will appear on the edges, when a requested injunction goes somewhat further than enjoining conduct directly tied to the trade secret itself.

Suppose, for instance, an Illinois employer seeks injunctive relief under the DTSA that seeks to bar a sales employee from working with all of the employer’s former customers. Further assume the claimed act of misappropriation concerns the employee’s downloading of her own customer list, but not those of other sales employees. An injunction on this basis could violate a hypothetical restrictive covenant in breadth similar to that of the requested injunction, for Illinois law generally finds that this type of restrictive covenant is overbroad. See, e.g., *Abbott-Interfast v. Harkabus*, 619 N.E.2d 1337, 1341 (Ill. App. Ct. 1993) (noting restrictive covenant should be limited to customers with whom employee developed relationship).

The better way to approach this, however, may be to examine sub-section (II) through the prism of a broader expression of State public policy, as opposed to judicially crafted rules concerning the breadth of non-competes. On that score, the States with legislative limits on the use of non-competes seem ripe candidates for a more rigorous application of sub-section (II). Examples include Hawaii’s ban on non-competes for workers in technology fields HAW. REV. STAT. § 480-4 and Oklahoma’s law prohibiting employee restraints except to protect the “established customers” of an employer. OKLA. STAT. TIT. 15, § 219A. But in the main, it may be a stretch for a defendant to invoke sub-section (II) successfully whenever the requested trade secrets injunction pushes slightly past the limits of what the common-law rules concerning non-compete enforcement may allow in a particular case.

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Inevitable Disclosure Injunctions

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Applying Sub-section (II) to *PepsiCo*. Revisiting *PepsiCo* in light of sub-section (II) does not pose a particular challenge. Illinois law allows for the enforcement of a reasonable restrictive covenant, a standard that requires a court to consider the totality of the circumstances surrounding the covenant. *Reliable Fire Equipment Co. v. Arredondo*, 965 N.E.2d 393, 396-97, 403 (Ill. 2011). Those circumstances may include the employee’s “acquisition of confidential information,” as well as time-and-place restrictions. *Id.* at 403. Given Redmond’s high-level position with *PepsiCo* and his undisputed access to competitively sensitive information, an Illinois court could enforce a market-based non-competition agreement against Redmond without violating State law. *See, e.g., Midwest Television, Inc. v. Oloffson*, 699 N.E.2d 230, 235 (Ill. App. Ct. 1998) (enforcing 100-mile work restriction that was reasonably tied to radio station’s broadcast range). True, many non-competes are unenforceable – but only through an as-applied analysis of case-specific facts and not because of a uniform State law. *See AssuredPartners, Inc. v. Schmitt*, 44 N.E.3d 463, 472-73 (Ill. App. Ct. 2015) (finding market-based non-compete in wholesale insurance brokerage business to be unenforceable). Applying sub-section (II) to *PepsiCo*, the district court’s injunction barring Redmond’s employment at Quaker would not violate State law, since *PepsiCo* and Redmond hypothetically could have agreed to a market-based restraint consistent with the actual trade secrets injunction.

Conclusion: The Future of *PepsiCo* and Inevitable Disclosure in the Seventh Circuit

PepsiCo always has presented challenges and opportunities, both for bench and bar. The inevitable disclosure doctrine is counterintuitive and enables a plaintiff to entrench an adversary

in expensive litigation with few means for an innocent defendant to recoup legal fees. By the same token, a proper application of the doctrine – in what Judge Hamilton called a “narrow set of circumstances” – should result in a quick injunction proceeding and limited, prophylactic relief.

After more than twenty years, one rightly could view *PepsiCo* two different ways: as a case either limited to its rather unique facts or one where the plaintiff actually established a “threatened” misappropriation. Neither view would be controversial, and it would assist district courts from opening up the doctrine to a

broader use. But assuming the doctrine exists beyond these limits I’ve suggested, district courts can confine *PepsiCo* to prevent overuse in several ways:

- (1) establish a de facto heightened pleading standard, somewhat analogous to *Rule 9*;
- (2) require an early identification of the particular trade secrets at issue, before forcing the defendant to wade into the unruly thicket of discovery; and
- (3) presumptively limit *PepsiCo* to cases involving technical trade secrets or high-level executives.

Along with the limited success plaintiffs have had in pursuing inevitable disclosure claims, these guideposts may prevent wasteful litigation and weed out lawsuits that serve only an anti-competitive purpose.

The Defend Trade Secrets Act has helped clarify the significant challenges *PepsiCo* has presented over the years. Its passage only adds to the complex choices litigants face. Will plaintiffs attempt to pursue inevitable disclosure under both State law and the DTSA? If federal jurisdiction otherwise exists, will plaintiffs avoid pleading a DTSA claim in district court altogether? Will courts re-examine *PepsiCo*’s central holding in light of the DTSA’s limits on injunctive relief? Are inevitable disclosure cases destined to proceed in state court, where judges will have little incentive to assess the DTSA?

