A A L S

FEDERAL COURTS SECTION NEWSLETTER

July 27, 2021

2022 Annual Meeting Program

It is time, again, to turn our scholarly gazes toward the states. The federal courts, as always, get all of the attention. By some measures, our federal courts are highly professional, well-funded, celebrated, and increasingly polarized. But as all of us know but often ignore—most litigation takes place outside of the federal system. More than ninety percent of claims in the United States are in state courts and overwhelmingly comprise landlord-tenant, debt collection, and small contract claims. The rules of procedure in our state courts are increasingly distinct from their federal analogs in areas like standing, multidistrict litigation, pleading, and discovery. Sometimes these differences generate friction. For example, federal judges presiding over multidistrict litigation are increasingly issuing injunctions to stop state discovery in parallel cases. At other times, the state-federal overlap generates cooperation. Witness, for instance, the growing number of cases where state and federal judges jointly manage complex litigation. Even more, the states play a role in the federal judicial system as litigators, competitors, and sites of political contestation. Pedagogically, some faculty have incorporated the states by renaming Federal Courts classes, "Federal and State Courts in the Federal System."

This panel will discuss this new "turn toward the states" in scholarship and its relationship to current trends in the federal system. It will consider the role of multidistrict litigation in both state and federal courts, jurisdictional overlap between the two systems (and its effect on the common law), how the states increasingly dissent from federal judicial trends, differences in docket composition between the two court systems, procedural divergence, and the incorporation of the states in Federal Courts classes.

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2020 Term, followed by descriptions of cases awaiting review that appear to present Federal Courts issues. Material new in this issue of the newsletter appears in blue type. There are hyperlinks to Supreme Court opinions, lower court decisions, and argument transcripts.

Decided in the October 2020 Term

***Brownback v. King*, 141 S. Ct. 740 (2021) (Decision below: 917 F.3d 409 (6th Cir. 2019)) (Argument transcript)**

Two officers working for an FBI task force misidentified James King, a college student, as a criminal suspect and subjected him to a violent arrest. King sued the United States for Michigan tort claims under the Federal Tort Claims Act (FTCA) and the officers for Fourth Amendment claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court granted the government summary judgment on the FTCA claims on the ground that the undisputed facts precluded relief and dismissed the *Bivens* claims on the ground that the officers were entitled to qualified

immunity. King appealed the *Bivens* claims' dismissal, and the Sixth Circuit reversed after determining that the FTCA's "judgment bar" could not apply because the district court's ruling rested on a lack of jurisdiction over the FTCA claims. The judgment bar provides that "[t]he judgment in an action under [28 U.S.C. § 1346(b)] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

In an opinion by Justice Thomas, the Court unanimously reversed, holding that the district court's ruling constituted a merits judgment notwithstanding that "in the unique context of the FTCA, all elements of a meritorious claim are also jurisdictional." The Court did not decide whether the judgment bar actually precluded King's *Bivens* claims, remanding for consideration of arguments including that the bar does not apply to claims within a single suit. Justice Sotomayor concurred, expressing skepticism that the judgment bar would foreclose relief here.

***California v. Texas*, 141 S. Ct. 2104 (2021) (Decision below: 945 F.3d 355 (5th Cir. 2020)) (Consolidated with *Texas v. California*)**

***Texas v. California*, 141 S. Ct. 2104 (2021) (Decision below: 945 F.3d 355 (5th Cir. 2020)) (Consolidated with *California v. Texas*) (Argument transcript)**

In an opinion by Justice Breyer, a 7–2 Court ruled that plaintiffs lacked standing to challenge the provision of the Patient Protection and Affordable Care Act (ACA) that required individuals to purchase health insurance (nicknamed the "individual mandate"). After a 2017 amendment reduced to zero the penalty for failure to comply with the individual mandate, Texas and numerous other states filed a federal action seeking a declaration that the amended mandate was an unconstitutional use of congressional power and inseverable from the remainder of the ACA. Two individual plaintiffs joined as plaintiffs. California, along with numerous states and the District of Columbia, intervened as defendants.

