A A L S

FEDERAL COURTS SECTION NEWSLETTER

March 2024

ANNOUNCEMENTS

2024 Annual Meeting Program

In his dissent in *New State Ice Co. v. Liebmann* in 1932, Justice Louis Brandeis famously wrote that a single state may "serve as a laboratory"—conducting experiments that could then be considered by the rest of the country. An analogous phenomenon is arguably occurring at the federal courts of appeals today.

Though all part of the same middle tier of review within the larger federal judiciary, the thirteen courts of appeals are quite different from each other in critical ways. Specifically, they vary along key case management metrics—how often they hear oral argument in appeals and how often cases are submitted on the briefs; how often appeals result in published opinions and how often they result instead in unpublished orders. Beyond even the processes by which they decide appeals, there are key differences in the norms and cultures of these courts, resulting in different "personalities." But unlike with the idealized laboratories of democracy, the "results" of these different experiments are not well known outside of the courts, and sometimes even within the courts themselves.

At the 2024 Annual Meeting, Judges Pam Harris and Sri Srinivasan and Professors Alli Larsen, Marin K. Levy, Merritt McAlister, and Chas Tyler considered the extent of the variation across the courts of appeals today and assessed how the different experiments across appellate adjudication have fared and where more experimentation would be beneficial.

Daniel J. Meltzer Award

Congratulations to Professors Vicki Jackson (Harvard) and Judith Resnik (Yale), who at the 2024 Annual Meeting became the most recent winners of the Daniel J. Meltzer Award, which honors the life and work of the late Professor Meltzer. With this Award, the Section recognizes that Professors Jackson and Resnik have exemplified over the course of their careers the tradition that Professor Meltzer set in excellence in teaching, careful and ground-breaking scholarship, engagement in issues of public importance, generosity as a colleague, and overall contribution to the field of Federal Courts.

Best Untenured Article Award

Also at the 2024 Annual Meeting, Professor Z. Payvand Ahdout (Virginia) won the 2023 Best Untenured Article Award for *Separation-of-Powers Avoidance*, 132 Yale Law Journal 2360 (2023). This award recognizes outstanding scholarship in the field of Federal Courts by an untenured faculty member. Congratulations, Payvand!

Section Officers

At the 2024 Annual Meeting, Professor Marin K. Levy (Duke) was elected Chair, and Professor Richard Re (Virginia) was elected Chair-Elect. We know they'll do a wonderful job leading the Section!

NEW SCHOLARSHIP

We appreciate the excellent response to this feature and look forward to publicizing your work again! If you're a Section member and would like information about a Federal Courts article, essay, or book you published in 2024 included in the first 2025 issue of the newsletter, email the citation and a summary of no more than 200 words to Katherine Mims Crocker (kmcrocker@wm.edu) and Celestine Richards McConville (mcconvil@chapman.edu) by January 15, 2025.

Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 Yale Law Journal 2360 (2023)

When federal judges are called on to adjudicate separation-of-powers disputes, they are not mere arbiters of the separation of powers. By resolving a case (or declining to), federal courts are participants in the separation of powers. Stemming from this idea, this Article introduces "separation-of-powers avoidance." Judges employ familiar techniques to avoid compelling high-level coordinate-branch officials to act.

This Article documents and models this phenomenon. It explores how courts have dug a moat around the separation of powers through transdoctrinal principles that can, if taken beyond the courtroom, distort the interpretation of the separation of powers. From constitutional rights to statutory interpretation, scholarship has recognized that judicial expositions of legal principles are not necessarily coterminous with underlying law.

This Article extends that insight to the structural Constitution. It theorizes this form of avoidance as reflecting uniquely judicial considerations. Finally, it offers normative prescriptions for the resolution of separation-of-powers conflict outside of federal courts. Separation-of-powers doctrine refracted through the lens of avoidance should not be taken outside of the courtroom. Bilateral negotiations between Congress and the President should not incorporate this doctrine, and both public and legal discourse should adjust to account for avoidance's distortionary effects on the structural Constitution.