These questions are coming. I’m looking forward to the answers.





Avoiding Missteps

OVER THE SCOPE OF THE BANKRUPTCY COURT'S AUTHORITY TO ISSUE FINAL ORDERS

*By David Christian**

Attorneys regularly respond to complaints in bankruptcy court without sufficient assertions of their client's position on the nature and extent of the bankruptcy court's jurisdiction to enter final orders or judgment. This results in both a failure to comply with the rules and, under Supreme Court precedent, a real risk of waiver. Depending on the circumstances, attorneys may thereby prejudice their clients and create malpractice risk.

Federal Rule of Bankruptcy Procedure 7012(b), in addition to making provisions of Federal Rule of Civil Procedure 12(b)-(i) applicable to adversary proceedings in bankruptcy, adds the requirement that, "A responsive pleading shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court." Fed. R. Bankr. P. 7012(b). (This rule does not apply to "contested matters" – relief sought by motion and objected to in the main bankruptcy case. *See* Fed. R. Bankr. P. 9014(c).) The statement required by Rule 7012(b) would ordinarily be made in response to the jurisdictional allegations in the complaint. For example, if the complaint alleges that the causes of action asserted by the plaintiff are "core," a defendant might respond by denying that the complaint raises core proceedings and, further, that the defendant does not consent to the entry of final orders or judgment by the bankruptcy court. But, importantly, a defendant is required to make the statement about its position on the extent of the bankruptcy court's authority regardless of whether the complaint includes allegations on the subject.

Although some courts will read a lack of affirmative consent in a responsive pleading to mean that the requirement of consent for final orders by a bankruptcy judge has not been met, a defendant who fails to include the statement required by the rule runs the risk that it will waive any objections to the entry of final orders by the bankruptcy judge. This could adversely impact the level of later review by an Article III district judge. For instance, if a bankruptcy judge cannot enter final orders in a case, the

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Avoiding Missteps

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bankruptcy judge must issue a report and recommendations to the district court akin to a magistrate judge. The district court would ordinarily provide de novo review (including the possibility of taking testimony or other evidence, although this is unusual as a practical matter). In contrast, if the bankruptcy judge enters a final order, the district court will sit as an appellate court, reviewing the bankruptcy court’s fact finding for clear error and discretionary determinations for an abuse of discretion.

These technical aspects of bankruptcy practice have taken on new significance after the Supreme Court’s decisions in *Stern v. Marshall*, 562 U.S. 2 (2011) and its progeny. In *Stern*, the widow Vickie Lynn Marshall (better known as Anna Nicole Smith) filed bankruptcy after the death of her elderly husband, reputed to be one of the wealthiest men in Texas. Her deceased husband’s son filed a proof of claim in the bankruptcy case for defamation, then Vickie counterclaimed by asserting tortious interference with the gifts she expected to receive from her deceased husband. After two trips to the Supreme Court, the Justices held that the Congress’ decision to label Vickie’s counterclaim as “core” – and thus subject to entry of judgment by an Article I bankruptcy judge – could not deprive the defendant of his constitutional right to adjudication by a district court judge appointed with the protections inherent in Article III, namely life tenure and protection from diminution in salary.

Because the *Stern* decision purported to be “narrow” and left many unanswered questions, application of *Stern* to various scenarios became the subject of frequent litigation. Much of this litigation concerned the possible application of waiver principles to “*Stern* issues.” For example, a man named Sharif attempted to discharge a debt to Wellness International Network, Ltd. Wellness filed a declaratory judgment action against Sharif in bankruptcy court seeking a determination that alleged trust assets were part of Sharif’s bankruptcy estate. The bankruptcy court entered a default judgment against Sharif, but while Sharif’s appeal to the district court was pending, the Seventh Circuit held that *Stern* limited the bankruptcy court’s power to enter judgment to claims that would augment the bankruptcy estate and exist without regard to bankruptcy. Later, the Seventh

Circuit held that Sharif’s *Stern* objection to the bankruptcy court’s entry of judgment against him could not be waived.

In *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), the Supreme Court reversed, holding that Article III permits bankruptcy judges to adjudicate *Stern*-type claims with the parties knowing and voluntary consent. Significantly for practitioners, the Supreme Court held that this consent need not be express. Thus, the parties’ conduct can lead to a finding of consent to entry of final orders and judgment by the bankruptcy court.

As in *Wellness*, a determination of what conduct constitutes the kind of knowing and voluntary consent to final adjudication by bankruptcy judge will be fact-intensive. Practitioners open their clients to risk that implied consent will be asserted when they fail to record their objections to entry of final orders by the bankruptcy court early and often. Even if implied consent is not found, a litigant can be forced into potentially expensive and time-consuming side litigation over the subject. If implied consent is found, then the client may be prejudiced and an allegation of malpractice may result.

