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## ***DUN & BRADSTREET REVISITED — A COMMENT ON LEVINE AND WERMIEL***

Scott L. Nelson\*

Lee Levine and Stephen Wermiel's account of the internal history of the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>1</sup> convincingly demonstrates the utility of the papers of retired Justices in facilitating a painstaking reconstruction of the Court's deliberations. As someone who clerked for Justice Byron White in the October 1984 and 1985 Terms and was thus present during the second of the two years in which the Court considered *Dun & Bradstreet*,<sup>2</sup> I will not comment on the accuracy of the particular details the Article reports or add any inside information about the Court's deliberations. That would be both improper and impossible. Improper because a law clerk has a duty of confidentiality both toward his or her Justice and toward the Court as an institution; and impossible because, not having worked on the case myself, I have only fuzzy recollections concerning the many twists and turns the Article describes, and certainly none that match the wealth of detail the authors have gleaned from the documentary record.

I will, however, try to situate the case within the broader context of the issues before the Court during the 1984 Term, which may give the reader a more accurate perspective from which to judge whether the story of *Dun & Bradstreet* is that of a doctrinal perfect storm or a

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1. 472 U.S. 749 (1985).

2. Unlike Levine and Wermiel, and my fellow commenters, I refer to the case as *Dun & Bradstreet*, not *Greenmoss Builders*. That is what I recall the case being called at the time it was reargued; that is how the Court has referred to it on the very few occasions when a later opinion has cited it more than once, for example, *Snyder v. Phelps*, 562 U.S. \_\_\_, 131 S. Ct. 1207, 1215–16 (2011); and that is how I have always thought of it. I am going against the flow on this point not because I think one way of referring to the case is more correct than the other, but for purely personal reasons. For me, it would feel unnatural to call the case anything but *Dun & Bradstreet*. Perhaps, like Justice White at times, I am simply “out of step.” See *infra* note 68 and accompanying text.

tempest in a teapot—or, perhaps more likely, something in between. I will also comment on the usefulness of the sources relied on by the authors in creating an accurate picture of the Court’s workings. Finally, I will offer some brief observations on the issues in *Dun & Bradstreet*, the problems it posed for the Court, and the decision’s place in the evolution of the Court’s First Amendment libel jurisprudence.

## I. CONTEXT: THE SUPREME COURT’S 1984 TERM

Levine and Wermiel understandably present *Dun & Bradstreet* as a story of considerable drama, with large issues, including the fate of *New York Times Co. v. Sullivan*,<sup>3</sup> hanging in the balance. The case’s odd history, including its reargument and the apparent change in outcome that transformed Justice Powell’s opinion from a dissent to a plurality opinion announcing the Court’s judgment, as well as the fundamental issues raised by Justice White’s concurrence, lends itself to that portrayal. Such a case, readers of their Article might understandably conclude, must have been one of the focal points of the Term when it was reargued, much like last Term’s decision in *National Federation of Independent Business v. Sebelius*,<sup>4</sup> in which the Court upheld the constitutionality of the Affordable Care Act and, according to leaks reported in the press, the Court’s deliberations led to considerable rancor among the Justices.

But perhaps not. *Sebelius* was one of only sixty-four signed opinions issued by the Court in cases briefed and argued on the merits in the October 2011 Term, and it towered in practical, political, and doctrinal importance over most of the other cases on the Court’s docket. That is not to say that there were not other important and interesting cases in the 2011 Term, but much of the Court’s small docket was taken up by small cases, half of which were decided unanimously or with only a single dissent.<sup>5</sup>

By contrast, in the October 1984 Term, the Court disposed of a whopping 139 cases by signed opinions. And *Dun & Bradstreet* does not stand out now in retrospect, nor did it stand out at the time, as the

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3. 376 U.S. 254 (1964).

4. \_\_\_ U.S. \_\_\_, 132 S. Ct. 2566 (2012).

5. See *October Term 2011 – Granted and Noted List*, SUPREME COURT OF THE U.S. (June 29, 2012), <http://www.supremecourt.gov/orders/grantednotedlist.aspx?Filename=11grantednotedlist.html> (case list of October Term 2011 opinions); *2011 Term Opinions of the Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=11> (last visited Mar. 1, 2013) (follow the links to case names to determine how the Justices voted in each opinion).

leading case of the Term or even close to it. Although the 1984 Term was not dominated by any one landmark case like *Sebelius*, the Term featured a wealth of important decisions in a wide range of areas, and many of them divided the Court at least as deeply as *Dun & Bradstreet* did.

A few examples, somewhat arbitrarily chosen, will illustrate the breadth of the business conducted by the Court in the 1984 Term. Criminal procedure and death penalty cases were a major focus of the Burger Court, and the Term featured a number of prominent examples: *Oregon v. Elstad*,<sup>6</sup> concerning the fruits of *Miranda* violations; *Wainwright v. Witt*,<sup>7</sup> rejecting a Sixth Amendment challenge to the use of “death qualified” jurors to determine guilt in capital cases; and *Ake v. Oklahoma*,<sup>8</sup> establishing that indigent capital defendants have a right to state-paid psychiatric experts when necessary to their defense. Establishment Clause cases were also a major feature of the 1984 Term, with decisions including *Wallace v. Jaffree*,<sup>9</sup> the “moment of silence” case; *Aguilar v. Felton*<sup>10</sup> and *School District of City of Grand Rapids v. Ball*,<sup>11</sup> both striking down aid to parochial schools (and both later overruled by the Rehnquist Court<sup>12</sup>); and *Thornton v. Caldor*,<sup>13</sup> holding unconstitutional a state statute that gave preferential rights to Sabbath observing employees. Other major cases in the 1984 Term included *Mitchell v. Forsyth*,<sup>14</sup> allowing interlocutory appeals of decisions denying qualified immunity to public officials sued for constitutional violations; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>15</sup> a milestone in the Court’s developing jurisprudence, favoring the enforcement of arbitration agreements; *Tennessee v. Garner*,<sup>16</sup> holding that the Fourth Amendment limits the use of deadly force by law enforcement officers; *Cleveland Board of Education v. Loudermill*,<sup>17</sup> rejecting Justice Rehnquist’s effort to create a “bitter with the sweet”

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6. 470 U.S. 298 (1985).

