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# **Writing for the Fifth: Who Said It and Did It Work?**

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# Basic Statistics Over Past 3 Years

- More than 11,500 cases decided
- Criminal versus Civil? Split roughly 60% civil cases, 40% criminal cases
- Published versus Unpublished? Split roughly 85% unpublished, 15% published

## Top Published Authors

Per curiam ( $\approx 16\%$ )  
Smith, Higginson, Southwick ( $\approx 6\%$  each)  
Duncan, Elrod ( $\approx 5\%$  each)  
Wilson, Jones, Willett ( $\approx 4\%$  each)

## Top Published *En Banc* Authors

Oldham  
Richman  
Jones  
Willett  
Per curiam

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**Fifth Circuit  
Jeopardy!!!**

<b>Opinion Structure</b>	<b>Digging Deep Into History</b>	<b>Precedents &amp; Outcomes</b>	<b>Interpreting Text</b>	<b>Social Statements</b>
\$200	\$200	\$200	\$200	\$200
\$400	\$400	\$400	\$400	\$400
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# Opinion Structure

“Steven Mitchell Qualls, 28, spent the last 34 hours of his life on a jailhouse floor, enduring a slow, agonizing death as his body shut down following a drug overdose. Unable to stand or speak coherently, Qualls moaned in pain, twitched, thrashed, convulsed, hallucinated, vomited multiple times (throwing up a dark black liquid and part of a plastic bag), and repeatedly cried out for help. Help never came. By the time officers noticed Qualls was dead on the floor, rigor mortis had already set in. Said one non-defendant officer: ‘I should have looked, but, you know, oh well.’”

*Sims v. Griffin*, 35 F.4th 945 (5th Cir. 2022)

# Opinion Structure

“Here the signposts point both ways. *Pro* Moya: (1) the Raven .25 was legally possessed; (2) it was unloaded; and (3) the ammo stored with the gun may or may not have matched it. *Contra* Moya: (1) he was involved in drug trafficking; (2) the gun was near his bed; and (3) the gun was in a box with drug money. The kind of weapon is a wash: the Raven .25 is neither an ‘antique[ ] mounted on the wall,’ which would suggest ‘benign’ possession, nor is it ‘particularly dangerous,’ which would suggest the opposite. But the fact that it is a handgun, ‘a type of gun commonly used in drug trafficking,’ tips the scales against Moya. Still, the jury heard Moya's story that the gun was given to him by his father years ago, that it was unconnected to his drug trafficking, and that he stored it unloaded on a shelf to keep it out of his children's reach.”

*United States v. Moya*, 18 F.4th 480 (5th Cir. 2021)

# Opinion Structure

“First, some legal background...

Next, the factual and procedural background ...”

*Data Mktg. P’ship v. United States Dep’t of Lab.*, 45 F.4th 846  
(5th Cir. 2022)

or *Seville v. Maersk Line, Ltd.*, 53 F.4th 890 (5th Cir. 2022)

or any number of other cases!

# Opinion Structure

“Suppose one section of an insurance policy provides coverage against various enumerated risks. But another section of the policy eliminates coverage for those risks. In other words, the policy contains two provisions that appear to be in irreconcilable conflict with one another—what one provision giveth, the other taketh away.”

*Princeton Excess & Surplus Lines Ins. Co. v. A.H.D. Houston, Inc.*, 84 F.4th 274 (5th Cir. 2023) (dissent)



“Imagine that your employer suddenly declares that he finds one of your religious beliefs offensive. It could be your view on abortion, or marriage, or sexuality, or gender, or any number of other religious tenets. Your view has no economic impact whatsoever on the company. But it offends the sensibilities of the executives who populate the C-suite.

So the company puts you on unpaid leave for an indefinite period of time. And the *only* way you can reclaim your job is to abandon your religious convictions—and to do so irreversibly.

Imagine further that you love your God—and you also love your family, who counts on you and your livelihood to survive.

Finally, imagine that, if you can't get preliminary injunctive relief, you'll have no choice but to sacrifice your faith, in order to avoid sacrificing your family.

Now ask yourself this question: What measure of damages would make you whole?  
Put another way: For how much would you sell your soul?”

*Sombrano v. United Airlines, Inc.*, 45 F.4th 877 (5th Cir. 2022) [Ho, concurrence]

“Imagine the following two fact patterns.

Person A is a real estate developer who gives tens of thousands of dollars to a city council member for the purpose of subsidizing the member's personal consumption, not political advocacy. He uses unrecorded cash transactions to evade detection. And in return, the council member uses her office to pursue certain government actions worth millions to the developer.

Person B is a citizen who donates a few hundred dollars to a candidate for city council, for the purpose of supporting political advocacy, not personal consumption. There's no evidence of any *quid pro quo* agreement. There's no evidence the donor will benefit in any way from making the donation. In fact, there's no evidence the donor has ever even met or communicated with the candidate—let alone entered into any corrupt arrangement of any kind.

Now imagine that I ask you to pick which person has engaged in constitutionally protected activity—and which person has committed a crime.

I imagine you'd say that Person B engaged in constitutionally protected activity—and Person A committed a crime.

But you'd be wrong. At least in our circuit.”