Practitioners should take several steps to avoid unnecessary litigation over this subject. First, absent a conscious decision that a litigant prefers final adjudication in the bankruptcy court, a litigant should record his objection to the entry of final orders and judgment by the bankruptcy court in his first substantive filing. For instance, any motion to dismiss should include a section with a statement of the litigant’s position on the scope of the bankruptcy court’s authority (as required by Bankruptcy Rule 7012(b)). If the initial filing is not an answer, a litigant should also include his position in response to the jurisdictional allegations of the complaint when an answer is filed, even if the plaintiff does not effectively plead the bankruptcy court’s jurisdiction and scope of authority.

Additionally, a practitioner should keep in mind at every turn in the proceedings the possibility that his conduct after the filing of responsive pleadings might be implied consent to proceeding in the bankruptcy court. Conducting motion practice about discovery disputes, asking the bankruptcy court for summary judgment, and other common events during litigation might be asserted by an opponent as a fact supporting the litigant’s knowing and voluntary consent to the entry of final orders by the bankruptcy court. Thus, counsel should regularly consider whether submissions to the court should be qualified by the party’s continuing objection.



LINK AND REFERENCE ROT IN JUDICIAL
INTERNET CASE CITATIONS AND THE
**Seventh Circuit
Library Solution**

By Barbara Fritschel* and John Klaus**

You may not have thought about it, but lawyers are used to having stable information. The text of a case does not change whether it is in print or available from one of the commercial legal research databases. The text of a statute does not change unless it is amended by the legislature, a process that can be tracked and recorded, again either in print or online. In a judicial system that relies on stare decisis, the stability of information is valued.

With the development of graphical interfaces in the mid-1990s, the Internet became a popular place to store and share information. The types of information that became available exploded. Lawyers could now easily access government documents, treaties, health information, municipal codes and regulations, scholarly articles and historical financial information. Courts could use the Internet to provide information to inform the reader about the context of a case, provide definitions of specialized terminology and provide access to the materials mentioned above.

Courts started citing to the Internet in 1996. The first U.S. Supreme Court case to cite to the Internet was Justice Souter's concurrence in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996). He offered two Internet citations — one to a USA Today article and the second to the Gateway company website. Since then the Supreme Court has cited to the Internet over 300 times. One study showed that “all of the Justices serving on the Rehnquist Court cited at least one website in a majority opinion.” Raizel Liebler and June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link*, 15 Yale J. L. & Tech. 273, 279-280 (2013).

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Seventh Circuit Library Solution

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The Seventh Circuit followed with its first Internet citation in *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997). Again, the citation was in a footnote, providing a link to an EEOC document. To date, the Seventh Circuit has cited to the Internet in over 1,250 cases, both published and unpublished. This figure places it second among the circuits in Internet citation, only behind the much larger Ninth Circuit, which has about 40 more cases relying on Internet citations.

The types of information the Seventh Circuit has cited to is quite varied. Definitions, country reports in immigration cases, government information, parties' websites, newspaper articles, youtube videos, and even information produced by the courts such as local rules and jury instructions are among the most common types of information cited. While some of these have print equivalents, the citation to the Internet provides a convenient place for people to access the information.

Unfortunately, studies have shown that a big difference between print and Internet materials is the stability of the information. See Arturo Torres, *Is Link Rot Destroying Stare Decisis as We Know it: The Internet-Citation Practice of the Texas Appellate Courts*, 13 J. App. Prac. & Process 269 (2012), Nick Szydowski, *Dead Link or Final Resting Place: Link Rot in Legal Citations*, 18 AALL Spectrum 7 (April 2014). Print and commercial databases have quality control measures in place to ensure unnecessary changes are not made. The quality control on the Internet varies from site to site. Researchers have identified two sources of instability with Internet citations in judicial opinions — link rot and reference rot. Jonathan Zittrain, Kindra Colbert and Lawrence Lessig, *PERMA: Scooping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 Harv. L. Rev. F. 176 (2013-2014). Link rot is when you click on the URL (Uniform Resource Locator) and do not get to the page you are expecting because the Internet site itself is unstable. This can

occur for several reasons. Website reorganization is a common one. Others include the website going to a different organization, (like the overhaul of the White House website with a change in administration), hosting companies going defunct or the company itself is out of business. Reference rot occurs when you are able to pull up the page but the information on the page has changed since the court cited it. Here the information itself is unstable. Sometimes this is readily apparent with a different date on the document. However, web pages are often updated without notification that material has changed.