7. 469 U.S. 412 (1985).

8. 470 U.S. 68 (1985).

9. 472 U.S. 38 (1985).

10. 473 U.S. 402 (1985).

11. 473 U.S. 373 (1985).

12. See *Agostini v. Felton*, 521 U.S. 203 (1997).

13. 472 U.S. 703 (1985).

14. 472 U.S. 511 (1985).

15. 473 U.S. 614 (1985).

16. 471 U.S. 1 (1985).

17. 470 U.S. 532 (1985).

doctrine limiting procedural due process rights; *Burger King Corp. v. Rudzewicz*,<sup>18</sup> concerning due process limitations on the assertion of personal jurisdiction over out-of-state defendants; *Heckler v. Chaney*,<sup>19</sup> sharply curtailing judicial review of agency enforcement discretion; *City of Cleburne v. Cleburne Living Center*,<sup>20</sup> applying rational basis review with teeth under the Equal Protection Clause to strike down discrimination against the disabled; and *County of Oneida v. Oneida Indian Nation*,<sup>21</sup> allowing Indian land claims litigation to proceed.

Even in the area of freedom of speech, *Dun & Bradstreet* did not particularly stand out as among the most important cases of the Term. Competing for that title would be *Zauderer v. Office of Disciplinary Counsel*,<sup>22</sup> a major commercial speech case striking down limits on attorney advertising; *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>23</sup> rejecting a claim of fair use and First Amendment protection for the appropriation of copyrighted material of public interest; *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,<sup>24</sup> limiting First Amendment rights to expression in a “nonpublic forum” created by the government; *Brockett v. Spokane Arcades, Inc.*,<sup>25</sup> further refining the Court’s definition of obscenity and distinguishing the appropriate uses of facial and as-applied challenges; *FEC v. National Conservative Political Action Committee*,<sup>26</sup> striking down limits on expenditures by political action committees; *In re Snyder*,<sup>27</sup> holding that an attorney may not be disciplined for writing a letter criticizing a court’s handling of a request for attorney’s fees; and *Lowe v. SEC*,<sup>28</sup> limiting the application of securities laws to newsletters and other publications.

Indeed, among the three cases in which the Court announced on July 5, 1984, that it would hear reargument in the October 1984 Term—*Dun & Bradstreet*, *New Jersey v. T.L.O.*,<sup>29</sup> and *Garcia v. San Antonio*

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18. 471 U.S. 462 (1985).

19. 470 U.S. 821 (1985).

20. 473 U.S. 432 (1985).

21. 470 U.S. 226 (1985).

22. 471 U.S. 626 (1985).

23. 471 U.S. 539 (1985).

24. 473 U.S. 788 (1985).

25. 472 U.S. 491 (1985).

26. 470 U.S. 480 (1985).

27. 472 U.S. 634 (1985).

28. 472 U.S. 181 (1985).

29. 469 U.S. 325 (1985).

*Metropolitan Transit Authority*<sup>30</sup>—*Dun & Bradstreet* was the one with the lowest profile. The narrow questions on which the Court solicited reargument in *Dun & Bradstreet* stood in marked contrast to the questions implicated in the other two cases: what standards apply to searches and seizures in the public schools (*T.L.O.*), and whether the Court’s abortive foray into revitalizing the Tenth Amendment in *National League of Cities v. Usery*<sup>31</sup> should be overruled (*Garcia*). Of course, had the Court requested reargument in *Dun & Bradstreet* about whether *Times v. Sullivan* should be overruled, the relative importance of the cases would have appeared rather different. But that was not the question actually posed by the Court, nor does it appear from the now publicly available record of the Court’s deliberations that any of the Justices other than Justice White (and, in response, Justice Brennan) viewed the case as really presenting that question.

None of this, of course, is intended to contradict Levine and Wermiel’s careful tracing of the documentary history of the case. Nor is it meant to suggest that the case was not viewed as very important by Justice Brennan and his law clerks, as the written history compiled by the Brennan Chambers clearly indicates; by Justice Powell, who appears from the documents cited in the Article to have been deeply engaged in the case and in the not entirely successful struggle to articulate a coherent rationale for affirmance; and by Justice White, who seems from the record to have vacillated about the outcome before deciding to use the case to toss a grenade (or, perhaps more accurately, a cherry bomb, given its inefficacy) at *Times v. Sullivan*.

Nonetheless, the Article may subtly overstate the degree to which the case was a dramatic focal point of the Term. The sheer number of other important (and also not-so-important) cases competing for the attention of the Court suggests that it was not. And even the records cited by the authors do not seem to indicate that the rest of the Court felt the same degree of interest in the case as the three protagonists. What had become by that time something of a liberal bloc—Brennan, Marshall, Blackmun, and Stevens—lined up dutifully behind their leader (notwithstanding the qualms Marshall had earlier expressed about extending *Times v. Sullivan*,<sup>32</sup> and the similar reservations that would lead Stevens to dissent the next Term in *Philadelphia Newspapers, Inc. v. Hepps*<sup>33</sup>), and their

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30. 469 U.S. 528 (1985).

31. 426 U.S. 833 (1976).

32. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 78 (1971) (Marshall, J., dissenting).

