A A L S

FEDERAL COURTS SECTION NEWSLETTER

March 2025

ANNOUNCEMENTS

2025 Annual Meeting Review

Section Panel

In 2018, Chief Justice Roberts famously posited that there are no "Obama judges or Trump judges." This expression of judicial independence from politics represented a conventional picture of impersonal judging under the law. Yet legal culture has become unusually polarized in recent years, as reflected in predictable voting lineups at the Supreme Court, allegedly partisan behavior by some federal circuit courts of appeals, and aggressive forum and judge shopping by litigants. Judicial retirements, too, are becoming increasingly politicized in light of the vast legal and practical consequences attending a justice's death in office. And even the tone and tenor of judicial opinions seems to be in flux, as judges sometimes seem to jockey for attention and ideological credibility by issuing genre-busting opinions with sensational rhetoric.

These developments have prompted a series of policy proposals, ranging from structural changes in the appointment or replacement of Supreme Court justices to greater unpredictability in district court panel assignments. Behind the scenes, some judges have tried to restore old norms of collegiality or else create new practices capable of meeting new challenges. Court decisions, too, offer fodder for reform, as judges seek ways of preserving their authority and independence in a time of partisan strife over the judiciary.

The Federal Courts Section's program at the 2025 Annual Meeting placed these recent events in historical context and explored paths forward. Judge William Fletcher, former Judge Michael McConnell, and Professor Richard Re served as panelists, and Professor Marin Levy moderated. The panel discussed questions like whether the present moment is really so anomalous; whether effective steps are being taken to preserve the ideal that federal judges transcend the president or political party that appointed them; and whether, alternatively, legal culture will eventually have to accept that there really are Obama, Trump, and Biden judges, after all.

Best Untenured Article Award

At the 2025 Annual Meeting, John Harland Giammatteo (Buffalo) won the Best Untenured Article Award for *The New Comity Abstention*, 111 California Law Review 1705 (2023). This award recognizes outstanding scholarship in the field of Federal Courts by an untenured faculty member. Congratulations, John!

Section Officers

Also at the 2025 Annual Meeting, Professor Richard Re (Virginia) was elected Chair, and Professor Fred Smith (Emory) was elected Chair-Elect. We know they'll do a wonderful job leading the Section!

NEW SCHOLARSHIP

Following are summaries of scholarship published by Section members in 2024. If you're a Section member and would like information about a Federal Courts article, essay, or book you published in 2025 included in the first 2026 issue of the newsletter, email the citation and a summary of no more than 200 words to Katherine Mims Crocker (kmcrocker@law.tamu.edu) and Celestine Richards McConville (mcconvil@chapman.edu) by January 16, 2026.

Z. Payvand Ahdout & Bridget Fahey, *Layered Constitutionalism*, 124 Columbia Law Review 1295 (2024)

It is conventional wisdom that the states are free to structure their governments. This article challenges that received wisdom and argues that the Supreme Court has drawn on an eclectic set of constitutional provisions to develop a broad body of federal constitutional rules of state structure. This article gathers and systemizes that body of law. It first locates the constitutional openings onto which federal courts have seized to rule on questions of state structure. The article then distills approaches federal courts have used to decide when and why the federal Constitution constrains state structural discretion and what state governance structures it endorses. The article finally turns to the implications of this body of doctrine for both federalism and federal structural constitutional law. It develops a vocabulary to understand why these cases have not been incorporated into the federalism canon and the institutional design choices and values they implicate. Ours is a system of layered constitutionalism, but not one in which each government's constitutionally chartered structures operate discretely. It is one that contains structural interdependencies between the federal and state constitutional structures. The challenge is to locate structural interdependencies in ways that preserve the values of our system of layered constitutionalism.

Rachel Bayefsky, *Dignity and Judicial Authority* (Oxford University Press 2024)

Human rights movements and organizations all over the world cite the pursuit and preservation of dignity as one of their goals, but the legal implications of this term are highly contested. *Dignity and Judicial Authority* offers a theory of dignity that emphasizes respect for status, non-domination, and control over self-presentation to others. The book explains how U.S. courts can recognize the loss of dignity as a legally actionable harm and provide remedies for this harm. In applying these ideas, the book explores a host of corresponding legal topics, including constitutional standing doctrine, the "dignitary torts," and court-mandated apologies. It demonstrates the connections between dignity and subjects such as jurisdiction and remedies, which help to delineate the bounds of judicial authority.

This inquiry sheds light not only on the nature of dignity, but also on the power of courts and their proper functions in a constitutional democracy. How can judges decide whether dignity has been violated, especially when these decisions risk embroiling them in contentious social disputes? Will accepting dignitary claims burst open the proverbial "floodgates of litigation"? Through theoretical analysis and detailed doctrinal discussion, the book explains how courts can integrate dignity into legal determinations in a thoughtful and principled manner.