Studies on rot in court opinions show that link rot exists at about 30% of the citations. Jonathan Zittrain, Kindra Colbert and Lawrence Lessig, *PERMA: Scooping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 Harv. L. Rev. F. 176 (2013-2014). While it is anticipated that the older the citation, the more likely for link rot, studies showed that even citations only a year old can be subject to significant link rot. The link rot comes from all sources. One of the worst domains for link rot is the .gov domain as government websites are often restructured. Link rot also affects all types of documents — .txt, .html and .pdf. Reference rot is even more prevalent. The Jonathan Zittrain article mentioned above showed that nearly 50% of U.S. Supreme Court citations suffered from reference rot. Indeed, of the two citations in *Denver*, the citation to the Gateway home page brings up a German company's website.

In 2007, the Seventh Circuit Library system decided to do screen captures of the webpages cited in the court's opinions. They were the first circuit to start screen captures. After seeing that there was significant link rot from the earlier cases, it was decided to capture screen shots for cases issued after January 1, 2007. In addition to the screen capture, a watermark is added indicating the date the screen capture was made. This would allow a researcher to make an independent judgement as to whether any reference rot had occurred. Library staff attempt to get screen

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Seventh Circuit Library *Solution*

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captures within a day or two of an opinion's release but this is not always possible. The library created a webpage <http://www.lb7.uscourts.gov/archivedurls.html> to provide access to the screen captures. The Seventh Circuit URL archive has been cited in federal court cases, law review articles, books, a speech from a U.S. Government officials and numerous scholarly articles. In the published remarks by a FTC Commissioner he links to our archive because the item referenced in his speech is no longer available on the FTC's website.

In 2016, the decision was made to add the screen captures to the Pacer docket to ensure easier accessibility of the materials to researchers. A meeting was held with representatives from the library and the circuit clerk's office to figure out how the program would be implemented. Among the concerns was how to address youtube or other video files since Pacer only accepts .pdf files. It was decided to insert language directing people to the library site where this type of file could be

stored. It was also agreed to list whether a citation appeared in a concurrence or dissent, including the name of the judge who authored the concurrence or dissent. Regardless of when the docketing occurred, the date for the docket entry is the same date as the opinion, making it easier to find the Internet citations without having to scroll throughout the entire docket.

After training, Barbara Fritschel started a retrospective project to add over 2,000 screen captures to the Pacer dockets. Some difficulties were encountered. Some files were encrypted or had other features such as fill in the blanks which required conversion before CM/ECF would accept those files. Other files were too large and had to be split into smaller segments. Approximately one percent of the files required extra work from IT or the clerk's office to get the file into a form that could be docketed. Some dockets were located on the pre CM/ECF system and so the screen captures could not be added to the docket sheet. This project was completed in November 2016.

Docketing of screen captures continues. This project addresses both issues of link and research rot. Current cases are added within a day or two of issuance. While the library site listed above will be the most comprehensive site, it is hoped that by adding the materials to the docket sheet, it will make it easier for researchers to see what information the judge(s) used to inform the opinion.

Upcoming Board of Governors' Meetings

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Tuesday, May 2, 2017*

**at the annual conference at the JW Marriott, Indianapolis, Indiana*

Saturday, September 9, 2017

Saturday, December 2, 2017

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM



Book Review

By Jeffrey Cole*

RICHARD POSNER

BY WILLIAM DOMNARSKI**

In his celebrated Speech on John Marshall, Holmes told his audience that “it is most idle to take a man apart from the circumstances which, in fact, were his... A great man represents a great ganglion in the nerves of society... and part of his greatness consists in his being *there*.” (emphasis in original). For lawyers and judges being *there* means being one of only 113 people who, since the beginning of the Republic, have made it to the Supreme Court. Given the small number of Justices on the Court at any one time and the nationwide effect of the Court’s few decisions, coupled with the anonymity of the large number of federal appellate court judges, it should come as no surprise that judicial biographies of lower federal court judges are largely nonexistent.

There are rare exceptions, the most notable being Gerald Gunther’s 680-page biography of Learned Hand, who Judge Posner has said “is considered by many the third greatest judge in the history of the United States, after Holmes and John Marshall....” Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 Yale L.J. 511 (1994). Another notable exception is the biography of Henry Friendly, who Judge Posner, with undisguised admiration, has called “the most powerful legal reasoner in American legal history.” See David M. Dorsen, *Henry Friendly: Greatest Judge of His Era* (The Belknap Press of Harvard University Press 2012)(Foreword by Richard Posner).

And then there is Richard Posner, whose place in the Pantheon of judicial greatness was long ago assured. The New York Times has said of him: “in the past half-Century there has been no figure more dominant

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**Mr. Domnarski has been a lawyer and writer of great distinction for over 30 years. His previous books include *Federal Judges Revealed*, *In the Opinion of the Court*, *The Great Justices*, and *Swimming in Deep Water*. He has written numerous articles that have appeared in the Nation’s leading law and history reviews, and he is the author of numerous articles on legal history and literary criticism.