Thomas Baker, A Primer on the Jurisdiction of the United States Courts of Appeals (Federal Judicial Center 3d ed. 2023)

This primer is a brief introduction to the complexity and nuance in the subject-matter jurisdiction of the U.S. courts of appeals. It examines procedural issues related to the exercise of appellate jurisdiction in appeals from final judgments and interlocutory appeals. It covers civil and criminal appeals, extraordinary writs, and federal administrative agency reviews.

Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 Wake Forest Law Review 1 (2023)

This article contrasts the decline of implied rights of action under *Bivens*, which the Court has justified because Congress, not courts, should be in the business of creating rights of action, with the Court's very active role policing actionable statutory harms under Article III standing after *TransUnion*. It finds a through line in these contradictory approaches to the judicial function in the Roberts Court's wariness of the damage-seeking private plaintiff and posits that the Roberts Court has deployed seemingly neutral separation-of-powers principles to achieve goals that were unattainable in the legislative process.

Anna Conley, *A Challenge to "Equitable Originalism"—The History of Injunctions as a Principle-Based Adaptable Judicial Power*, 17 NYU Journal of Law & Liberty 112 (2023)

"Equitable originalism" is a judicial philosophy that only injunctions allowable in English chancery courts at America's founding in the 1780s are allowable in federal courts today. Accordingly, previously unknown injunctions, such as structural or nationwide injunctions, are prohibited exercises of judicial power. Historical analysis does not support the assertion that the original meaning of "equity" in Article III crystalized federal equitable powers in the 1780s. Analysis of Article III, federal legislation, rules of court, treatises and caselaw in the late 1700s and 1800s illustrate that the United States received equity from the colonies and England as a principle-based jurisdiction that was expected to adapt to changing circumstances.

Like the U.S. reception of English common law, English chancery practices were a gap-filler for a burgeoning U.S. legal system with different political, economic and environmental realities. The "equitable originalism" approach to federal injunctive power is not in keeping with the text, function, purpose or traditions associated with equity. Rather than cabin in federal equity as it existed in England in the 1780s, the founders, the first congress, and early U.S. scholars and courts expected courts to exercise caution when issuing injunctions and apply

the centuries-old requirement that legal remedies are inadequate.

Scott Dodson, *Why Do In-State Plaintiffs Invoke Diversity Jurisdiction?*, Law & Social Inquiry (2023)

The traditional rationale of federal diversity jurisdiction is to protect out-of-state parties from state-court bias. Yet a strikingly high percentage—more than 50%—of original domestic-diversity cases are filed by in-state plaintiffs. Why? Drawing on docket data and an original dataset based on responses to a survey sent to more than 12,000 attorneys who represented in-state plaintiffs in domestic-diversity cases, I find that these plaintiffs can be grouped into roughly three categories: (1) tort cases, filed by individual plaintiffs against corporate defendants, that are eligible for consolidation with an existing federal multi-district litigation; (2) in-state corporate plaintiffs represented by attorneys who tend to represent defendants in federal court and who invoke diversity jurisdiction primarily based on perceptions of advantages of federal procedure, efficiencies and conveniences of federal practice, and superior quality of federal court; and (3) in-state plaintiffs represented by attorneys who tend to represent plaintiffs in state court and who invoke diversity jurisdiction to preempt the defendant's likely removal of the case. My findings offer grounds for reforming diversity jurisdiction in more tailored and nuanced ways than have previously been proposed.

Scott Douglas Gerber, *The Leak of the* Dobbs *Draft*, in SCOTUS 2022: Major Decisions and Developments of the US Supreme Court 201 (Morgan Marietta ed., Palgrave Macmillan, 2023)

The chapter chronicles the leak in the *Dobbs* case, the ramifications of the leak, the history of Supreme Court leaks, and possible reforms for preventing future leaks.