Rachel Bayefsky, *Judicial Institutionalism*, 109 Cornell Law Review 1297 (2024)

The idea of institutionalism figures prominently in today's debates about the role of federal courts in American democracy. For example, Chief Justice Roberts is often described as an institutionalist who seeks to preserve the Supreme Court's power or reputation. But what exactly is institutionalism, and should judges be institutionalists? This article offers an extended analysis and defense of judicial institutionalism. It conceptualizes institutionalism as an approach to judging that meaningfully takes into account two interests of the judiciary: legitimacy—understood as public confidence in the courts—and the efficient administration of the court system. Institutionalism bolsters the enforceability of court decisions and helps to prevent a situation in which one side of salient cultural debates is a "permanent loser" in the judicial process. Institutionalist judges do not flout the law; instead, institutionalism properly shapes their view of what the law requires. The article offers several practical options for implementing institutionalism in the real world. These options cover such areas as the certiorari process, equitable remedies, unpublished opinions, justiciability, stare decisis, and the "merits" of a case.

A.J. Bellia Jr. & Bradford R. Clark, *Constitutional Federalism and the Nature of the Union*, 66 William & Mary Law Review 281 (2024)

Some commentators reject longstanding federalism doctrines—such as state sovereign immunity,

the anti-commandeering doctrine, and the States' equal sovereignty—on the ground that the Constitution does not affirmatively grant States these rights. This charge overlooks background context essential to faithful interpretation of the Constitution. The former British Colonies in North America became "Free and Independent States" following the Declaration of Independence—a status that entitled them to all of the rights and powers of every other sovereign state under the law of nations. Under that law, states could alienate their sovereign rights and powers in a binding legal instrument only if the instrument did so in clear and express terms or by unavoidable implication. Hamilton explained that because the Constitution involved a "division of the sovereign power," this rule was "clearly admitted by the whole tenor of the instrument." Thus, the proper question in federalism cases is not whether the Constitution affirmatively grants the States sovereign rights and powers (it does not), but whether it includes text sufficient to alienate the rights and powers they enjoyed when they became "Free and Independent States." In defending this thesis, we respond to misguided critiques offered by Professors Martin Flaherty and David Schwartz.

A.J. Bellia Jr. & Bradford R. Clark, *State Sovereign Immunity and the New Purposivism*, 65 William & Mary Law Review 485 (2024)

In evaluating congressional attempts to override state sovereign immunity, the Supreme Court established that Congress may abrogate immunity when enforcing the Fourteenth Amendment, but not when exercising its Article I powers. This distinction is consistent with the original public meaning of the constitutional text understood in historical context. Recently, in a surprising turnabout, the Court abandoned this established paradigm by finding that the States agreed to an implied "structural waiver" of their sovereign immunity in the "plan of the Convention" whenever such immunity would "thwart" or "frustrate" the purpose underlying a congressional power that is "complete in itself." The Court's new purposive approach is incompatible with the Constitution because it gives courts open-ended discretion to alter the federal–state balance established by the instrument. As Alexander Hamilton explained, because the Constitution "aims only at a partial union or consolidation," "the whole tenor of the instrument" requires adherence to "the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor." Under this rule, the "plan of the Convention"—properly understood—divested the States of their sovereign rights only when it did so clearly and expressly or by unavoidable implication.

Aaron-Andrew P. Bruhl, *Law and Equity on Appeal*, 124 Columbia Law Review 2307 (2024)

Most lawyers know that the Federal Rules of Civil Procedure merged the divergent trial procedures of the common law and of equity, but few are familiar with the development of federal appellate procedure. Here too there is a story of the merger of two distinct systems. Unlike the story of the fusion of trial procedure, in which we can identify a date of merger (1938, with the Federal Rules) and a winning side (equity), the story of federal appellate procedure laid out in this article reveals a merger that occurred fitfully over two centuries and yielded a blended system that incorporates important aspects of both traditions.

In addition to revealing the complicated roots and hybrid character of current federal appellate practice, this article aims to show that an appreciation of the history can explain some current pressures in the system and open our minds to the possibility of reform. I do not suggest that we resurrect the bifurcated procedure of the past, but there are circumstances in which today's federal courts could benefit from recovering submerged features of the equitable model of appeal.

William Casto, *Helping Students to Organize Their Thoughts About the* Erie *Doctrine*, 99 Indiana Law Journal Supplement 62 (2024)

This article is about teaching. It is not a scholarly analysis of the *Erie* Doctrine. Rather it is a guide to organizing students' thoughts regarding the applicability of federal or state law to all the issues that arise in litigation.