Book Review

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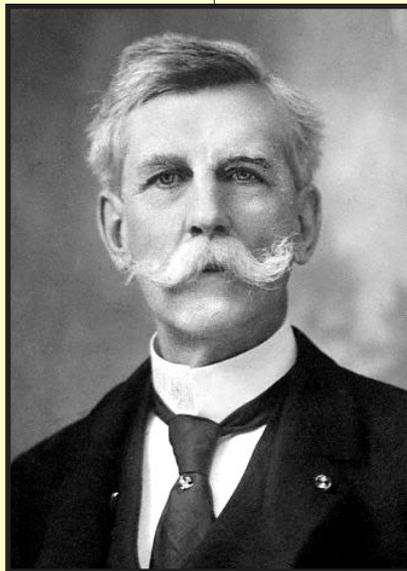
or more controversial in American law than Posner.” It does not matter whether you disagree with Posner or even like him. Certain things are simply undeniable: he is prolific beyond measure – more so than any judge, at any level of the federal or state judiciary, past or present. To borrow a phrase from Justice Cardozo – whose picture Posner keeps in his chambers, along with that of Holmes and Friendly – Posner’s “fecundity...would make Malthus stand aghast.”

Even those who vehemently disagree with Posner concede his creativity and his insatiable curiosity. He has written 65 books on all manner of complicated subjects, with most spanning several hundred pages and having a depth of analysis that is astonishing. If you want to know about sexuality and economics; empathy in critical race theory; plagiarism; economics and the law; national security; Holmes; Cardozo; Hand; Friendly; originalism; President Clinton’s impeachment; Greek love and the institutionalization of pederasty; economics and the law; jurisprudence; law and literature; radical feminism; eugenics; governmental intelligence efforts in the wake of the 911 attacks; how judges think; the failure of capitalism; sex and reason; public intellectuals; problems of jurisprudence; aging and old age; perspectives on judges and jurisprudence; issues of moral and legal theory; problems of jurisprudence; the behavior of federal judges; *Bush v. Gore*, and scores of other abstruse topics, Posner is your man.

He has authored some 200 law review articles, all intricate – and most long. He has written articles voicing and championing his own views and responding to critics, and reviewing, often at length, the work of others in various disciplines. The New York Times recently placed the number of articles at “over 500.” He has been interviewed repeatedly, lectures as often as he pleases,

and had a blog with a Nobel prize winner; he has been a professor at the University of Chicago; has written the introductions to scores of books written by others; is mentioned by name literally thousands of times in the legal literature and in judicial opinions. Whatever one may think of Posner’s conclusions, his outpouring of thought is astonishing and is unmatched by any judge in history. Indeed, his written work may have exceeded that of anyone in any discipline.

And all of this has been accomplished while he has been the most prolific federal appellate court judge in the Nation. He has written over 3,000 opinions as an active judge on the Seventh Circuit, leading the federal appellate judges in total output, in most if not all years, since his appointment to the Seventh Circuit in 1981. Things which were thought simple and settled have taken on newer and more subtle meanings. And he has generated more than a little controversy among members of the bar and in the academy. Even a number of other judges have expressed disagreement with him.



And yet, until quite recently there was no biography of Richard Posner. Part of the problem – if it can be called that – is that

Posner is alive and well. Posner had taken the position that judges seldom made good subjects for biographies, and, in any event, he thought a judicial biography ought to await the judge’s passing from the scene. But that was before the biography of Henry Friendly in 2012. Not surprisingly, Posner was asked to write the “Foreword.” In it, Posner explained that while he “was not entirely negative” about judicial biographies, he did question “the value of the genre.” And, he had his doubts about whether Friendly was a promising subject for a biography. After all, he noted, Friendly was not a “character” like Learned Hand – Posner’s description. He had not led an exciting early life like Holmes or Byron White; he had not been involved in great political events like Brandeis, Frankfurter, and Jackson. He was, Posner said, merely a lawyer, although a highly successful one, in New York. But, as he unhesitatingly acknowledged in his Foreword, “Was I wrong!”

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Book Review

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With the release of the Friendly biography and the softening of Posner's views about judicial biographies in general, the way was opened to a long overdue biography of Posner, himself. The biography appeared in late 2016 and was aptly titled RICHARD POSNER. It is authored by William Domnarski and published by the Oxford University Press. It was Mr. Domnarski who first wrote about the Friendly – Posner correspondence made public by Harvard. That correspondence revealed the mutual respect and affection that existed between these two extraordinary judicial figures. See William Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982-86*, 51 Am. J. Legal Hist. 395 (2011). See also Jeffrey Cole, *The Friendly-Posner Letters 1982-1986*, The Circuit Rider 15 (April 2013).