*United States v. Hamilton*, 62 F.4th 167 (5th Cir. 2023) [Ho, dissent]

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# Digging Deep Into History

“To fully appreciate the events that gave rise to the petitions before us, we begin with a careful review of the statutory and regulatory background. Nearly a century ago, Congress passed the Food, Drug, and Cosmetics Act (‘FDCA’), which established broad regulatory authority—such as a premarket ‘new drug’ authorization requirement—to protect the public against the dangers of ‘adulterated and misbranded food, drugs, devices, and cosmetics.’

The FDCA developed substantially over the next fifty-eight years, but tobacco remained unregulated through the Act and its accompanying regulations. That is, until 1996 ...”

*Wages & White Lion Inv., L.L.C. v. Food & Drug Admin.*, 41 F.4th 427 (5th Cir. 2022), *reh’g en banc granted, opinion vacated*, 58 F.4th 233 (5th Cir. 2023)

# Digging Deep Into History

“Throughout American history, laws have regulated the combination of guns and intoxicating substances. But at no point in the 18th or 19th century did the government disarm individuals who used drugs or alcohol at one time from possessing guns at another. A few states banned carrying a weapon while actively under the influence, but those statutes did not emerge until well after the Civil War. Section 922(g)(3)—the first federal law of its kind—was not enacted until 1968, nearly two centuries after the Second Amendment was adopted.

In short, our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage.”

*United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023)

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## Precedents & Outcomes

“Our precedent forecloses this argument. In *Peters v. Ashcroft*, we held that res judicata does not bar a subsequent removal proceeding based on a conviction that also supported a prior terminated removal proceeding, so long as the two proceedings occur pursuant to distinct statutory provisions. In other words, even when the ‘second removability charge [is] based on the same underlying ... offense as the first,’ ‘so long as the Government relied on a different provision the second time around, res judicata is no bar.’ We have reaffirmed this principle on multiple occasions.”

*Diaz Esparza v. Garland*, 23 F.4th 563 (5th Cir.), cert. denied, 143 S. Ct. 87 (2022)

## Precedents & Outcomes

“Of course, Supreme Court rulings can overrule our precedent. But we cannot disregard our precedent simply because we think the Court might someday disagree with it. Until the highest court ‘unequivocally’ overrules our precedent, we are bound by it. This aspect of the rule of orderliness rule promotes stability in the law.”

*Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408 (5th Cir. 2022), *reh'g en banc granted*, *opinion vacated*, 61 F.4th 1012 (5th Cir. 2023)



## Precedents & Outcomes

“I am convinced that it is well past time for this circuit to be dragged screaming into the 21st century by joining all of the other circuits that have now recognized the state-created danger cause of action. I acknowledge that we can only do so by taking this case en banc. The extreme and uncontested facts of this case present an excellent opportunity for us to do so. As a senior judge, I could participate on the three-judge panel that heard and is deciding this case. And as a senior judge, I shall participate as a voting member of the en banc court if this case is re-heard en banc. But, as a senior judge, I cannot call for an en banc poll or even vote in such a poll if one is called for by an active judge of this court. I therefore write this dissent in the hope that one of my active colleagues will call for an en banc poll...”

*Fisher v. Moore.*, 62 F.4th 912 (5th Cir.), *withdrawn and superseded on denial of reh’g en banc*, 73 F.4th 367 (5th Cir. 2023)

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# Interpreting Text

“We are, of course, in the day-to-day business of resolving textual ambiguities; this is our wheelhouse.”

*Matter of Gabriel Inv. Grp., Inc.*, 24 F.4th 503 (5th Cir.),  
*certified question answered sub nom., Gabriel Inv. Grp., Inc. v.*  
*Texas Alcoholic Beverage Comm’n*, 646 S.W.3d 790 (Tex.  
2022)

# Interpreting Text

“The term ‘physician’ in § 907(b), which was added in 1972, is not provided with a statutory definition. Dictionaries published in or around 1972 may then shed some light on the meaning of the term ‘physician’ at the time it was codified in the LHWCA. *Webster’s Third* provides that a physician is: ...”

*Huntington Ingalls, Inc. v. Dir. Off. of Workers’ Comp. Programs*, 70 F.4th 245 (5th Cir. 2023)

# Interpreting Text

“The rear emergency exit of the school bus is equipped with a release mechanism that allows the door to latch and unlatch, as shown below:



To open the emergency exit, a person must unlatch the door by pulling the red lever upward, and then push against the door. The rear emergency exit also has a separate ‘vandal lock,’ shown below:”



*Estate of Miranda v. Navistar*, 23 F.4th 500 (5th Cir. 2022)

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# Social Statements & Pop Culture

“As this nation careens past \$30 trillion in national debt, risking bankruptcy during our or our children's lifetimes, one may ask: is there no institutional check on government spending? In fact, there is. The Constitution ...”

*Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218 (5th Cir. 2022)

# Social Statements & Pop Culture

“Lost in the shuffle of the majority opinion is this case's bottom-line issue: in many circumstances, only those with money can get out of jail before trial. So, if you can pay for your crime of arrest, you're free. If you can't, you're not. That is the core of the problem presented here.”

*Daves v. Dallas Cnty., Texas, 22 F.4th 522 (5th Cir. 2022)*



# Social Statements & Pop Culture

“You are not a horse.”

*Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579 (5th Cir. 2023)

# Social Statements & Pop Culture

“Texas high school football has a storied history. *See generally* H. G. Bissinger, FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM (1990).”

*Watts v. Northside Indep. Sch. Dist.*, 37 F.4th 1094 (5th Cir. 2022)

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