John Harland Giammatteo, *The New Comity Abstention*, 111 California Law Review 1705 (2023)

The piece documents what I argue is an emerging form of abstention which would require federal courts to abstain from hearing federal claims challenging state court procedures. Currently percolating in the federal courts, this new comity abstention doctrine would bar enforcement of federal rights any time the action could cause a downstream effect on state court proceedings or require a federal court to review state court procedures. I document the emergence of this new species of abstention and critique it. I also examine how, if it were to be fully adopted, the doctrine would amount to a severe threat to federal jurisdiction and a categorical abdication of the federal courts' role in enforcing fundamental federal rights against a large swath of state action.

Joel S. Johnson, *Vagueness and Federal–State Relations*, 90 University of Chicago Law Review (2023)

This Article aims to clarify the content of the void-for-vagueness doctrine and defend its historical pedigree by drawing attention to a fundamental aspect of the Supreme Court's vagueness decisions—that vagueness analysis significantly depends on whether the law at issue is a federal or state law. That simple distinction has considerable explanatory power. It reveals that the doctrine emerged in the late-nineteenth century in response to two simultaneous changes in the legal landscape—first, the availability of Supreme Court due process review of state penal statutes under the Fourteenth Amendment, and second, a significant shift in how state courts construed those statutes. The federal–state distinction also divides the Court's decisions into two groups with mostly separate concerns. It reveals that separation-of-powers concerns primarily motivate the Court's vagueness decisions involving federal laws, while federalism concerns are the driving force in its vagueness decisions involving state laws. In the vast majority of cases involving a federal law, the Court narrowly construes the law to avoid vagueness concerns. In cases involving a state law, by contrast, the Court will follow any preexisting state-court construction of the law, however indefinite it may be.

Michael Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 Indiana Law Journal Supplement 37 (2023)

The United States Supreme Court in its shadow docket grants or denies requests for stays of lower court decisions, often controversially on a hurried basis with rudimentary briefing and no oral argument, and with little if any explanation by the Court or individual Justices. Scholars have advanced various reforms to ameliorate the perceived problems of the shadow docket. One suggestion is to require suits against federal statutes and policies to be litigated before a specially convened three-judge district court, in the District of Columbia, with a direct appeal to the Court. Supporters argue that this process would result in more consistent decision ma-

king by the Court and lower courts. The reform would largely replicate the procedure Congress established from 1937 to 1976 for challenges to the constitutionality of federal statutes, a procedure abolished in 1976. The Essay evaluates the recent suggestion considering the prior experience, an evaluation that includes an empirical analysis of Supreme Court decisions under the earlier process. The suggested reform would reduce forum shopping but deprive the Court of the benefits of percolation of multiple suits. The Essay concludes that the reform could ameliorate some problems of the shadow docket, but should be undertaken with an appreciation of the mixed past experience with similar institutional arrangements.

Xiao Wang, *The Old Hand Problem*, 107 Minnesota Law Review 971 (2023)

Why do judges take senior status when they do? The scholarly consensus emphasizes non-partisan reasons, such as rising caseloads or financial incentives. This Article, though, presents the first attempt to analyze the timing behind every senior status decision since 1919. My dataset offers a rebuttal to the existing literature, showing that today—more than ever before—the decision to go senior is politically strategic, giving open seats to Presidents from the same political party.

I call this sort of behavior the "old hand" problem, an allusion to the dead hand problem. Senior judges, while technically retired, continue to control law and policy for this generation and future generations—thereby eroding judicial legitimacy for three distinct reasons.

First, when a circuit judge goes senior, they create an opportunity to fill a vacant seat with an ideologically compatible replacement, all while staying on to participate in panel decisions. That is *court-packing*. *Second*, when a district judge goes senior, they get to choose what cases they hear—*court-picking*. And *third*, when chief judges invite senior judges to visit their courts to advance political goals, that creates *court-stacking*. I conclude by discussing ways to address the old hand problem.