33. 475 U.S. 767 (1986).

involvement seems to have been largely confined to Justice Stevens's wise counsel that Brennan should not get too carried away by the idea that the case was some kind of referendum on *Times v. Sullivan*.<sup>34</sup> Meanwhile, the conservatives—Burger, Rehnquist, and O'Connor—backed the outcome favored by Powell, though the documentary record indicates that Burger (typically) cared little how the Court got there; that Rehnquist seems to have been bemused by the thought that Powell, as the author of *Gertz v. Robert Welch, Inc.*,<sup>35</sup> would suddenly have qualms about constitutionalizing libel law; and that O'Connor played a role similar to that of Stevens on the other side, counseling a way to get the case over with a minimum of additional fuss.<sup>36</sup> Thus, another reading of the record cited by Levine and Wermiel is that for the Court as a whole, the case was not a matter of huge significance, but rather one that was more trouble than it was worth, and probably of less interest than much of the rest of the Court's business that Term.

## II. THE DOCUMENTARY RECORD PROVIDED BY THE FORMER JUSTICES' PUBLICLY AVAILABLE PAPERS

The point I have just made is one about matters of importance and emphasis, not accuracy. For me, one of the principal contributions of Levine and Wermiel's Article is that it illustrates the degree to which the publicly available papers of the Burger Court's Justices allow—for better or for worse, depending on one's views of the importance of confidentiality versus openness of such deliberative processes—an almost complete account of the Court's internal deliberations over cases it decided, from the certiorari stage through decision on the merits.

At the certiorari stage, the primary documents that allow insight into the considerations that may have shaped the Court's decision to grant review of a case are the law clerks' "pool memos." Pool memos are memoranda discussing each petition for certiorari filed with the Court, which were prepared in each case by one of the law clerks for the six Justices (Burger, White, Blackmun, Powell, Rehnquist, and O'Connor) who participated in the "cert pool" at that time. Copies of those memos were circulated to each of the Justices in the pool, and complete sets appear to be available in the publicly available papers of several of the

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34. Lee Levine & Stephen Wermiel, *The Landmark that Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 87–89 (2013).

35. 418 U.S. 323 (1974).

36. Levine & Wermiel, *supra* note 34, at 47, 86–89 (Burger), 39, 73–74 (Rehnquist), 60–63, 71 (O'Connor).

Justices. The copies of the pool memos retained by each of the participating chambers will differ slightly because of annotations by the Justices' law clerks and the Justices themselves. These annotations provide additional insights about the views of a case in particular chambers. Accounts of actual discussion of certiorari petitions by the Justices in Conference are likely to be sketchy at best, but in cases (such as *Dun & Bradstreet*) where there were not four votes to grant certiorari the first time a petition was discussed, additional insights into the Court's decision-making process may be gleaned from drafts of dissents from denial of certiorari, which were circulated to all the Justices and often served as advocacy pieces seeking to sway enough votes to result in a grant of certiorari.

In cases set for argument before the Court, some preliminary insights into the Justices' deliberations may be derived from bench memoranda prepared by the Justices' law clerks, and in some cases preargument memoranda prepared by the Justices themselves. But not all Justices received bench memoranda in all cases, and such memoranda, even where they exist, are unreliable as indicia of the positions of the Justices, as the law clerks' views of a case might differ completely from those of their Justices. Nonetheless, those memoranda, together with the recordings and transcripts of arguments before the Court (which unfortunately during that era did not identify the Justices who posed particular questions to the advocates), may provide some clues about the evolution of the Justices' thinking leading up to the Conferences at which they discussed and voted on the cases.

The Court's practice in the 1984 Term was to hear four one-hour arguments a day, Monday through Wednesday, during the two weeks of each sitting. The Court voted on cases argued on Mondays at a Conference held after the completion of arguments on Wednesday afternoon, and voted on the Tuesday and Wednesday cases at the Friday Conference where petitions for certiorari were also considered. The Conferences, attended only by the Justices, are something of a black box, as there were no witnesses and no official record was kept of the Justices' deliberations. Each Justice kept his or her own notes, more or less elaborate; Justice White's generally consisted simply of vote tallies for each case scribbled in pencil on small pieces of paper. Apparently, Justices Powell and Brennan kept more elaborate notes, and other Justices may have done so as well; and Justice Brennan appears to have given his clerks accounts of what was said that appear in their histories of the Term (about which more later). Notwithstanding the availability of these sources, reconstruction of Conferences is probably one of the least reliable elements of any attempt to write a history of the Court's



consideration of a case. Fortunately, it is also probably not the most important aspect of such a history, as the Justices tended to flesh out their views in the opinion-writing process that followed, rather than in the necessarily abbreviated discussions in the Conferences, at which the Court had to address multiple cases in fairly limited amounts of time.

Following the Conference at which the Justices cast their initial votes on a case, much of the critical action revealed itself in documents that went to all the Justices. Such memoranda were typically addressed to “the Conference,” which in the parlance of the Court at the time meant the nine Justices collectively. The outcome of the Court’s vote can generally be inferred by the memorandum from the senior Justice in the majority assigning the majority opinion, which usually circulated a day or two after the final Conference of each sitting. Initial opinion drafts exchanged between the Justices and their law clerks were of course generally not circulated beyond chambers, and may or may not now be available in the papers of the writing Justice, depending on the document retention practices of the particular Justice and, perhaps, on the happenstance of whether a law clerk discarded a marked-up draft after entering changes into the document on the word processing system used by the Court at the time. Finished drafts, however, were sent to the Court’s printer to be typeset and then circulated in page-proof form to the Conference. Memoranda joining or commenting on draft opinions were also circulated to the Conference, as were memoranda expressing the intention to draft a dissenting or concurring opinion (or to await an anticipated draft of a separate opinion from another Justice). Separate opinions, once drafted, were also printed and circulated to the Conference, as were the resulting revisions and counter-revisions that followed. The general circulation of these items ensures that a fairly complete record can be pieced together from the papers now publicly available.