Grant Christensen, *Article III and Indian Tribes*, 108 Minnesota Law Review 1789 (2024)

This article concludes that the Supreme Court was wrong in 1985 when it assumed a plenary judicial power over Indian affairs. The consequences are profound and suggest a reconceptualization of the entire field of Indian law. Canon-creating cases like *Oliphant*, *Montana*, and *Cabazon* should never have been decided because the exercise of a tribe's inherent authority does not create a federal question conferring subject matter jurisdiction on the federal courts. The inherent power of Indian tribes to criminally prosecute or civilly regulate non-Indians in

Indian country should not subject them to the judicially imposed limits set by the Supreme Court because the Court lacks subject matter jurisdiction to decide those cases. Until a treaty or statute creates an affirmative basis for federal court review, an Indian tribe's inherent powers are subject to the checks and balances imposed by tribal government and no others.

Katherine Mims Crocker, *Constitutional Rights and Remedial Consistency*, 110 Virginia Law Review 521 (2024)

This article is about the extent to which federal courts should provide similar opportunities to obtain relief for wrongs to discrete constitutional rights. It explores how a commitment to generality and neutrality values can translate into a paradigm promoting transsubstantivity (meaning consistent applicability across separate substantive concerns) for constitutional remedies (meaning rules for implementing and preventing or punishing violations of constitutional rights)—and how the Supreme Court has deviated from this paradigm. The article proposes a novel framework arising from the idea that remedial inconsistency can be transparent, translucent, or opaque depending on the clarity of non-transsubstantivity. The article then examines how using this framework could help improve judicial approaches to constitutional-remedies law. Among additional contributions, by providing innovative tools for centering remedial consistency as an important—but not absolute—aspect of constitutional law, this article offers a potential step toward decreasing perceptions of the Supreme Court's work as pervasively political and thus reinforcing its legitimacy at this time of skepticism.

Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 Minnesota Law Review 815 (2024)

Since the Supreme Court declared that states are "entitled to special solicitude"—presumably meaning preferential treatment—"in [the] standing analysis," commentators have depicted the concept as permitting opportunistic and ideological crusades in courts across the country. But what if "special solicitude" is not so special after all? This article first shows that in the Supreme Court, the concept has faded from explicit prominence and has not made much implicit impact. The article then collects all cases from federal courts of appeals to discuss special solicitude, finding no consensus about what the concept means but, again, a lack of doctrinal significance. Courts often deny state standing or pronounce special solicitude extraneous. And even where courts purport to apply it, special solicitude rarely if ever makes a definitive difference. Accordingly, this article argues, while the Court should discard the doctrine, stakeholders hoping to improve this area of constitutional law should focus less on special solicitude and more on other potential reforms.

Katherine Mims Crocker & Jack Goldsmith, *Prudence, Role Morality, and Restraint: Judge Wilkinson on the Separation of Powers*, 110 Virginia Law Review Online 269 (2024)

Caution in reviewing the actions of the legislative and executive branches has been a hallmark of the jurisprudence of Judge J. Harvie Wilkinson III. This essay, an invited contribution to a symposium of tributes for the Judge, highlights how three related features stand out in his work on the separation of powers: prudence, role morality, and restraint.

Scott Dodson, *The Culture of Forum Shopping in the United States*, 57 International Lawyer 307 (2024)

Most judicial systems have case-allocative rules that rigidly and substantially limit party choice among forums. Not so in the United States. This paper details the unique landscape of forum shopping in American courts along three dimensions: vertical shopping between federal and state court, horizontal shopping among states, and individual shopping for particular judges. It describes the legal, structural, and cultural foundations that enable and even encourage forum shopping in the United States, especially as contrasted with other countries. It then explains and assesses its persistence in American litigation culture today. The paper concludes that a prevailing U.S. solution to problematic forum shopping is . . . more forum shopping.

Scott Dodson, *When Does State Law Affect Federal Jurisdiction?*, 43 Review of Litigation 117 (2024)

Federal courts routinely assert that a federal court lacks jurisdiction to hear a state claim that state courts lack jurisdiction to hear. That assertion is wrong. State law cannot, on its own force, deprive federal courts of jurisdiction because federal jurisdiction is the exclusive province of federal law. However, state law can, and often does, affect federal-court jurisdiction. For example, state laws on remedies can affect whether a plaintiff has satisfied the amount-in-controversy threshold for statutory diversity jurisdiction or whether a plaintiff has standing to sue in federal court. Thus, while state

law cannot override federal jurisdiction, it can affect federal jurisdiction under circumstances permitted by federal law.