All plaintiffs failed the traceability requirement for standing. The individual plaintiffs claimed injury from past and future purchases of health insurance, but having identified no threat of enforcement by government officials, they fell one hundred percent short of the traceability mark, which requires plaintiffs to "show that the likelihood of future enforcement is 'substantial.'" The state plaintiffs fared no better. The Court rejected their claim that the mandate increased enrollment in state-run health programs (thereby increasing costs to the states), finding that the benefits flowing from other ACA provisions provided a more likely cause for any increase in enrollment. Likewise, costs incurred to comply with other ACA provisions did not support standing because they were unrelated to the mandate.

Justice Alito, joined by Justice Gorsuch, dissented, arguing that compliance costs imposed by other provisions of the ACA traced back to the mandate because the mandate was inseverable from the rest of the law, rendering enforcement of the other provisions unlawful. The majority declined to entertain this argument because it was not "directly argued" in the lower courts or raised on certiorari.

***Carney v. Adams*, 141 S. Ct. 493 (2020) (Decision below: 922 F.3d 166 (3d Cir. 2019)) (Argument transcript)**

An attorney registered as an independent challenged the Delaware Constitution's provision that limited membership on major state courts to a bare majority Republicans or Democrats, with the balance of seats to be filled by members of the other party. The eight participating Justices ruled that the attorney presented only a generalized grievance. In his deposition, the plaintiff had testified, "I would apply for any judicial position that I thought I was qualified for, and I believe I'm qualified for any position that would come up . . . [o]n any of the courts." He had not, however, made any application, rejection of which (on the grounds of the Delaware constitutional provision) might have furnished the concrete and particularized injury-in-fact that standing doctrine requires.

***CIC Services, LLC v. Internal Revenue Service*, 141 S. Ct. 1582 (2021) (Decision below: 925 F.3d 247 (6th Cir. 2019)) (Argument transcript)**

A material advisor to taxpayers sued the IRS under the Administrative Procedure Act, challenging the promulgation of an IRS notice imposing reporting requirements on the advisor and subjecting it to noncompliance penalties treated as taxes. In an opinion by Justice Kagan, the Court unanimously held (on the day of the federal individual income-tax filing deadline) that because the action's "objective aim" was to remove the reporting requirement

rather than to enjoin the tax penalty, the Anti-Injunction Act did not prohibit the suit. Justice Sotomayor concurred, noting that the case might have come out differently if the plaintiff were a taxpayer instead of a material advisor. Justice Kavanaugh also concurred, distinguishing between "pre-enforcement suits challenging the regulatory component of a regulatory tax" and "pre-enforcement suits challenging a regulation backed by a tax penalty" and saying that the Court's opinion allowed only the latter.

***Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (Decision below: 2019 WL 8643258 (5th Cir. 2019)) (Argument transcript)**

After finding that *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (unanimous-jury requirement for "serious" state crimes) did not qualify for the watershed exception under *Teague v. Lane,* 489 U.S. 288 (1989), the Court, 6–3, eliminated the exception. The Court leaned heavily on the fact that, in the thirty-two years since *Teague*, no decision has qualified for watershed protection, not even "landmark and historic criminal procedure decisions," rendering the exception "theoretical."

Justice Thomas, joined by Justice Gorsuch, concurred to note that the Court could have reached the same result through application of the Antiterrorism and Effective Death Penalty Act rule requiring deference to reasonable state-court decisions. Justice Gorsuch concurred, describing *Teague* as an attempt to limit the exercise of judicial discretion on habeas and praising the majority for eliminating the "wiggle room" created by the watershed exception. Justice Kagan, joined by Justices Breyer and Sotomayor, dissented, arguing that *Ramos* "perfectly fits" the watershed exception, "refut[ing] the majority's one stated reason for overruling" *Teague.*

***Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (Decision below: 894 F.3d 406 (D.C. Cir. 2018)) (Argument transcript)**

***Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (Decision below: 911 F.3d 1172 (D.C. Cir. 2018)) (Argument transcript)**

Philipp involved a suit brought by heirs of German Jewish art dealers against Germany and a German governmental entity alleging that the Nazi regime coerced the dealers to sell a collection of medieval relics (known as the Welfenschatz or the Guelph Treasure) in 1935 for far less than their fair market value. In an opinion by Chief Justice Roberts, the Court unanimously held that the Foreign Sovereign Immunities Act's "expropriation exception"—which rejects immunity where "rights in property taken in violation of international law are in issue"—incorporates the "domestic takings rule" and thus does not include a sovereign's taking of its own nationals' property. Accordingly, the Court concluded that the district court lacked jurisdiction. The Court did not decide whether the district court "was obligated to abstain from deciding the case on international comity grounds."

