FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS

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FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS

Fourth Edition

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MATTHEW BENDER

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DEDICATION

For my grandchildren: Adam Jacob Hamilton, Noah Charles Hamilton, Sara Miriam Hamilton and Sophie Kate Hamilton

— Professor Fink

For four generations: Mom, Susan, Sarah, and Ellie

— Professor Rowe

To my family

— Professor Tushnet

SPECIAL ALERT

This Special Alert deals with important decisions handed down after the main text was completed in May 2013.

(1) The Supreme Court addressed issues of Article III standing in two cases involving gay rights.

a. *United States v. Windsor*, 570 U.S. ___, 2013 U.S. LEXIS 4921 (June 26, 2013), dealt with the constitutionality of the Defense of Marriage Act (DOMA). Windsor sought an estate-tax exemption for an inheritance from her spouse, whom she had married in Canada. When it was denied, she paid the tax and filed suit in the federal district court. The administration took the position that DOMA was unconstitutional and as required by statute notified Congress of that position. A group of House lawmakers, known in the litigation as BLAG, was permitted to intervene in the district court to defend the statute. The district court and then the court of appeals held the statute unconstitutional. BLAG continued in the litigation as permissive intervenors through the Supreme Court. The Supreme Court granted certiorari. With neither party defending DOMA's constitutionality, the Court appointed an amicus curiae to argue that the Court lacked jurisdiction over the case.

Justice Kennedy, writing for five members, held that Windsor clearly had Article III standing when she filed her lawsuit, and that the government's continuing refusal to pay the refund until the Supreme Court rendered a decision on the merits gave her a "real and immediate" economic injury sufficient to provide continuing Article III standing. The only remaining question, he continued, was whether the case should be dismissed on "prudential" standing grounds, described as "more flexible." One consideration bearing on prudential standing was the extent to which the merits had in fact been vigorously presented to the Court. "BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." The Court then held DOMA unconstitutional.

Justice Alito, while dissenting on the merits, would have held that BLAG had Article III standing, as representative of congressional interests in upholding a lawfully enacted statute when the executive branch refused to do so. Justice Scalia, joined by the Chief Justice and Justice Thomas, dissented from the standing holding (with Justices Scalia and Thomas, but not the Chief Justice, dissenting from the holding on the merits as well). For Justice Scalia, "Windsor's injury was cured by the judgment in her favor." "Article III requires not just a plaintiff (or appellant) who has standing to complain but an opposing party who denies the validity of the complaint. . . . (Relegating a jurisdictional requirement to 'prudential' status is a wondrous device, enabling courts to ignore the requirement whenever they believe it 'prudent' — which is to say, a good idea.)"

Would a holding that an Article III case or controversy was absent when the executive took the position that a statute was unconstitutional in effect give the executive a second chance to veto the statute? (A more accurate version of this question is, Would doing so give a President elected after the statute was signed by a predecessor President a chance to exercise an effective veto, and indeed one that Congress could not override?) Justice

Scalia emphasized that, in that event, "The matter would . . . [be] left, as so many matters ought to be left, to a tug of war between the President and the Congress, which has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written."

(b) *Hollingsworth v. Perry*, 570 U.S. ___, 2013 U.S. LEXIS 4919 (June 26, 2013), was a challenge to the constitutionality of a voter-initiated amendment to California's constitution that barred gay marriage. A federal district court held the initiative unconstitutional. The state officials named as defendants in that lawsuit accepted the judgment and declined to appeal. Proponents of the initiative were permitted to intervene and, after some complex procedural maneuvers, the California Supreme Court held that, "[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." Writing for a majority that included Justices Scalia, Ginsburg, Breyer, and Kagan, Chief Justice Roberts held that the initiative's proponents did not have Article III standing.