As the records of the *Dun & Bradstreet* case reviewed by Levine and Wermiel demonstrate, a Justice sometimes sent a memorandum commenting on the issues posed by an opinion only to one or two other Justices (or added a handwritten addendum to one Justice’s copy of a memorandum otherwise circulated to the Conference as a whole). The Article cites examples where such privately exchanged memoranda contained substantive comments on opinions that were perhaps more detailed or candid than appropriate for circulation to the Conference. I believe that, at least in the 1984–86 timeframe, such memoranda were much rarer than those that went to the Conference, and often their content would be reflected in some form in follow-up memoranda to the Conference and/or in revisions to circulated opinions. Nonetheless, as

the *Dun & Bradstreet* case illustrates, access to such private memoranda, such as the O'Connor–Powell and Stevens–Brennan memos cited by Levine and Wermiel,<sup>37</sup> may be critical to understanding the evolution of the Justices' thinking and the resulting opinions. Fortunately, the papers of enough of the Justices from that era are now publicly available that the likelihood that either the author's or the recipient's copy will be in one of the available sets of papers is fairly high.

What the paper record does not necessarily reflect, of course, is the role that telephone conversations or face-to-face meetings between the Justices may have played in shaping the outcomes of cases and the evolution of opinions. Except in a few famous (reputed) instances that have come to light as a result of ostensible leaks of some kind—such as the account in *The Brethren* of a lunch meeting between Justices Brennan, Stewart, and White at a now-defunct Washington, D.C., restaurant called the Market Inn, at which the Justices supposedly “conspired” to take over the opinion in *United States v. Nixon*,<sup>38</sup> which Chief Justice Burger had assigned to himself<sup>39</sup>—such person-to-person interactions of the Justices will for the most part necessarily be lost to history. (As an aside, I note that Justice White enjoyed taking his law clerks, and sometimes their parents, to lunch or dinner at the Market Inn and on more than one occasion of which I am aware, loudly stated in the presence of outsiders that “that table” or “that booth” was the one where he, Potter Stewart, and “Billy” Brennan had conspired to take the opinion in *Nixon* from the Chief Justice, sometimes adding, “if you can believe what it says in *The Brethren*.”)<sup>40</sup>

However, my own observation of the Court and that, I believe, of most of my contemporaries, was that substantive conversations among the Justices outside of formal Conferences were surprisingly rare and far less common than written communications. And, as the papers canvassed by Levine and Wermiel demonstrate, even when these conversations occurred they were often confirmed by or referenced in subsequent memoranda. For the most part, then, the primary documents now available in the public papers of the Justices—that is, the contemporaneous drafts and memoranda, both internal to their chambers and circulated to the Conference or to specific colleagues—provide the

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37. Levine & Wermiel, *supra* note 34, at 83–84 (Stevens), 60–62, 71–72 (O'Connor).

38. 418 U.S. 683 (1974).

39. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 322–28 (1979).

40. See also Stephen McAllister, *Justice Byron White and The Brethren*, 15 GREEN BAG 2D 159, 168–69 (2012).

basis for a reasonably accurate account of the Court's decision-making process in any given case.

That is not to say that context may not be helpful in examining the documentary record. For example, the January 1985 memorandum from Justice White to Justice Brennan quoted by Levine and Wermiel, in which Justice White refers to "fleeing the city for a week or two" after circulating his draft calling for the reconsideration of *Times v. Sullivan*,<sup>41</sup> may appear in a somewhat different light if one knows (as Justice Brennan certainly did) that Justice White generally spent at least a week skiing in his native Colorado during the long hiatus between the Court's early January and late February sittings. (I recall that particular vacation well, as I used the occasion of Justice White's absence from chambers to grow a beard, which I have kept to this day.) Justice Brennan would have understood Justice White's comment to be a facetious reference to his skiing plans, but one that also reflected White's obvious awareness that his longtime colleague and friend would be none too pleased by the draft that shortly followed. Justice White's personal note to Brennan warning him of the imminent circulation of the draft is consistent with his great esteem for Justice Brennan, of whom he invariably spoke in the most affectionate terms, frequently referring to him as "Billy"—which Justice Brennan himself once described as "an unusual but quite agreeable moniker."<sup>42</sup>

So far, I have discussed the primary documents on which Wermiel and Levine rely, but I should also add a word or two about another source—something between a primary and a secondary source—that they also use very effectively: the "histories" compiled by the Brennan clerks. The Brennan histories were, of course, compiled very close in time to the events they recount, by participants in those events, and they appear to rely to a large extent on the primary historical record—the memoranda and drafts that directly record the Justices' interactions leading to the issuance of the Court's opinions. At the same time, however, the histories are after-the-fact reconstructions, and they rely not only on the documents, but also on the recollections of the clerks as well as on second- and third-hand accounts, including, it appears, information provided by Justice Brennan about what went on in Conferences and about his interactions with other Justices, as well as hearsay accounts from other law clerks, containing information that may

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41. Levine & Wermiel, *supra* note 34, at 63.

42. William J. Brennan, "Cheers!" *A Tribute to Byron R. White*, 1994 BYU L. REV. 209, 225 (1994).

have been garbled in transmission. As a result, the histories provide information about some of the oral communications among Justices and law clerks that are otherwise undocumented and beyond the ken of history. At the same time, however, that information may not be entirely accurate.

The histories are also, as Levine and Wermiel's excerpts indicate, written from a point of view: that of Brennan and his clerks (actually not a single point of view, but multiple points of view, though ones that from the perspective of someone outside the Brennan Chambers usually though not invariably appeared to be closely aligned). The histories thus reflected the standpoint of persons who had been directly involved in and cared deeply about the disagreements within the Court that the histories discuss. And what the histories say is likely, at times, colored by their authors' perspectives, and perhaps by the expectation that the histories would ultimately be made public (an expectation very different from that which prevailed in the White Chambers, where preserving a record for posterity was definitely not among the law clerks' tasks).