At the time they began corresponding, Friendly was acknowledged to be the preeminent judge in the country; Posner had only been on the bench a few years. Friendly saw in Posner a judge of extraordinary intellect and range. In 1983, Friendly wrote to Posner that every one of the opinions that Posner had sent him “is a masterpiece of analysis, scholarship and style.” He went on to say that a year ago he had written Posner that “you were already the best judge in the country; having uttered that superlative, I am baffled on how to better it. If I could think of a way, I would use it.” “How would we get along without judges who have the understanding of such matters that you do?”

There are striking parallels between Friendly's life and Posner's, as their biographies reveal. From the beginning, Friendly was an incredibly gifted student. So was Posner. Friendly had the highest grades in the history of the Harvard Law School, from which he graduated *summa cum laude*, first in his class and President of the Harvard Law Review. He went on to clerk for Justice Brandeis. Posner too was a gifted student, and, like Friendly, Posner graduated first in his class from the Harvard Law School, was the President of the Harvard Law Review and went on to clerk on the Supreme Court for Justice Brennan. Both were judges of important federal courts of appeals, Friendly in New York, Posner in Chicago.

Mr. Domnarski's biography is indispensable to an understanding of Posner and to the focus and growth of law in the Seventh Circuit. The biography brilliantly and effectively analyzes Posner's views and their acceptance or rejection by the Seventh Circuit. If you think that casual and episodic reading of Seventh Circuit opinions makes for an understanding of what they actually say and of what Posner was seeking to accomplish, you will be surprised and edified by what is in the Domnarski biography.

While some of the information about Judge Posner has been discussed, in one form or another, in articles about Posner, much is new, and all the information has received a fresh analysis by Mr. Domnarski. Mr. Domnarski has read many of Posner's private letters, Posner's academic articles, many of his books, and all of his more than 3,000 judicial decisions. No one before Mr. Domnarski had undertaken so systematized a review of the Judge's life and contributions – where he has succeeded and where he has fallen short – and why. Happily, Mr. Domnarski's biography of Richard Posner is unusually balanced; it is an equal mix of what is laudatory and what is not. Here is but an example:

Posner, the judge most followed, cited, and quoted by other judges, ironically became the Judge most intent on reshaping the federal judiciary by calling it out for not working hard enough and for not being as interested as it should be in science and statistics. Posner's contrary spirit and generally inquisitive mind led to him when new to the bench to consider in an academic book the work load the federal courts were straining under. This led not only to proposals for reforms but also to a caustic critique of federal judges which started with the complaint that they did not write their own opinions but that was only the beginning. He continued with his complaints throughout all his years of judging and most recently has in books and articles become even more pointed in his criticisms of federal judges, including the Justices of the Supreme Court. This complaint merged with his complaints about lawyers acting as a drag on the judicial process by not following rules, underperforming, in not making themselves useful with either their briefs or their oral arguments.”

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Book Review

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The biography is arranged chronologically and spans 256 pages, with 34 pages of endnotes. It is divided into six parts, each with several subchapters that take the reader through each phase of Posner’s life and examine the forces that have helped to shape him. The first chapter is titled appropriately, *The First Thirty Years*, and spans the time from the Judge’s birth through his tenure as a teacher at Stanford Law School. Mr. Domnarski’s book reveals new information and delves more deeply than has been done before into the formative influences on Posner’s early life, not the least of which was that of his mother. Her life is fascinating and her influence on her son profound, as Domnarski shows.

There is the brilliant, aspiring, and assertive – and perhaps somewhat combative – young man, coming to grips with the world around him and striving (with considerable but not unbroken success) for excellence and recognition and renown. Mr. Domnarski’s discussion of Posner’s early efforts in self-discovery and for recognition are important and moving.

Mr. Domnarski’s biography reviews in appropriate detail Posner’s undergraduate experiences in college and the brilliant record he achieved. It explores his years at the Harvard Law School, followed by his clerkship with Justice Brennan, and his time with Phillip Elman at the Federal Trade Commission. There are the years at the office of the Solicitor General, his stint in the President’s Task Force on Communication Policy, the early years at Stanford Law School, followed by his professorship at the University of Chicago Law School. Each of these periods and how they helped to shape Posner’s views are explored and explained by Mr. Domnarski. There is not a dull moment.

The “law and economics” movement for which Posner is perhaps most famous is, of course, explored at length, proving how prescient Holmes was when he said in *The Path of the Law*, that “for the rational study of the law the black – letter man may be the man of the present, but the man of the future is the master of statistics and the master of economics....” Domnarski at 150.