Monica Haymond, *Intervention and Universal Remedies*, 91 University of Chicago Law Review 1859 (2024)

This article examines over 500 nationwide-injunction cases and shows that a surprising participant is influencing the result: an outsider who has joined as an intervenor. Intervenors can stand on equal footing with the original parties, so a decision to grant or deny intervention has real-world stakes for the life cycle of the case. This article examines the role that intervenors play and the effect of judicial discretion over whether to allow intervenors to join.

Judicial discretion over intervention functionally gives courts control over how nationwide-injunction cases proceed, or whether they proceed at all. With few principles guiding that discretion, procedural rulings can appear to be influenced by the court's own political leanings, undermining public confidence in the court's decision on the merits. What's more, intervenors can keep cases alive even after government officials have withdrawn, thereby increasing the odds that high-stakes, politically salient questions will be resolved by the courts rather than the democratic process.

This article is the first scholarly examination of the significant role that intervention plays in nationwide-injunction suits. More broadly, this article uses intervention to explore the function of procedural rules and the federal courts in a democratic system and to offer proposals for reform.

Joel S. Johnson, *Ad Hoc Constructions of Penal Statutes*, 100 Notre Dame L. Rev. 73 (2024)

The Supreme Court construed penal statutes in forty-three cases from the 2013 Term through the 2022 Term. In those cases, the Court tended to adopt narrow constructions, a preference consistent with several substantive canons of construction, such as the rule of lenity and the avoidance of constitutional vagueness concerns. Substantive canons were routinely included in party briefs, frequently raised during oral argument, and occasionally explicated in concurring opinions. Yet the Court did not rely on substantive canons in most narrow-construction cases. For example, the Court never firmly relied upon lenity—the substantive canon most often raised in briefs and at argument—to justify a narrow construction over the entire ten-Term period. Instead, the Court's rationale in these cases tended to be "ad hoc," in the sense that the Court based its narrow reading only on statute-specific ordinary-meaning analysis. That approach may be motivated by textualist suspicion of substantive canons or a desire to maximize interpretive discretion in future cases involving penal statutes. The Court's ad hoc approach has large-scale implications that perpetuate the enactment, enforcement, and interpretation of penal statutes in an expansive manner—undermining the rule of law by systematically increasing discretion for various actors who administer criminal law.

Joel S. Johnson, *Vagueness Avoidance*, 110 Virginia Law Review 71 (2024)

Vagueness avoidance is a powerful tool of judicial construction for constraining penal statutes. Unlike ordinary constitutional avoidance, which is triggered by ambiguity and seeks to resolve semantic meaning, vagueness avoidance is triggered by vagueness-related indeterminacies that effectively delegate the legislative task of crime definition. Such language requires construction to give it legal effect. Because vague statutory language typically has a practically identifiable core, courts may legitimately craft a construction of the text that captures only that core while excising its indeterminate peripheries. Doing so respects the separation of powers, the principle of legality, and the modern methodological commitment to implementing legislative will. The Supreme Court has traditionally been explicit about applying vagueness avoidance to federal penal statutes with indeterminate language. Yet the Court has recently moved toward implicit vagueness avoidance—the practice of justifying narrow constructions on the basis of mere interpretation that determines semantic meaning. That practice reflects an unfortunate conflation of vagueness avoidance and ordinary constitutional avoidance. As a result, the Court's recent decisions do little to deter lower courts from adopting broad constructions and thus embolden prosecutors to exploit indeterminate language in the federal criminal code to attach criminal penalties to a wide range of commonplace conduct.

Michael S. McGinniss, *Declaring Independence to Secure Integrity: The Supreme Court Justices' Code of Conduct*, 25 Federalist Society Review 272 (2024)

In late 2023, the nine current members of the Court adopted the Code of Conduct for Justices of

the Supreme Court of the United States. Although over past decades the Justices have made official statements and unofficial comments on Supreme Court ethics, adoption of this Code "represents the first time that the Court has implemented and published a written code of conduct for Justices" to guide them in performing their duties. Unsurprisingly, an array of legal commentators, academics, and federal legislators immediately criticized the new Code as inadequate, especially because it does not include a specific enforcement mechanism.

This article argues the new Justices' Code of Conduct represents a bold and appropriate declaration of the Court's independence in the face of the recent surge of congressional and media-driven efforts at intimidation of the individual Justices to influence their adjudication of cases. Sound constitutional interpretation and principles of separation of powers establish that Congress lacks the institutional authority or policy prerogative to impose ethics regulations on the Court. With proper respect for the Supreme Court's decisional and institutional independence, Congress' exclusive post-confirmation recourse for what it regards as ethical misconduct by individual Justices is impeachment and removal under the Impeachment Clauses.