To use one example from Levine and Wermiel's Article, the Brennan histories apparently state that during *Dun & Bradstreet*'s first Term before the Court, and following Justice White's circulation of a memorandum stating that he would await Justice Powell's anticipated dissent before deciding whether to join Justice Brennan's draft opinion reversing the Vermont Supreme Court, "Brennan's [C]hambers learned that White's own clerks 'as usual, had no idea what was bothering' their Justice."<sup>43</sup>

I must say at the outset that I myself have "no idea" whether Justice White's law clerks knew what was "bothering" him about *Dun & Bradstreet* in early June 1984, or, indeed, whether his law clerks in the 1983 Term *generally* had any idea what was on his mind with respect to particular cases. However, given the source, I would recommend that readers take statements like this one from the Brennan histories with a grain of salt.

Justice White could certainly be a hard person to read, even for his law clerks, and his views were at times, though certainly not invariably, less predictable than those of some of the other Justices seemed to be. In addition, Justice White, like most other Justices at the time, did not choose law clerks based on ideological agreement with him (indeed, it would have been virtually impossible for him to choose law clerks on that basis, given that hardly anyone coming out of law school at that

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43. Levine & Wermiel, *supra* note 34, at 28.

time shared Justice White's particular combination of views), so his law clerks were not necessarily on the same wavelength as their boss in any individual case. At the same time, the Justice's views had a logic to them if you could figure out his conceptual starting point. And by the time a case had been briefed and argued, discussed in chambers by the Justice and all four of his law clerks following argument (as was his practice at the time), and voted on by the Conference (following which the Justice would report the vote of the Justices, including his own, to his law clerks), I generally felt that I had a fairly good idea of the Justice's views about the case even though he tended to be fairly closed-mouthed in explaining them. I expect the same was true of the Justice's clerks during the October 1983 Term, all of whom were then, and are now, extremely able and intelligent.

Having an idea of what was on Justice White's mind, however, was not necessarily the same thing as sharing that understanding with law clerks from other chambers. Unlike Justice Brennan's law clerks, who sometimes appeared to act as emissaries for their Justice in communications with other chambers, Justice White's law clerks were generally not expected to negotiate with other chambers over opinions or to serve as informal messengers expressing his views to his colleagues on the bench through their own law clerks. When Justice White was ready to communicate his views to his colleagues, he did so directly, and usually in writing, not through his law clerks. Justice Brennan's law clerks, however, may not have completely understood that Justice White's law clerks felt considerably more constrained about purporting to express their Justice's views than did the Brennan clerks, and as a result may have confused a White clerk's reticence about saying what was "bothering" Justice White with a lack of understanding.

Thus, I would recommend that readers disregard the "as usual" in the passage cited by Wermiel and Levine, ascribing it either to misunderstanding or perhaps mild snarkiness. But as for whether Justice White's law clerks in fact knew what was bothering him in this instance (and again I stress that I have no inside information on the point) it seems plausible that they did not—not because of some general lack of insight into Justice White's mind, but because the record compiled by Levine and Wermiel strongly suggests that the Justice himself had not yet come to rest in his thinking about the case.

Why do I say this? All the communications from Justice White that Levine and Wermiel cite from the relevant time period (late May to early July 1984), including the oral communications ascribed to Justice White in the Brennan histories, seem consistent with those of a Justice who was genuinely, as he stated in his June 25, 1984, memorandum, "up in the

air.”<sup>44</sup> The memoranda and conversations described by the authors suggest that although Justice White was inclined to want to join Justice Powell in affirming, he did not see a satisfactory way of doing so consistent with the Court’s precedents, which, as his tentative draft concurring statement indicated, were more consistent with reversal than affirmance.<sup>45</sup> Even Justice White’s suggestion of reargument seems strangely formless, as it does not appear to have indicated exactly what issue he wanted to have reargued. That matter, according to the documentary record, was left to Justices Brennan and Powell to negotiate,<sup>46</sup> and the questions that they came up with certainly did not encompass the issue Justice White ultimately focused on the next Term—whether *Gertz* and even *Times v. Sullivan* were correctly decided. Had Justice White already decided that *that* was the nub of the case, the suggestion that the case be reargued on other issues would have made little sense.

The bottom line here is that the Brennan histories, in this particular instance, may or may not be accurate in detail (as to whether Justice White’s law clerks in fact had any idea what was bothering him about the case in June 1984), but they appear to reflect accurately that Justice White’s unsettled position was a source of confusion and consternation in Justice Brennan’s Chambers. The broader lesson is that the histories are most useful as a reflection of Justice Brennan’s and his law clerks’ perspectives; beyond that, they help fill out the primary documentary record but should not be taken as gospel to the extent that they purport to recount the words or doings of other Justices. And as Levine and Wermiel’s Article shows, checking the histories against the documentary record, especially the part that is preserved in the collections of other contemporary Justices, may reveal instances in which the law clerks who wrote the histories had imperfect or incomplete knowledge.<sup>47</sup>

### III. *DUN & BRADSTREET*’S PLACE IN THE COURT’S JURISPRUDENCE

Finally, I offer a few words about the merits and significance of *Dun & Bradstreet* itself. Justice White’s advocacy of a grant of certiorari and the Court’s eventual acquiescence following his circulation of a draft dissent from denial do not appear terribly surprising. The Vermont

44. Levine & Wermiel, *supra* note 34, at 36–37.

45. *Id.* at 37.

46. *Id.* at 39–40.

47. *Id.* at 71, n.423.