The proponents argued, among other things, that the California Supreme Court's decision implied that they were authorized by the state to "act '"as agents of the people" of California.'" The Chief Justice responded, "that Court never described petitioners as 'agents of the people,' or of anyone else. . . . All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This 'does not mean that the proponents become de facto public officials'. . . ." Relying on the RESTATEMENT (THIRD) OF AGENCY, he wrote:

> [T]he most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. "An essential element of agency is the principal's right to control the agent's actions." 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, Comment f (2005) (hereinafter RESTATEMENT). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California's attorney general, they are not elected at regular intervals — or elected at all. No provision provides for their removal. . . . "If the relationship between two persons is one of agency . . . , the agent owes a fiduciary obligation to the principal." 1 RESTATEMENT § 1.01, Comment *e*. But petitioners owe nothing of the sort to the people of California. Unlike California's elected officials, they have taken no oath of office. . . . They are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, dissented.

> Under California law, a proponent has the authority to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting

> federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court's definition of proponents' powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.
>
> In my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the RESTATEMENT OF AGENCY or with this Court's view of how a State should make its laws or structure its government. The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied.

Does the Court's holding mean that Article III imposes limits on interests created by state law (or by federal statute) to confer standing? Consider in this connection the treatment of the "procedural injury" claim in Lujan v. Defenders of Wildlife and the treatment of the claim about denial of access to information in Federal Election Commission v. Akins. Which does the interest created in the initiative's proponents more closely resemble? Consider as well the possibility that California's Supreme Court offered reasons, of a sort typical of the common law, for developing a special rule of agency law in connection with ballot initiatives, sometimes enacted over the opposition of the officials generally authorized to defend the constitutionality of state statutes. Why should Article III limit a state court's power to develop the law of agency in such a manner?

(2) The Third Circuit has settled the disagreement within the Eastern District of Pennsylvania, described in Note 1 of the Notes and Questions on Citizenship for Diversity Purposes in Chapter 8, § 8.01[D], over whether GSK's conversion to an LLC with its sole member, GSK Holdings, arguably based in Delaware should mean that it is not a Pennsylvania citizen and can thus remove diversity cases filed against it in state court in Pennsylvania. The panel unanimously held that it was the sole member's citizenship that counted for purposes of determining the LLC's citizenship and that the LLC was not a citizen of Pennsylvania, even though GSK LLC remained headquartered in Pennsylvania. The panel majority found that, on the facts, GSK Holdings was a citizen of Delaware, while a concurring colleague regarded GSK Holdings' "nerve center" as being in England. The LLC can therefore remove diversity cases filed against it in Pennsylvania state courts. *See Johnson v. SmithKline Beecham Corp.*, ___ F.3d ___, 2013 U.S. App. LEXIS 11501 (3d Cir. June 7, 2013).

FOREWORD TO FOURTH EDITION

In this edition we have tried to produce a leaner book with tighter focus on the areas usually covered in upperclass courses on Federal Courts or Federal Jurisdiction. The biggest change is that we have largely eliminated the material in two previous chapters on Aggregative Procedure, mostly covering class actions, and on Expanding and Restricting Complex Federal Litigation, covering the likes of various joinder devices, venue and forum non conveniens, and multidistrict litigation. We saw intellectual and practical merit in those chapters, but these areas seem better covered in separate courses devoted to Advanced Civil Procedure or Complex Civil Litigation.

We have retained some of the materials from the deleted chapters. A new Chapter 11 on Doctrinal and Statutory Restrictions on Federal Jurisdiction Related to State-Court Litigation, placed right after the chapters on federal courts' statutory jurisdiction, covers the abstention doctrines and the Anti-Injunction Statute, 28 U.S.C. § 2283, previously treated in the complex-litigation chapter. And earlier coverage in the class-actions chapter of the Class Action Fairness Act of 2005 (CAFA) now is part of a new section at the end of Chapter 8 on Diversity and Alienage Jurisdiction. The new section is devoted to the three forms of minimal-diversity federal-court jurisdiction presently on the books — statutory interpleader; the Multiparty, Multiforum Trial Jurisdiction Act of 2002; and CAFA. Additionally, coverage of venue, forum non conveniens, and transfer remains in Chapter 12.