Jeffrey A. Parness & Alexandria N. Short, *FRCP 11 Sanctions for Bad Discovery Advocacies*, 54 New Mexico Law Review 213 (2024)

The article explores how FRCP 11 can apply to certain discovery abuse notwithstanding FRCP 11(d).

Judith Resnik, *"Open" Courts and "Remedy by Due Course of Law": The Capital of and the Investments in Courts, State and Federal*, 99 NYU Law Review 6 (2024)

Longstanding constitutional commitments appear to ensure rights to remedies for "every person." Nonetheless, courts were once exclusionary institutions contributing to the maintenance of racialized status hierarchies. Twentieth-century civil rights movements pushed courts into recognizing the authority of diverse claimants to pursue their claims. These movements also succeeded in legislatures, which invested in making constitutional obligations real through statutory entitlements, jurisdictional grants, and funding for tens of hundreds of courthouses, judgeships, and staff. This essay explores how the federal courts became the source of "our common intellectual heritage," why it is difficult to bring sustained attention to state courts, and why doing so has become pressing as economic inequalities in state and federal courts undermine adjudication's legitimacy. I focus on the infrastructure of state and of federal courts and data on users and needs. Filings in both federal and state courts have, in recent years, declined, while concerns about self-represented litigants and the inaccessibility of courts have risen. I argue that the legal academy needs to take on "class" (as in economic wherewithal) in courts and that Congress needs to provide fiscal support for both federal and state courts, on which enforcement of law depends, and I address the challenges of doing so.

Judith Resnik, *Seeing "the Courts": Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy from the 1980s to the 2020s*, 43 Review of Litigation 193 (2024)

This article analyzes the federal judiciary's function as an adjudicatory institution and as an "agency" with its own programmatic agendas. During the last few decades, the federal judiciary has successfully lobbied Congress to create and finance a host of projects, including authorizing judges to centralize cases through multidistrict litigation, to select and appoint adjunct magistrate and bankruptcy judges, and to oversee the design of dozens of new courthouses. Since the 1990s, the federal judiciary has also gathered statistics on and repeatedly raised concerns about the number of self-represented litigants. Yet the judiciary has not generated structural responses, such as a national database on the many district court "pro se" projects and new mechanisms to enlist lawyering and other resources, to enable judges to make principled decisions in those cases. Likewise, while the docket is heavily dependent on the cross-litigant subsidies generated through class actions and MDLs, judges have not crafted methods to mobilize the lawyering resources in those configurations to support litigants within or to shape a robust method of overseeing implementation of the resolutions reached. To date, the federal judiciary has not instituted a mechanism to buffer against allocating adjudicatory resources largely based on litigants' economic wherewithal. Moreover, the federal judiciary, entwined with state and tribal court adjudication, has not joined its counterparts in pressing Congress to provide new streams of funding for all kinds of courts and the people using them.

Navigating the political economy of courts producing a crisis of legitimacy requires reorienting the

"process due" by revising statutes, doctrine, practices, and rules to respond to an eclectic set of claimants seeking to be heard. "Management" of the people in court does not suffice.

Judith Resnik, Henry Wu, Jenn Dikler, David T. Wong, Romina Lilollari, Claire Stobb, Elizabeth Beling, Avital Fried, Anna Selbrede, Jack Sollows, Mikael Tessema & Julia Udell, *Lawyerless Litigants, Filing Fees, Transaction Costs, and the Federal Courts: Learning from SCALES*, 119 Northwestern University Law Review 109 (2024)

Two Latin phrases describing litigants—pro se (for oneself) and in forma pauperis (IFP, as a poor person)—prompt this inquiry into the relationship between self-representation and requests for filing fee waivers. We sketch the governing legal principles for people seeking relief in the federal courts, the sources of income for the federal judiciary, the differing regimes to which Congress has subjected incarcerated and non-incarcerated people filing civil lawsuits, and analyses of data enabled by SCALES, a newly available database that coded 2016 and 2017 federal court docket sheets. This essay's account of what can be learned and of the gaps demonstrates the challenges of capturing activities in federal lawsuits and the burdens and inefficiencies of current federal court waiver practices.