Supreme Court's decision to withhold *Gertz*'s First Amendment-based protections from a non-media defendant sued for libel seemed inconsistent with the Court's general unwillingness to grant different First Amendment protections to the media, even if it was not necessarily foreclosed by the Court's existing libel precedents. As Justice White's draft dissent from denial suggested, whether such an exception for non-media defendants should be crafted was an issue "appropriate for consideration by th[e] Court because of [its] implications for First Amendment jurisprudence as a whole."<sup>48</sup>

Once the Court took the case, however, its problematic nature became apparent. The nature of the "speech" involved—the sale of commercial credit information about businesses—evidently appeared to many of the Justices to differentiate it from the speech that *Times v. Sullivan*, and even *Gertz*, were designed to protect. *Dun & Bradstreet*'s credit reporting hardly seemed as central to the interests of the First Amendment as reporting about controversial actions by public figures. (It is an interesting mark of how times have changed that conservative Justices in 1984–85 questioned whether such sales of information merited much First Amendment protection, while their conservative heirs on today's Court seem to take precisely the opposite view.)<sup>49</sup> Credit reporting also is a particularly robust form of speech because of its profitability; it involves information that is readily confirmed as true or false with the exercise of due care; and false reports have great potential to cause harm. And the application of *Gertz* to such speech raised concerns among at least some of the Justices about whether the Fair Credit Reporting Act, which provides for both presumed and punitive damages for "willful" false credit reports,<sup>50</sup> would satisfy *Gertz*'s requirement that presumed or punitive damages may be imposed only on proof of "actual malice" in the *Times v. Sullivan* sense.<sup>51</sup>

But the Court had written itself into a corner. Each of the potential ways of distinguishing *Dun & Bradstreet* from *Gertz* ran smack-dab into precedent. The Vermont Supreme Court's media/non-media distinction seemed directly contrary to the Supreme Court's repeated insistence that the media has no greater First Amendment protection than non-media

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48. *Id.* at 13 (citation omitted).

49. I refer to *Sorrell v. IMS Health Inc.*, \_\_ U.S. \_\_, 131 S. Ct. 2653 (2011), where the Court held that a prohibition on the sale of prescription data to marketers and data miners violated the First Amendment.

50. 15 U.S.C. § 1681n (1976).

51. Levine & Wermiel, *supra* note 34, at 10, 20, 21.

speakers.<sup>52</sup> The possibility that the sale of credit information might be defined as “commercial speech” entitled to a lesser degree of First Amendment protection did not fully jibe with existing definitions of commercial speech—speech proposing a commercial transaction, or, essentially, advertising—and expanding the category could pose difficult line-drawing problems.<sup>53</sup> And the remaining possibility, limiting First Amendment protection because the speech in question did not concern a matter of public interest, ran afoul of *Gertz*, where Justice Powell had pooh-poohed the notion that the degree of First Amendment protection afforded to speech could depend on a public interest test.<sup>54</sup>

All this was of little concern to a Justice, like Brennan, who was principally interested in defending *Times v. Sullivan* against any further inroads (and for whom *Gertz* itself was bad enough).<sup>55</sup> But for a Justice inclined to think that the kind of speech at issue in *Dun & Bradstreet* should not receive protection even under the *Gertz* standard, the path forward was more difficult. There were two basic ways of affirming the outcome reached by the Vermont Supreme Court: overruling one or more precedents (most likely *Gertz*), or tacking on a conceptually incoherent exception to *Gertz*—conceptually incoherent because it would involve acceptance of some proposition that had been rejected either in *Gertz* or some other precedent of the Court.

Conceptual incoherence was a preferred modus operandi of the Burger Court—limiting precedents (especially Warren Court ones) without overruling them<sup>56</sup>—and *Dun & Bradstreet* was no exception. For Powell, of course, overruling *Gertz*, his own handiwork, was out of the question, so he was condemned, even as he fought a more serious, and courageous, battle with cancer, to a months-long task of squaring the circle: maintaining *Gertz*, which was premised on the idea that whether speech concerned a matter of public interest was not a proper consideration in determining the First Amendment protection to which it was entitled, while cobbling on an exception to *Gertz*'s limits on presumed and punitive damages for, you guessed it, speech not concerning a matter of public interest.

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52. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

53. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

54. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

55. See *id.* at 361 (Brennan, J., dissenting).

56. Charles Fried, attacking the Burger Court from the right, commented that this practice “piled incoherence on incoherence.” Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 76 (1995).



Powell's course involved a considerable degree of self-deception. Having thoroughly constitutionalized the law of libel in *Gertz*, he now presented himself as the champion of defending the common law against constitutionally based incursions—an irony that, according to the Brennan histories cited by Levine and Wermiel, had elicited a tart comment from Justice Rehnquist in one of the final Conferences where the Justices discussed the case in the 1983 Term.<sup>57</sup> And even while purporting to defend the common law, Justice Powell apparently considered using the case to advance his pet project of defending corporate America by limiting punitive damages generally, not just in libel actions but in common-law tort actions generally.<sup>58</sup> Powell's dream was ahead of its time, as the limits on punitive damages he already contemplated in 1985 did not come to fruition for another decade, when a coalition of moderate and conservative Justices discovered due process limits on punitive damages, over the objection of the Court's more principled conservatives and one liberal.<sup>59</sup>

The documentary record compiled by Levine and Wermiel suggests that for Justice White, the incoherence of the effort to reconcile affirmance with the Court's precedents was a sticking point, accounting for his apparent initial vote to reverse and his proposed terse concurrence in the judgment if the case were not reargued, which would have said simply that reversal was more consistent with the Court's existing precedents than affirmance.<sup>60</sup> At the same time, his lingering disagreement with *Gertz* and what were by his own account growing doubts about the wisdom of *Times v. Sullivan* itself appear to have inclined Justice White to want to look for a defensible approach that could lead to affirmance of the Vermont Supreme Court's judgment—an approach he seems to have found lacking in Powell's drafts both in the 1983 Term and the 1984 Term. And perhaps Justice Brennan, by seizing the opportunity to write a broad paean to *Times v. Sullivan* and the First Amendment rather than a more spare this-is-what-our-precedents-require opinion (which would arguably have been more suitable for a case presenting such a narrow issue and involving such uninspiring facts),<sup>61</sup> drew out the contrarian in Justice White and led him to press for a

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57. Levine & Wermiel, *supra* note 34, at 39.