IN THE SUPREME COURT

Here are descriptions of decided cases and cases in which the Court has granted certiorari that appear to present Federal Courts issues. Material new to this issue appears in blue type. There are hyperlinks to lower-court decisions and argument transcripts.

DECIDED CASES

***Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18 (2023) (Decision below: 50 F.4th 259 (1st Cir. 2022)) (Argument transcript)**

Deborah Laufer sued Acheson Hotels for allegedly violating the Americans with Disabilities Act (ADA) by failing to include sufficient accessibility information on the website of the Coast Village Inn and Cottages. Laufer is disabled—with limited mobility and vision impairment—but did not intend to visit the inn. Instead, as the First Circuit explained, Laufer was "a self-proclaimed ADA 'tester'" who "advocate[d] for disabled persons" and "filed hundreds of other ADA-related suits in federal courts from coast to coast."

The district court dismissed the case on standing grounds, reasoning that Laufer had not suffered a cognizable injury. The First Circuit reversed, concluding that the Supreme Court recognized standing for testers in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The First Circuit further declared that any language undermining such standing in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), was dictum—or in the alternative, that "Laufer's feelings of frustration, humiliation, and second-class citizenry" constituted "adverse effects" capable of providing standing under *TransUnion*.

The Supreme Court granted cert to decide whether a tester who does not intend to visit the business in question has standing to pursue an ADA action—a question over which several circuits had split. Before argument, however, Acheson dismissed the underlying complaint and filed a suggestion of mootness. She averred that she did not intend to file any additional ADA tester suits, as one of her attorneys had been sanctioned for unethical conduct related to some of her cases.

The Supreme Court, in an opinion by Justice Barrett, held the case moot, leaving the standing issue undecided. Justices Thomas and Jackson each filed a concurrence in the judgment. Thomas argued that the Court should have held that Acheson lacked standing. Jackson wrote separately to express concerns about the Court's vacatur practices for moot cases under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

***Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 144 S. Ct. 457 (2024) (Decision below: 46 F.4th 159 (3d Cir. 2022)) (Argument transcript)**

The plaintiff borrowed money from the U.S. Department of Agriculture (USDA). Claiming that he had repaid the loan in its entirety but that USDA nevertheless told a credit-reporting agency it was past due, the plaintiff sued under the Fair Credit Reporting Act (FCRA). The district court held that USDA was protected by sovereign immunity. The Third Circuit reversed, holding that the FCRA waives such immunity. The Supreme Court unanimously affirmed. The Court explained that it has found clear waivers when (1) "'a statute says in so many words that it is stripping immunity from a sovereign entity,'" and (2) "'a statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" The FCRA fell into the latter category. The Court rejected the government's argument that when Congress creates a cause of action and authorizes suit, it must also include a separate waiver provision to clearly waive sovereign immunity.

GRANTED CERTIORARI

***Federal Bureau of Investigation v. Fikre*, No. 22-1178 (Decision below: 35 F.4th 762 (9th Cir. 2022))**

The plaintiff sued the Federal Bureau of Investigation (FBI), arguing that it violated his substantive and procedural due process rights by placing and maintaining him on the "No Fly List." The district court dismissed the claims as moot after the FBI removed the plaintiff from the No Fly List and submitted a sworn declaration stating that the plaintiff "no longer satisfied the criteria for placement on the No Fly List" and that he "will not be placed on the No Fly List in the future based on the currently available information." The Ninth Circuit reversed. In conflict with the Fourth and Sixth Circuits, it held that the government's assurance did not "satisfy the heavy burden of making it absolutely clear that the government would not in the future return [the plaintiff] to the No Fly List for the same reason it placed him there originally." The FBI's failure to explain the reason for "inclusion on and removal from" the list, including any change in policy, led the court to conclude that the plaintiff's removal was "'more likely an exercise of discretion than a decision arising from a broad change in agency policy or procedure.'" The FBI challenges the Ninth Circuit's conclusion that the sworn declaration was insufficient to show mootness.