Simon involved a similar suit brought by Holocaust survivors for claims against Hungary and its national railway company. A *per curiam* Court remanded for further proceedings consistent with *Philipp*.

***Mckesson v. Doe*, 141 S. Ct. 48 (2020) (Decision below: 945 F.3d 818 (5th Cir. 2019))**

A police officer sued a civil-rights activist in tort after sustaining serious injuries during a protest following the death of Alton Sterling. The officer alleged that the activist "negligently staged the protest in a manner that caused the assault." The district court dismissed the case as barred by the First Amendment, and the Fifth Circuit reversed. In a *per curiam* opinion without argument, the Supreme Court vacated and remanded, stating that the Fifth Circuit should have certified unsettled state-law questions to the Louisiana Supreme Court before reaching the First Amendment issue. Justice Barrett did not participate. Justice Thomas dissented without opinion.

***Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (Decision below: 929 F.3d 623 (9th Cir. 2019)) (Consolidated with *Cargill*)**

***Cargill, Inc. v. Doe I*, 141 S. Ct. 1931 (2021) (Decision below: 929 F.3d 623 (9th Cir. 2019)) (Consolidated with *Nestlé*) (Argument transcript)**

Individuals sued U.S.-based companies under the Alien Tort Statute (ATS) for allegedly aiding and abetting child slavery on cocoa plantations in Ivory Coast. In an opinion by Justice Thomas, the Court held, 8–1, that the lawsuit could not proceed because it was based on extraterritorial conduct and because "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS."

Writing only for himself and Justices Gorsuch and Kavanaugh, Thomas also reasoned that only Congress, not the Court, could recognize causes of action under the ATS beyond those for three "historical torts" ("violation of safe conducts, infringement of the rights of ambassadors, and piracy"). Justice Gorsuch concurred, joined in different parts by Justices Alito and Kavanaugh, rejecting the companies' argument that plaintiffs cannot sue corporations under the ATS (which the Court did not decide) and like Thomas arguing that courts may not create new causes of action under the ATS. Justice Sotomayor concurred in part and concurred in the judgment, joined by Justices Breyer and Kagan, opposing Thomas's argument that would confine the ATS's coverage to three historical torts. Justice Alito dissented, saying he would "reject petitioners' argument on the question of corporate immunity, vacate the judgment below, and remand these cases for further proceedings."

***Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (Decision below: 894 F.3d 449 (2d Cir. 2018)) (Argument transcript)**

The Court's eight participating Justices held that the Religious Freedom Restoration Act of 1993, by its express remedies provision, does permit suits seeking money damages against individual federal employees.

***Taylor v. Riojas*, 141 S. Ct. 52 (2020) (Decision below: 946 F.3d 211 (5th Cir. 2019))**

A *per curiam* Court, Justice Thomas dissenting without opinion, reversed the Fifth Circuit's grant of summary judgment on immunity grounds. The Court decided the case without oral argument, affirming the Circuit's finding "that the conditions of confinement alleged by inmate, whereby for six full days he was confined in a pair of shockingly unsanitary cells, the first of which was covered nearly floor to ceiling in 'massive amounts' of feces and the second of which was frigidly cold and equipped with only a clogged floor drain to dispose of bodily wastes, violated the Eighth Amendment's prohibition on cruel and unusual punishment," but ruling that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Justice Alito concurred in the judgment but thought that the Court should not have granted review in a case he characterized, quoting the Court's rules, as "'the misapplication of a properly stated rule of law.'"

***TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (Decision below: 951 F.3d 1008 (9th Cir. 2020)) (Argument transcript)**

Spokeo, Inc. v. Robins, 578 U.S. 330 (2016), ruled that "Article III standing requires a concrete injury even in the context of a statutory violation," but arguably entertained the possibility that *some* statutory violations, standing alone, might provide the necessary injury. A 5–4 majority in *TransUnion* closed the door on that reading of *Spokeo*, holding that a statutory violation, by itself, will *never* supply the necessary concrete injury. While acknowledging Congress's power to create statutory rights and authorize suit for their violation, the Court warned that this power "does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." Concrete injuries, the Court explained, include "traditional tangible harms, such as physical harms and monetary harms," as well as "intangible harms . . . with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts."

Here, class-action plaintiffs alleged that TransUnion violated a provision of the Fair Credit Reporting Act (FCRA) requiring use of "reasonable procedures to assure maximum possible accuracy of the information" contained in credit reports. The Court ruled that only those plaintiffs whose erroneous credit reports were sent to third parties suffered a concrete injury (akin to defamation) sufficient to support standing. And only the named plaintiff had standing to challenge TransUnion's compliance with provisions requiring it to provide "[a]ll information in the consumer's file" upon request, and to accompany the information with a "summary of rights," because "plaintiffs presented no evidence that, other than [the named plaintiff], 'a single other class member so much as *opened* the dual mailings,' 'nor that they were confused, distressed, or relied on the information in any way.'"

In dissent, Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, distinguished between private and public rights. Violation of the former establishes standing for private plaintiffs without a separate showing of injury, while violation of the latter does not. The challenged provisions of the

FCRA created private rights because they imposed duties "owed to individuals, not to the community writ large." Thus, TransUnion's "mere violation" of FRCA supplied the requisite injury-in-fact. Justice Thomas argued that the majority's opposite conclusion rendered "legislatures . . . constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law."

***Trump v. New York*, 141 S. Ct. 530 (2020) (Decision below: 485 F. Supp. 3d 422 (S.D.N.Y. 2020)) (Argument transcript)**

Plaintiffs brought constitutional and statutory challenges to President Trump's memorandum directing the Secretary of Commerce to provide information so that unauthorized immigrants could be excluded from the apportionment base for congressional seats following the census count. In a *per curiam* opinion, the Court held that standing and ripeness both necessitated dismissal because it was unclear who would be excluded or what the impact of such exclusions would be. Justice Breyer dissented, joined by Justices Sotomayor and Kagan, arguing that the plaintiffs had standing, the case was ripe, and the policy was unlawful.

***Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) (Decision below: 781 F. App'x 824 (11th Cir. 2019)) (Argument transcript)**

An 8–1 Court ruled that "nominal damages provide the necessary redress for a completed violation of a legal right," even if plaintiff fails to seek actual damages for that injury. The Court relied on the common-law availability of such damages, as well as the principle that "every injury imports a damage." This holding allowed plaintiff to escape dismissal for mootness after defendant mooted the claim for injunctive relief by abandoning the challenged policy. Justice Kavanaugh concurred to note that he, like Chief Justice Roberts, believes that "a defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits." In a lone dissent, Roberts warned that the majority's decision "turn[s] judges into advice columnists," and "risks a major expansion of the judicial role." He argued that nominal damages "represent[] a judicial determination that the plaintiffs' interpretation of the law is correct—nothing more."

Granted Certiorari

***Brown v. Davenport*, No. 20-826 (Decision below: 964 F.3d 448 (6th Cir. 2020))**

Brecht v. Abrahamson, 507 U.S. 619 (1993), ruled that a federal court may not grant habeas relief unless the "error had substantial and injurious effect or influence in determining the jury's verdict," a standard different than the one applied on direct review under *Chapman v. California*, 386 U.S. 18 (1967). In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) imposed numerous limits on federal habeas relief, one of which (28 U.S.C. § 2554(d)(1)) requires federal-court deference to reasonable state-court application of "clearly established Federal law." *Davis v. Ayala*, 576 U.S. 257 (2015), held that "the *Brecht* test subsumes the limitations imposed by AEDPA."

The question presented is whether "a federal habeas court [may] grant relief based *solely* on its conclusion that the *Brecht* test is satisfied, as the Sixth Circuit held, or must the court also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held?"