Elizabeth Lee Thompson, *Procedural Innovation, the Rule of Law, and Civil Rights Justice*, 14 U.C. Irvine Law Review 1164 (2024)

Among the most inscrutable and plaguing roadblocks to implementing the Rule of Law in the United States and abroad has been delay—both postponement required by legal substance and procedure and delaying tactics offensively employed by parties and jurists who oppose clearly established law. This article proposes the key of employing innovative and courageous procedural mechanisms to thwart delay and breakthrough the logjam of resistance. The Federal Circuit Court of Appeals governing six Southern states during the post-*Brown v. Board of Education* (1954) years provides an exemplar of how court systems can surmount dilatory and obstructive tactics to deliver justice. This article adds four critical dimensions to previous scholarship: (1) diving deeper and broader into the basis for and ingenuity of these procedures; (2) extending appreciation of the long-term effect of these bold moves; (3) proposing three replicable keys to the court's successfully subjugating delay and obstruction: proactively structuring and employing local rules and procedures, applying procedural rules assertively in non-traditional ways, and harnessing what this article terms "potential power" laws to grant the court the greatest authority; and (4) arguing for the broad employment of this bold procedural approach when democratic legal systems globally confront systemic or purposeful obstruction.

Elizabeth Lee Thompson, *The Perilous Focus Shift from the Rule of Law to Appellate Efficiency*, 56 Connecticut Law Review 791 (2024)

The federal appellate system experienced a significant transformation in the late 1960s and 1970s. Many of the effects are still felt today, including the shift from oral argument for all appeals and the view that study and disposition of each appeal were exclusively judicial tasks, to the adoption of a tiered appellate system where the great majority of appeals receive no oral argument and instead receive summary disposition often directed by staff attorneys. This article adds three previously underexamined central facets to the debate concerning use of the internal case processing procedures: (1) recognizing the Fifth Circuit's influence as the initiator of the reforms adopted by circuit courts nationally; (2) contending that the Fifth Circuit's reforms provided an incorrect model for replication based on the Circuit's unique experience attempting to fend off a circuit split, which shaped its internally focused, defensive, and narrow reforms; and (3) appreciating how Fifth Circuit judges' laudable approach towards procedural innovation in earlier civil rights jurisprudence informed the shape of its internal efficiency reforms. The article proposes reconsideration of the structure of circuit courts' internal management processes to consider broadly reform possibilities in order to promote justice instead of the lesser goal of judicial efficiency.

Ann Woolhandler & Julia D. Mahoney, *State Standing After* Biden v. Nebraska, 2023 Supreme Court Review 304 (2024)

In recent years, the federal courts have seen a plethora of lawsuits originated by states challenging federal government actions. As a result, there are growing concerns that disputes that belong in the political arena are instead becoming the province of the courts. *Biden v. Nebraska*, in which the Court held that the State of Missouri had standing because it could claim as its own the economic impact of a student loan forgiveness program on the Missouri Higher Education Loan Authority (MOHELA), has intensified these concerns. Our article analyzes

state standing after *Biden v. Nebraska* and other recent cases and provides recommendations for limiting state standing going forward.

IN THE SUPREME COURT

Following 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

***Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (Decision below: 529 P.3d 218 (Okla. Crim. App. 2023)) (Argument transcript)**

After receiving a box of "prosecutor's notes" from the Oklahoma Attorney General's Office, capital petitioner filed his fifth state postconviction petition, arguing, inter alia, that prosecutors failed to correct the key witness's false testimony in violation of *Napue v. Illinois*. Conceding error, the Oklahoma Attorney General's Office requested vacatur of petitioner's conviction and death sentence with a remand for a new trial. The Oklahoma Court of Criminal Appeals ruled that the State's concession of error "cannot overcome the limitations on successive postconviction review" because the "concession is not based in law or fact." The court accordingly dismissed the petition as procedurally defaulted under state law.

The Supreme Court, 6–2 (with Justice Gorsuch not participating), found jurisdiction to review the state-court judgment. Writing for the majority, Justice Sotomayor explained that the state court's procedural-default holding was not an adequate and independent state ground because the state court's

> application of the [state procedural-default statute] over the attorney general's confession of error depended on its determination that no *Napue* violation occurred. That was a federal holding, and it was the only reason the [state court] provided for its conclusion that the attorney general's confession could not 'overcome' the [state procedural-default law].

The majority also explained that, even if the state court's reliance on federal law "is insufficiently 'clear from the face of the opinion,' we nonetheless presume reliance on federal law under *Michigan v. Long*." On the merits, a five-member majority found *Napue* error, reversed the state court, and remanded for a new trial.

Justice Barrett concurred in part and dissented in part. While she agreed that the Court had jurisdiction and that the state court misapplied *Napue*, she would not address whether *Napue* error occurred. Instead, she would vacate and remand, "leaving next steps" to the state court. Justice Thomas, joined by Justice Alito, dissented on the jurisdictional holding and on the finding of *Napue* error. Joined by Justices Alito and Barrett, Justice Thomas also dissented as to the remedy, arguing that the Court lacks power to order a new trial because, inter alia, when the Court relies on the *Long* presumption, "state courts 'remai[n] free' to 'reinstat[e] their prior judgments after clarifying their reliance on state grounds.'"