***Food & Drug Administration v. Alliance for Hippocratic Medicine*, No. 23-235 (Decision below: 78 F.4th 210 (5th Cir. 2023));**

***Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, No. 23-236 (Decision below: 78 F.4th 210 (5th Cir. 2023))**

Several organizations with doctor members, as well as individual doctors, sued the Food and Drug Administration (FDA), challenging FDA's actions related to approving mifepristone, a drug used to terminate early pregnancies. The plaintiffs challenged four FDA actions—its initial approval in 2000, its amended conditions of use in 2016, its approval of a generic version in 2019, and its 2021 decision not to enforce a requirement for in-person prescribing and dispensing. Danco Laboratories (Danco), the maker of Mifeprex, the brand name for mifepristone, intervened.

The district court granted preliminary relief. The Fifth Circuit reversed the district court in part, holding that the claim relating to the 2000 approval was out of time and that the plaintiffs failed to show injury from the 2019 approval. The Fifth Circuit upheld the district court's order regarding the 2016 and 2021 actions. The court rejected FDA and Danco's argument that the plaintiffs' injuries were too speculative to support standing, finding that the plaintiffs had "proven up each link in the chain of causation—that a percentage of women who take mifepristone will suffer serious medical complications; that hundreds of the [plaintiff organizations'] members are physicians who treat patients in those circumstances; that many of the [plaintiff doctors] have in fact treated such patients; and that providing such treatment causes the [d]octors to violate their rights of conscience, sustain mental and emotional distress, divert time and resources away from their ordinary practice, and incur additional liability and insurance costs." On the merits, the Fifth Circuit found FDA's 2016 and 2021 actions arbitrary and capricious and upheld the district court's award of preliminary relief.

The consolidated petitions challenge (1) the Fifth Circuit's conclusion that the plaintiff organizations have standing to sue based on future risk of injury to some of their members from FDA's actions; (2) its determination that FDA's 2016 and 2021 actions were arbitrary and capricious; and (3) its decision to uphold the grant of preliminary relief.

***Murthy v. Missouri*, No. 23-411 (Decision below: 80 F.4th 641 (5th Cir. 2023))**

The plaintiffs are three doctors, a healthcare activist, the owner of the Gateway Pundit website, and the states of Missouri and Louisiana. The plaintiffs assert First Amendment claims based on social-media platforms allegedly "censoring" posts of theirs related to controversial topics like the origin of and response to COVID-19, supposed election fraud, and Hunter Biden's laptop because of pressure from the Biden Administration. The district court concluded that "the evidence produced thus far depicts an almost dystopian scenario" in which "the Government apparently engaged in a massive effort to suppress disfavored conservative speech." The district court granted preliminary injunctive relief restricting interactions between social-media companies and defendants associated with the White House, the Surgeon General's Office, the Centers for Disease Control and Prevention (CDC), the FBI, the National Institute of Allergy and Infectious Diseases, the Cybersecurity and Infrastructure Security Agency (CISA), and the State Department. The Fifth Circuit affirmed in part but limited the injunction to the defendants associated with the White House, the Surgeon General's Office, the CDC, the FBI, and (on a motion for rehearing) the CISA.

The Supreme Court granted the Biden Administration's application to stay the preliminary injunction, treated the application as a cert petition, and granted cert. Justice Alito, joined by Justices Thomas and Gorsuch, dissented from the decision to grant the stay, which he characterized as "highly disturbing" because "[g]overnment censorship of private speech is antithetical to our democratic form of government." The questions presented are (1) whether the plaintiffs have Article III standing, (2) whether the Biden Administration's conduct "transformed private social-media companies' content-moderation decisions into state action" and transgressed the First Amendment, and (3) whether the preliminary injunction was appropriate.

ADDITIONAL INFORMATION

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Katherine Mims Crocker (William & Mary) and Celestine Richards McConville (Chapman) prepared this newsletter. If you have an idea for the newsletter, please let one of us know. And if you'd like to assist with producing the newsletter, please contact one of the following Section officers:

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