The chapters covering areas affected by the Jurisdiction and Venue Clarification Act of 2011 (JVCA), particularly Chapter 8 on Diversity and Alienage Jurisdiction and Chapter 10 on Removal, have been extensively revised to take account of the many (and positive) changes made by the JVCA. Chapter 8 also has a new principal case, *Hertz Corp. v. Friend*, in which the Supreme Court settled a circuit split over interpretation of a corporation's "principal place of business" for diversity purposes. We have, of course, included updating notes and case summaries throughout the book.

Finally, the book has a new, concluding Chapter 18 on Federal Jurisdiction in Time of War and in an Age of Terrorism. This chapter's principal case is the Supreme Court's major 2008 decision in *Boumediene v. Bush* on habeas corpus for alien enemy detainees at the United States military base at Guantánamo Bay, Cuba. The chapter brings together themes from several aspects of the course — the role of the federal courts, separation of powers, the permissibility of "jurisdiction-stripping" legislation, the use of non-Article III federal tribunals, and suspension of the writ of habeas corpus. Included are background on the use of military commissions in United States history; discussion of executive, judicial, and legislative responses to the attacks of September 11, 2001; the *Boumediene* case itself; and developments since that decision. We hope that this chapter will provide a suitable, even exciting, capstone for the course.

FOREWORD TO THIRD EDITION

Much has happened to our country and to the world since the publication of the Second Edition of this casebook five years ago. As in previous eras, crises and political developments affect the federal courts. Sometimes they are battlegrounds themselves; sometimes events cause political controversy over the expansion or contraction of federal jurisdiction. In these past five years, America has been waging a "war on terror" and a war in Iraq. We have also seen political battles over the role of class actions and the use of habeas corpus. We have seen a thrust to move more business cases and mass-tort and mass-disaster cases, which often involve primarily state law, into the federal courts through the use of "minimal" diversity.

Thus the chapters that have been most significantly revised include those dealing with class actions, habeas corpus, and Article I courts. We have also broken out the material on implied rights of action into a separate chapter, added a new chapter on federal common law, and added an Epilogue on the Military Commissions Act of 2006 and the suspension of habeas corpus for alien enemy combatants. A section has been added dealing with attempts to try "foreign enemy combatants" before military commissions. In other chapters, we have revised and updated materials to reflect current developments, recent cases, and important law review articles.

More than ever, we cling to the theory with which this casebook and its predecessors began more than twenty years ago. That is that there is no "plain meaning" to Article III or to statutes defining federal jurisdiction and those creating federal rules of procedure. Concepts like due process, habeas corpus, the right to jury trial, Article I and Article III courts, abstention, class actions, and jurisdiction are, in final analysis, all judicial constructs, ever subject to the winds of change. (The foreword to the first edition of this book, reprinted infra, contains fuller discussion of these themes.)

Shortly before this edition went to press, the Supreme Court adopted amendments — mostly meant to be purely stylistic — to the entire Federal Rules of Civil Procedure. The changes take effect December 1, 2007, unless Congress intervenes, which seems unlikely. We have tried to replace old rule text with new wherever we quote rule language (as opposed to when an opinion we are quoting itself quotes a rule), but given time pressures we cannot guarantee that we caught every place where we should have made a change. We note, and take at least some comfort in, the Committee Note accompanying each restyled rule that the changes are meant to make the rules "more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

FOREWORD TO SECOND EDITION

The foreword to the first edition of this casebook, set out next, still encapsulates the philosophy of the book — we continue to reject the notion that there is a fixed meaning of the words of the constitutional provisions and statutory enactments that control the power of the federal courts. The meaning of the words of the Constitution and federal statutes evolves over the years with new court interpretations and new statutory enactments. This evolution also occurs with regard to judicial decisions setting the role of the Article III courts and their relationship to Article I courts and judges and to administrative agency determinations. Thus in the long run, the law is what the courts find that Congress intended in new legislation.

And in many areas the law has changed dramatically even since the first edition of this casebook was published in 1996. The emphasis in this revision is on the areas where there has been dramatic or even evolutionary change. The developments in certain areas, such as the Eleventh Amendment limitations on federal-court jurisdiction and Congressional power, the scope of federal habeas corpus, the legal rights of immigrants and prisoners, and the appellate jurisdiction of the federal courts, have been substantial in the courts and in Congress. Much has occurred with regard to class actions and in the uncertain relationship between the procedure of the federal courts and state law.