***Cameron v. EMW Women's Surgical Center, P.S.C.*, No. 20-601 (Decision below: 831 F. App'x 748 (6th Cir. 2020))**

This case arises from a challenge to a restrictive Kentucky abortion law. The Secretary of Kentucky's Cabinet for Health and Family Services defended the law until the Sixth Circuit invalidated it. He then declined to seek rehearing en banc or certiorari. The Kentucky Attorney General, Daniel Cameron, moved to intervene to continue the defense, and the Sixth Circuit denied the motion. From the petition, the question presented is "[w]hether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law."

Farewell to Don Doernberg

Unfortunately for us Federal Courts nerds, Don Doernberg decided to hand over the newsletter's reins. Don served our community for decades, keeping us up-to-date on the latest and greatest from the Court, and sharing his wisdom and insight (with a side of well-timed wisecracks). The authors ask that you not judge us by comparison, for the simple reason that there is no comparison to Don.

News of Don's retirement from the newsletter triggered many fond memories and kind words. We reprint them below:

In corresponding with Don about scholarship and this newsletter, I've been so grateful for his kindness and eagerness to encourage and assist a junior professor like me. Thank you, Don, for all you've done for the Federal Courts community!

--Katherine Mims Crocker

Thanks, Don, for your unflagging efforts to keep us all current on developments in our shared field. You are a valued colleague and friend (not to mention incredible co-author).

--Rich Freer

It was my privilege to be one of the co-authors of Don's Federal Courts casebook for several years. He was unfailingly generous and good humored in our collaboration, and for that I will be eternally grateful.

But the most lasting impression I got was how genuinely and unceasingly interested Don was in the material. When one loves a subject, the thing he or she most craves in a collaborator is a true fellow traveler, someone who unabashedly geeks out on the material as much (or more) as oneself. It turns chores into playtime.

Don brought that same infectious enthusiasm to the newsletter, and I always enjoyed reading them even though I usually knew what was coming. To my mind, he will always personify Federal Courts pedagogy.

--Evan Tsen Lee

I was fortunate to get a chance to work briefly with Don as Chair Elect of the section. I was definitely nervous to be selected to help run a group of such esteemed faculty, but Don's knowledge and expertise made the entire ordeal much less scary. He was always available to answer questions about section practices, and his emails gently asking when certain things were going to happen provided very helpful reminders. Don has also been an unparalleled cheerleader and supporter of the section's work—encouraging the development of a less typical section program at AALS, and congratulating us on a panel well done. He was a pleasure to work with and learn from. And he will be greatly missed!

--Leah Litman

When I expressed interest in contributing to the newsletter, Don welcomed me—a complete stranger—like an old friend. Working with Don on the newsletter and the latest edition of Don's Federal Courts casebook has been a gift. Don is generous with his time and wisdom, and I am honored to call him my mentor and friend.

Don, I will miss your voice in the newsletter.

--Celestine McConville

No one really knows how long Don worked on the Federal Courts newsletter. But we all know he has done a superb job. I am delighted that he's receiving time off for good behavior and wish him all the best as the world turns.

--Jim Pfander

Thanks across decades are due to Don Doernberg for lucid accounts of decisions that are not always themselves lucid. As a teacher of the class, I have been a lucky recipient of Don's careful and thorough help, guiding us each year to the opinions with which we need be familiar. Cheers for intellectual generosity in teaching us so much.

--Judith Resnik

I was not lucky enough to work with Don in the section. But I know his work has had a lasting effect. We're all grateful for his contributions. Thanks, Don.

--Diego Zambrano

Submissions

Katherine Mims Crocker (William & Mary) and Celestine McConville (Chapman) prepared this newsletter with assistance from Bobby Nevin (William & Mary law student). If you would like to contribute to the newsletter, please contact any of the following so that your name can be placed in nomination at the 2023 meeting:

- Leah Litman (Michigan),
  Section Chair for 2021,
  (734) 647-0549, lmlitman@umich.edu;
- Diego Zambrano (Stanford),
  (650) 721-7681, dzambran@law.stanford.edu;
- Katherine Mims Crocker (William & Mary),
  (757) 221-3758, kmcrocker@wm.edu; or
- Celestine McConville (Chapman),
  (714) 628-2592, mcconvil@chapman.edu.

Notice

This newsletter is a forum for the exchange of points of view. Opinions expressed here are not necessarily those of the section and do not necessarily represent the position of the Association of American Law Schools.