***Williams v. Reed*, 145 S. Ct. 465 (2025) (Decision below: 387 So. 3d 138 (Ala. 2023)) (Argument transcript)**

Petitioners applied for unemployment benefits from the State of Alabama. Believing the state unlawfully delayed consideration of their applications, petitioners sued the Alabama Secretary of Labor under 42 U.S.C. § 1983 in state court, alleging violations of the Due Process Clause and the Social Security Act. They sought an order requiring the State to speed up consideration of their applications. The state court dismissed for lack of jurisdiction, ruling that petitioners could not challenge delays in the administrative process until they exhausted that process and received a benefits determination. The Alabama Supreme Court affirmed.

The Supreme Court reversed, 5–4, holding that § 1983 preempted application of the state's exhaustion rule to § 1983 suits alleging unlawful delay of the administrative process. Writing for the majority, Justice Kavanaugh explained that application of the exhaustion rule "created a catch-22: Because the claimants cannot sue until they complete the administrative process, they can *never* sue under § 1983 to obtain an order expediting the administrative process." States may not "immunize state officials from § 1983 suits in that way." The majority emphasized the narrowness of its ruling, as it extends only to application of the state's exhaustion rule to claims alleging delay of the administrative process. The Court left open the question whether its "§ 1983 precedents . . . categorically bar both federal and state courts from applying state administrative-exhaustion requirements to § 1983 claims."

Writing for himself in dissent, Justice Thomas argued that states have "plenary authority to decide whether their local courts will have subject-matter

jurisdiction over federal causes of action." He also criticized the Court's preemption precedents as too broad. Writing for himself and Justices Alito, Gorsuch, and Barrett, he argued that § 1983 does not preempt application of the state's exhaustion rule because that rule is a "'neutral' rule[] that do[es] not embody any 'policy disagreement' with federal law."

ARGUED CASES

***Gutierrez v. Saenz*, No. 23-7809 (Decision below: 93 F.4th 267 (5th Cir. 2024)) (Argument transcript)**

This case concerns attempts by petitioner, a man on Texas's death row, to obtain postconviction DNA testing that he alleges would show he did not directly participate in the murder at issue. Petitioner acknowledges involvement in the robbery that precipitated the murder, and Texas's "law of parties" permits capital-murder convictions for persons who joined the underlying course of criminal conduct. But petitioner contends that DNA evidence indicating he did not participate in the murder itself would show that he would not have received the death penalty.

The Texas Court of Criminal Appeals rejected petitioner's efforts to obtain DNA testing on two grounds relevant here. First, the court held that state law permitted testing only when the results could affect the question of guilt or innocence, not just the sentencing determination. Second, the court held that "even if" state law allowed petitioner to seek "evidence that might affect the punishment stage as well as conviction," he "still would not be entitled to testing." Petitioner, the court explained, "would still have been death-eligible because the record facts satisfy the . . . culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life."

Petitioner then challenged the constitutionality of the state DNA testing system on due-process grounds under 42 U.S.C. § 1983 in federal court. The district court ruled in his favor, holding that the state-law right to file a second or successive habeas petition to challenge a death sentence was "illusory" in light of the law barring postconviction DNA testing that could not influence guilt or innocence. The Fifth Circuit vacated the judgment and remanded the case for dismissal, holding that petitioner did not have standing. Applying *Reed v. Goertz*, 598 U.S. 230 (2023), the Fifth Circuit said that redressability turned on whether "a Texas prosecutor, having in hand a federal court's opinion that a DNA testing requirement violated federal law and also an earlier [Texas] Court of Criminal Appeals opinion that this particular prisoner was not injured by that specific violation," would "*likely* order the DNA testing." The answer, the Fifth Circuit decided, was no.

The question presented is whether "Article III standing require[s] a particularized determination of whether a specific state official will redress the plaintiff's injury by following a favorable declaratory judgment."

***Louisiana v. Callais*, No. 24-109 (Decision below: 732 F. Supp. 3d 574 (W.D. La. 2024)) (Argument transcript)**

***Robinson v. Callais*, No. 24-110 (Decision below: 732 F. Supp. 3d 574 (W.D. La. 2024)) (Argument transcript)**

In 2022, the Louisiana legislature adopted a congressional districting map that created just one majority-Black district out of six. One third of the Louisiana population is Black. The 2022 map was subject to a successful challenge under Section 2 of the Voting Rights Act for diluting the votes of Black residents. The legislature responded in 2024 by enacting a new map with two majority-Black districts. Petitioners are Louisiana voters who allege that the new map is itself unlawful as an unconstitutional racial gerrymander.