Posner’s professorship at the University of Chicago Law School where he taught various courses until his appointment to the Seventh Circuit in 1981 receives careful review. It was at the U of C that Posner became nationally known. Mr. Domnarski’s biography takes the reader through that exciting and formative time in Posner’s development. His consulting practice and his years at Lexecon are not ignored.

Mr. Domnarski’s biography then turns to Posner’s appointment to the Seventh Circuit by President Reagan in 1981. It was an exciting and formative time for Posner, who says he was “intrigued at the prospect of being a federal circuit judge and measuring [himself] against Learned Hand and Henry Friendly, better lawyers, but with less economics.” Domnarski at 95. For the practicing lawyer, Mr. Domnarski’s analysis and his extended discussion of Posner’s judicial opinions and their significance is a highlight of the book and provides more information than had previously been available. The reader learns as well about a number of Posner’s judicial colleagues and is provided with an understanding of the opinions that the reader may not have seen or recalled upon a rushed or cursory reading.

From the time of his appointment to the Seventh Circuit to the present, Mr. Domnarski, with great patience and insight, explains the influences operating on Posner, and how their influence manifested themselves in the development of legal principles. Where Posner has been rebuffed or challenged – and why – is carefully analyzed. This includes a discussion of Posner’s stinging criticism of the Supreme Court and certain Justices and the practices of some judges who have delegated opinion writing to their clerks. *See* Domarski at 222.

This necessarily brief overview does not begin to do justice to the scope and significance of Mr. Domnarski’s superb and thoughtful biography. Only a reading of it can do that. Ironically, much of the second paragraph of Posner’s 1994 review of the Hand biography applies equally to the Posner biography: “the book is superbly readable, clearly written, [and] well paced.... Gunther’s achievement in making Hand’s life a moving and even exciting narrative is a veritable *tour de force*.”

Continued on page 63



Book Review

Continued from page 62

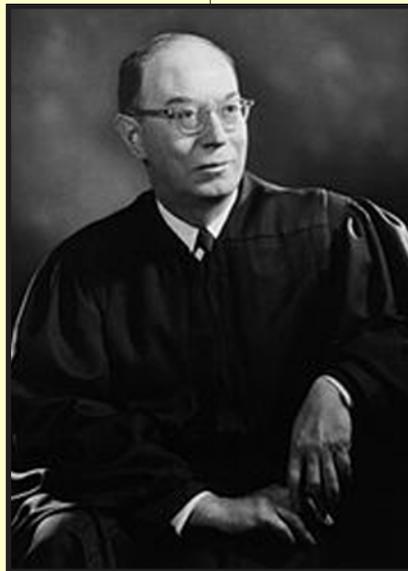
What should not be overlooked is the significant, practical value in having so much indispensable information about the Judge, the Seventh Circuit, and where the Law is or should be going collected and meticulously analyzed in one readily accessible, enjoyable, and easy to read book. Previously, as we have noted, one had to read thousands of opinions, scores of law reviews, and scour the Internet to get even a portion of what Mr. Domnarski’s book provides. None of us ever did it. Or would. Mr. Domnarski has done it for us, and our understanding of Judge Posner and what he has accomplished need no longer be fragmented and incomplete.

Mr. Domnarski’s “Conclusion” of the Posner biography is worth the price of admission. There, and elsewhere in the book, Mr. Domnarski quotes from letters to and from Judge Posner. The letters are fascinating and revealing: letters always are. Despite his enormous success, the letters reveal Posner’s doubts about the practice of law as a rewarding and fully satisfying endeavor, and they give candid opinions about the level of lawyering and judging in this country. In his letters, all of which have the Judge’s expected, highly developed literary style, there is expressed a “dread of retirement” and a lack of optimism that his work as a judge will have much of a lasting effect on the law, although Posner is a good deal more sanguine when it comes to his academic writing, especially his work on economic analysis of law, law and literature, and jurisprudence.

It is perhaps surprising that in his correspondence to more than one inquirer questioning whether law is a satisfying endeavor to be pursued, the Judge admits to having more than a little doubt. His correspondence expresses dissatisfaction with the teaching and practice of law – especially “academic law” – and with what he sees as other embattled fields. He wonders if law limits more than it offers. His correspondence leaves little question that he thinks

the greatest lawyer is on a plane of creativity far below that of a great scientist, philosopher, or artist. (And this with all he has accomplished). He writes that he “loves” judging – which, tongue-in-cheek, he says is his “day job.” After reviewing much of the Posner correspondence, Mr. Domnarski concludes that the fact that Posner “has been so respected by his fellow judges not for his economic analysis but for his take on the world as he has encountered it – as ever the critic at large – is perhaps a grand irony.”