58. *Id.* at 42–44, 55, 59–60. After his retirement, Justice Powell publicly expressed his views on punitive damages. Lewis Powell, *The Bizarre Results of Punitive Damages*, WALL ST. J., Mar. 8, 1995, at A21.

59. See *BMW of N. Am., Inc., v. Gore*, 517 U.S. 559 (1996).

60. Levine & Wermiel, *supra* note 34, at 37.

61. *Id.* at 26.

reargument that, he apparently hoped, would result in a better airing of the question whether there was a more principled basis for limiting *Gertz*.

Reargument appears to have left White back where he started, however, with no better rationale for limiting *Gertz* apparent. That would seemingly account for his reported vote following reargument in the 1984 Term (according to the Brennan histories) to reverse unless the Court was prepared to overrule *Gertz*, which no other Justice was evidently willing to do.<sup>62</sup> With support that grudging from his fifth vote, Justice Brennan, the great master at “counting to five,” might have been wise to scale back the opinion he had circulated the previous spring, but as the documentary record shows, he did not.<sup>63</sup> It seems possible (and again I am only speculating here) that the unpalatability of joining an encomium to opinions he disliked was one of the factors that pushed Justice White over the edge and led him to circulate his opinion advocating that *Gertz* be overruled and describing *Times v. Sullivan* itself as “improvident.”<sup>64</sup>

It is contrary to the Supreme Court’s normal practice to overrule decisions when no party has asked the Court to do so and the Court itself has not invited briefing or argument on the issue.<sup>65</sup> Outside those circumstances, Justices usually, but not invariably, put aside their objections to decisions they disagreed with when issued and accept them as binding precedents, even if they may seek to narrow and distinguish them. Justice White normally played by those rules, but as a number of his opinions and votes from around the time of *Dun & Bradstreet* indicate, he was quite willing to join in, or to advocate, overruling decisions with which he strongly disagreed, whether that disagreement was longstanding or recently developed.

In the 1984 Term itself, White joined the majority in *Garcia v. San Antonio Metropolitan Transit Authority* in overruling *National League of Cities v. Usery*,<sup>66</sup> a decision from which he had dissented when it was issued.<sup>67</sup> In the “moment of silence” case, *Wallace v. Jaffree*, he described himself as “out of step” with the Court’s Establishment Clause jurisprudence and called for a “basic reconsideration of [the Court’s]

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62. *Id.* at 48–49.

63. *Id.* at 52.

64. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774, 767 (1985) (White, J., dissenting).

65. *See, e.g., Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009).

66. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

67. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Brennan, J., dissenting).

precedents” in the area,<sup>68</sup> a view he repeated in his dissenting statement in *Grand Rapids v. Ball* and *Aguilar v. Felton*.<sup>69</sup> The next term, he issued a strident call for overruling *Roe v. Wade*<sup>70</sup> in his dissent in *Thornburgh v. American College of Obstetricians & Gynecologists*.<sup>71</sup> And in *Batson v. Kentucky*,<sup>72</sup> he joined the Court in overruling his own opinion in *Swain v. Alabama*,<sup>73</sup> which had prevented criminal defendants from challenging prosecutors’ racially discriminatory exercise of peremptory challenges in individual cases. In a concurring statement, he acknowledged that *Swain* had led to a situation in which “the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread,” and agreed that “the time has come” to overrule it.<sup>74</sup>

In short, Justice White was not shy about saying he thought an opinion should be overruled, even when he had joined it at the time it was first issued, as he had joined *Times v. Sullivan*. Thus, it is not terribly surprising that he eventually decided that even though the Court was not prepared to overrule *Gertz*, he would ultimately base his vote on the view that the case should be overruled, contrary to the position he had apparently expressed in Conference. And because the disagreement he had with *Gertz* was, fundamentally, a disagreement with the approach of *Times v. Sullivan* itself, it is equally unsurprising that he would aim much of his opinion at that decision.

Even so, it is worth noting that while criticizing *Times v. Sullivan*, saying that it struck an “improvident balance,”<sup>75</sup> and suggesting alternative ways of limiting libel law to protect First Amendment values that he thought preferable to the *Times* standard, he stopped short of explicitly calling for the Court to overrule *Times v. Sullivan*—unlike *Gertz*, which he stated “should be overruled.”<sup>76</sup> That even an opinion that otherwise took direct aim at *Times v. Sullivan* shied away from calling for its overruling may indicate how firmly the decision had

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68. 472 U.S. 38, 91 (1985) (White, J., dissenting).

69. 473 U.S. 373, 400 (1985) (White, J., dissenting) (dissenting from both *Grand Rapids v. Ball* and *Aguilar v. Felton*).

70. 410 U.S. 113 (1973).

71. 476 U.S. 747, 785–86 (1986) (White, J., dissenting).

72. 476 U.S. 79 (1986).

73. 380 U.S. 202 (1965).

74. *Batson*, 476 U.S. at 100–02 (White, J., concurring).

75. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring).

76. *Id.* at 774.

become entrenched by 1985.

Indeed, the most striking thing about Justice White's quixotic assault on *Gertz* and *Times v. Sullivan* was how little traction it gained elsewhere on the Court. Apart from Chief Justice Burger's effort to join both Justice Powell in endorsing *Gertz* and Justice White in trashing it,<sup>77</sup> no other Justice expressed any interest in fundamentally rethinking the Court's approach to libel and the First Amendment—not even Justice Rehnquist, the Justice on the Court at the time who was ostensibly the most averse to limiting state law through adventurous constitutional holdings. Justice White's protest only highlighted the broad consensus on the Court in favor of *Times v. Sullivan* and even, remarkably, what Rehnquist is said to have referred to as the "last minute compromise" of *Gertz*.<sup>78</sup> In light of that consensus, Justice Stevens was undoubtedly wise to counsel Justice Brennan not to react defensively, especially not with a defense that seemed "less persuasive" than *Times v. Sullivan* itself.<sup>79</sup> And Justice Brennan was wise to take that advice, notwithstanding his initial inclination to mount a full defense of *Times v. Sullivan* proceeding from "Meiklejohnian premises"<sup>80</sup> (a phrase that sounds much more like it came from a Brennan clerk than from Brennan himself).