A three-judge district court drawn from the Fifth Circuit concluded that the 2024 map violated the Equal Protection Clause and permanently enjoined its use.

The Supreme Court noted probable jurisdiction and consolidated two appeals, one by Louisiana (No. 24-109) and one by the challengers to the 2022 map (No. 24-110). In addition to multiple issues concerning the lawfulness of the map-drawing process, two questions presented at the merits stage concern justiciability. First, Louisiana argues that the challengers to the 2024 map lack standing because they presented no evidence of injury caused by the formation of a second majority-Black district. Second, Louisiana suggests invocation of the political-question doctrine by arguing that "racial-gerrymandering cases inherently present 'judicially unanswerable questions' properly left to 'the political branches.'"

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***Diamond Alternative Energy LLC v. EPA*, No. 24-7 (Decision below: 98 F.4th 288 (D.C. Cir. 2024))**

Petitioners are fuel producers and sellers that seek to challenge implementation of a provision of the Clean Air Act (CAA) allowing EPA to grant California, and only California, a waiver of the bar on states adopting their own emissions standards. As relevant here, in 2022, EPA granted California a waiver to regulate greenhouse-gas emissions and mandate zero emissions for a certain percentage of new vehicles in the state market. Petitioners argued that this waiver exceeded EPA's authority under the CAA because it was not "need[ed] . . . to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). Petitioners based this argument on the contentions that climate change, the condition underlying the state standards, is not a California-particular problem and that the standards would not materially reduce its effects.

The D.C. Circuit rejected the challenge on standing grounds. Petitioners' claimed injury depended on the actions of third-party vehicle manufacturers. Accordingly, the court explained that the injury "would be redressed only if automobile manufacturers responded to vacatur of the waiver by producing and selling fewer non-conventional vehicles or by altering the prices of their vehicles such that fewer non-conventional vehicles—and more conventional vehicles—were sold." And, the court concluded, "[t]he record evidence provides no basis for us to conclude that manufacturers would, in fact, change course" by Model Year 2025, the last relevant year under the 2022 waiver.

The Supreme Court granted cert limited to the question "[w]hether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties."

***Medina v. Planned Parenthood South Atlantic*, No. 23-1275 (Decision below: 95 F.4th 152 (4th Cir. 2024))**

In 2018, on the governor's order, the South Carolina Department of Health and Human Services prohibited abortion clinics from participating in Medicaid, even if they provided other medical services. Planned Parenthood and an individual Medicaid recipient who received contraceptive services from Planned Parenthood sued to challenge the prohibition as violating the Medicaid Act's "any-qualified-provider" provision. This provision says that to receive federal funds, states must allow Medicaid recipients to obtain healthcare from "any institution, agency, community pharmacy, or person, qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23).

The district court entered a permanent injunction against enforcing the order. The Fourth Circuit affirmed. The Supreme Court granted cert, vacated the judgment, and remanded for reconsideration in light of *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023). The Fourth Circuit again affirmed, holding that under *Talevski*'s analysis focusing on "whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs," the any-qualified-provider provision "creates individual rights enforceable via 42 U.S.C. § 1983." The court also concluded that the state's action violated the any-qualified-provider provision.

Here, the Supreme Court granted cert limited to the question "[w]hether the Medicaid Act's any-qualified-provider provision unambiguously confers a private right upon a Medicaid beneficiary to choose a specific provider."

***Rivers v. Guerrero*, No. 23-1345 (Decision below: 99 F.4th 216 (5th Cir. 2024))**

While his initial federal habeas petition was pending on appeal before the Fifth Circuit, petitioner filed another petition with the district court. The district court dismissed that petition for lack of jurisdiction, finding that it was a "second or successive" petition under 28 U.S.C. § 2244(b). Section 2244(b) prohibits the filing of second or successive petitions without circuit-court approval. Petitioner appealed the dismissal of his second-in-time petition, arguing that it should have been treated as an amendment to the initial petition rather than a second or successive petition.

Joining the Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits, the Fifth Circuit held that a second-in-time petition filed after the district court entered judgment on the initial petition is a second or successive petition subject to the gatekeeping procedures of § 2244(b). The Second and Third Circuits treat a second-in-time filing as second or successive if filed *after* exhaustion of appellate proceedings on the initial petition. In narrow circumstances, the Tenth Circuit treats a second-in-time petition as an amendment even when filed after the

district court's entry of judgment. The question presented asks the Supreme Court to resolve this circuit split.

ADDITIONAL INFORMATION

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