In the end, part of the value of Mr. Domnarski’s Posner biography is that it explores sophisticated and meticulous thinking and makes us realize in a way we perhaps did not before that the thought behind conclusions and the way that thought is expressed cannot be overstated and must never be ignored. While the point seems obvious, if not pedestrian, it is too often overlooked. In law, the consequences can be disastrous. *See, e.g., Sottoriva v. Claps*, 617 F.3d 971, 976 (7th Cir.2010); *In re UAL Corp. (Pilots’ Pension Plan Termination)*, 468 F.3d 444, 453 (7th Cir. 2006); *United States v. Eiselt*, 988 F.2d 677, 680 (7th Cir. 1993).



Mr. Domnarski explains that Posner has even admitted from time to time that his initial views were incorrect and has acknowledged that some of his most aggressive antagonists – Professor Dworkin for example – were right. (As an aside, Dworkin, who in his circle was as famous as Posner, clerked for Learned Hand, and went on to achieve great renown). The Dworkin-Posner encounters are fascinating.

For those inclined to sports metaphors, it is fitting that we end with Mr. Domnarski’s own characterization of the Judge. Perhaps dating himself a bit, he described Judge Posner to students at the University of Chicago as the “Wayne Gretzky of appellate court judges.” Whether or not you agree with Mr. Domnarski, it cannot be denied that Richard Posner is an extraordinary figure in the history of American law. Read Mr. Domnarski’s book. You won’t be sorry!



Seventh Circuit Annual Report Summary

By Gino Agnello, Clerk
Seventh Circuit Court of Appeals

Statistical Report Summary for the Year 2016

This report will briefly discuss the number of cases commenced, terminated and pending for the time period of January 1, 2016 to December 31, 2016. Statistics for the United States Circuit, District and Bankruptcy Courts will be reviewed, with a special focus on case loads in the Seventh Circuit.

Courts of Appeals

Nationally, appellate case filings have increased 11.5%. (59,419 new cases filed) In the Seventh Circuit, the 2,917 new cases filed represent a gain of 12.9% compared to last year. In all the appellate courts, most of the filing increases were second or successive habeas petitions. These petitions were filed as a result of the United States Supreme Court decision in *Johnson v. U.S.* For example, of the 719 original proceedings filed in the Seventh Circuit, 602 were *Johnson* cases. The percentages of criminal, prisoner and bankruptcy cases heard in the Seventh Circuit are all very close to the national average. However, the Seventh Circuit hears less civil cases. Across the country, about 52% of last year’s filings were pro se cases. The Seventh Circuit’s pro se caseload was 60%.

The national average oral argument rate is 17.2%, the Seventh Circuit’s rate is 31.4%. Nationally, only 11% of opinions are published compared to 31% in the Seventh Circuit.

The median time for a case progressing from the initial filing in the lower court to the final disposition in the 12 federal courts of appeal is 30.2 months. The median time is 31 months in the Seventh Circuit.

District Courts

In the nation’s District Courts, civil case filings decreased 4.5% below last year to 277,290 new cases. The “cases terminated” numbers were up about 5% and the number of pending cases were down 1.2% to 346,862.

In the Seventh Circuit, civil case filings decreased 4.8% to 23,351 total new cases. The number of “terminated” cases dropped 5% (24,673 total cases) while “pending” civil cases dropped 7.9 % to 29, 965 total cases.

Criminal case filings dropped 1.8% nationally (60,712 total new cases) compared to a 2.2 % decrease in the Seventh Circuit. (1,838 total new cases)

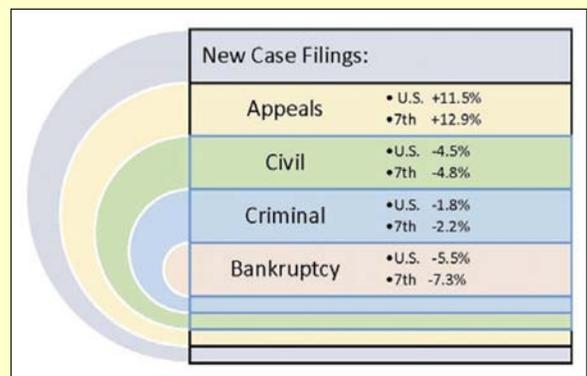
Bankruptcy Courts

U.S. Bankruptcy filings have dropped consistently since 2010 and fell further in 2016 to 794,960 new cases, a decline of 5.5% compared to the 2015 total.

In the Seventh Circuit, total bankruptcy case filings dropped 7.3% to 95,212 cases from last year’s 102,718 cases. Bankruptcy case terminations dropped 5.6% (103,781 total cases) and pending cases were also down 6.5% (119,457 total cases) from 2015 totals.

Statistics for the first half of 2017 indicate that caseload levels continue their slight downward momentum from the numbers we saw in 2016. However, the courts of the Seventh Circuit remain busy and productive.

2016 Case Filing Summary:





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