The extent to which *Times v. Sullivan* and its progeny had already won, despite Justice White's lone protest, was illustrated the very next term, when a majority of the Court (including *Dun & Bradstreet's* supposedly staunch defenders of state law, Justices Powell and O'Connor) added yet another limitation on the operation of common-law libel in *Philadelphia Newspapers v. Hepps*, holding that the First Amendment requires libel plaintiffs in cases involving speech on subjects of public concern to bear the burden of proving falsity as well as the requisite degree of fault.<sup>81</sup> (Interestingly, it was Justice Stevens, joined by White, Burger, and Rehnquist, who spearheaded the dissent to that holding.)<sup>82</sup>

And that same term, Justice White gave libel defendants one of their greatest victories in *Anderson v. Liberty Lobby, Inc.*,<sup>83</sup> which held that a court considering a summary judgment motion in a libel case must consider whether there is an issue of fact for the jury in light of the

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77. Levine & Wermiel, *supra* note 34, at 86–87.

78. *Id.* at 19 (citation omitted).

79. *Id.* at 83 (citation omitted).

80. *Id.* at 66 (citation omitted).

81. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

82. *Id.* at 780 (Stevens, J., dissenting).

83. 477 U.S. 242 (1986).

standard of proof required under *Times v. Sullivan*: clear and convincing evidence. The decision, which confers a tremendous procedural advantage on libel defendants, obviously reflects Justice White's understanding of the logic of the summary judgment standard rather than great sympathy for the First Amendment defenses of accused libelers. Ironically, Justice Brennan dissented based on his views about preserving jury trial rights in civil cases; Justice Rehnquist also dissented, joined by Chief Justice Burger.<sup>84</sup> Nowhere in any of the decisions was there any suggestion that the *Times v. Sullivan* standard was anything other than firmly entrenched law.

Indeed, once Justice White got his feelings about *Times v. Sullivan* off his chest in *Dun & Bradstreet*, they never reappeared in any subsequent opinion he wrote or joined, despite ample opportunities presented by later decisions involving libel. And with one minor exception, those criticisms were never taken up by any other Justices—the sole exception being a dissent from denial of certiorari written by Chief Justice Burger and joined by Justice Rehnquist near the end of the 1985 Term, which called for the reexamination of *Times v. Sullivan*.<sup>85</sup> Notably, Justice White did not join that dissent, although it invoked his opinion in *Dun & Bradstreet*.

Since 1986, the Court's relatively few forays into the area of defamation law have involved the working out of details, with the assumption that *Times v. Sullivan* and *Gertz* provide the governing principles.<sup>86</sup> Beyond the area of defamation, *Times v. Sullivan*'s tribute to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" has achieved iconic stature in the Court's First Amendment jurisprudence and is regularly invoked by Justices across the ideological spectrum.<sup>87</sup>

Not even Justice Scalia, who is reputed to have said that he regards *Times v. Sullivan* as wrongly decided,<sup>88</sup> has ever expressed that thought in an opinion since his appointment to the Court. Indeed, he joined the Court in extending the *Times v. Sullivan* standard to claims of intentional

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84. *Id.* at 257 (Brennan, J., dissenting); *id.* at 268 (Rehnquist, J., dissenting).

85. *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 476 U.S. 1187 (1986) (Burger, C.J., dissenting from denial of certiorari).

86. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989).

87. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 467–68 (2007) (Roberts, C.J., announcing the opinion of the Court).

88. *Levine & Wermiel, supra* note 34, at 3–4.

infliction of emotional distress in *Hustler Magazine, Inc. v. Falwell*,<sup>89</sup> and he has repeatedly joined opinions that are premised on the holding of *Times v. Sullivan* or that cite it favorably.<sup>90</sup> Justice Scalia's opinion for the Court in *District of Columbia v. Heller*<sup>91</sup> even invoked *Times v. Sullivan* as precedent for the proposition that there is nothing illegitimate about the Court's discovery of the scope of a constitutional amendment two centuries after its adoption: "Even a question as basic as the scope of proscribable libel," he wrote, "was not addressed by this Court until 1964, nearly two centuries after the founding."<sup>92</sup>

In short, *Times v. Sullivan* continues to tower over the fields of libel law and First Amendment jurisprudence generally, and its continued hegemony is not in serious doubt. *Dun & Bradstreet*, by contrast, is a footnote (albeit a fairly important one in its limited area of operation). My interpretation of the record compiled by Levine and Wermiel is that the case never truly called into question the continued vitality of *Times v. Sullivan* in anyone's mind except Justice White's (and, in response, Justice Brennan's and his clerks'). The only real continuing importance of Justice White's opinion is that it was so ineffectual as to confirm rather than undermine *Times v. Sullivan*'s vitality.

Levine and Wermiel have provided a fascinating and useful case study of how the history of a Supreme Court decision can be traced in detail through the papers made available to the public by the former Justices of the Court. But *Dun & Bradstreet* also illustrates that sometimes the Justices' footnote wars are less important than they may seem from the standpoint of the particular Justices and law clerks who are directly involved. The wealth of detail now available about the drafting of any one set of opinions should not lead students of the Court to miss the forest for the trees.

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89. 485 U.S. 46 (1988).

90. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *Masson*, 501 U.S. at 525 (White, J., joined by Scalia, J., concurring in part and dissenting in part).

91. 554 U.S. 570 (2008).

92. *Id.* at 626 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).