We have been able to include reference to the most recent developments, such as lawsuits brought under a law passed by Congress to center litigation arising out of the September 11, 2001 terrorist attack in the Southern District of New York, and the Act of Congress precluding judicial review of the location of the World War II memorial on the National Capital Mall.

Every chapter has been substantially revised to bring it up to date with the latest cases and legislation. But we know that this is only the current slice of a continually evolving organism called the federal court system.

FOREWORD TO FIRST EDITION

As its title implies, we have prepared an entirely new casebook with a view to what are the primary uses of the federal courts and the primary problems of federal jurisdiction as we enter the new century.

The progenitor of this casebook was Fink and Tushnet, *Federal Jurisdiction: Policy and Practice*, first published in 1984. The assumption of that book was that federal court jurisdiction was an ever-changing product of judicial interpretation of the Constitution and of the federal statutes. It postulated that what we mean by federal judicial power is actually the current resolution of two sets of constitutional issues:

(1) the proper allocation of power between branches of the federal government — characterized as "separation of powers"; and

(2) the proper allocation of powers between state government and federal government — characterized as "federalism."

The earlier casebook rejected the notion that there is a fixed meaning to the constitutional provisions or that there are any "right answers" in the cases construing the Constitution and the Judicial Code.

But the world of scholarship and the processes of legislation and judicial decision do not stand still. We believe it is time once again to rethink the subject in light of the marvelous scholarship that has occurred in recent years in this field, the new laws that Congress has enacted, and the continual revision of the subject by the Supreme Court and the lower federal courts.

We began by asking ourselves: What will be the most important purposes to which the federal courts are likely to be put as we begin the new century? What unique qualities does a national court system offer for solving problems of litigation whose magnitude was unimaginable a decade or two ago, and which will involve more and more disputes transcending the borders of nations as well as the states of the Union and which will be among companies, persons, and transactions with international ties? Moreover, we asked, what stresses will there be on the federal court system caused by the creation of so many new federal statutory rights and benefits, as well as the making of more and more conduct subject to federal criminal sanction?

Of course, we have not abandoned the belief that mastering the issues of federalism and separation of powers is fundamental to understanding today's and tomorrow's federal jurisdiction. Thus, *Federal Courts in the 21st Century* is the first casebook to discuss the 1996 legislation limiting habeas corpus and death-row appeals and the Supreme Court's decision interpreting this legislation in *Felker v. Turpin*, 517 U.S. 1182 (1996). It is also the first casebook to discuss the Supreme Court's new view of the Eleventh Amendment and of Congress's power to waive states' sovereign immunity in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

But the more far-reaching change in the new casebook is its extensive treatment of what we call "aggregative litigation" — multi-party, multi-claim litigation that is often national or international in scope. We think that the organization of the federal courts and their depth of resources make them uniquely capable to handle class actions and mass-

tort and other complex litigation cases. There is extensive discussion of the latest cases in this area, including *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc*., 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); *Georgine v. Amchem Products, Inc*., 83 F.3d 610 (3d Cir. 1996), [*aff'd sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)]; and *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996).

In addition, we believe that the federal courts will certainly continue to the be the primary forum for handling national constitutional litigation. We have discussion of the latest cases interpreting Article III's case and controversy requirements as limits on access to the federal courts. And we have discussion of the evolving role of the federal courts in limiting actions of state governments and state officials. Moreover, we believe the federal courts will continue to be the only forum in which judicial review can be had of actions of federal administrative agencies. We have significant discussion of this subject.

Just as we literally were about to go to press, President Clinton signed the Federal Courts Improvement Act of 1996, which raised the amount in controversy requirement in diversity and alienage cases to over $75,000, made changes in the removal statute, and changed the method of appeal in civil cases tried by the consent of the parties before a United States Magistrate Judge.

In light of the immediate attention to the subject, it hardly now seems likely that Congress is about to abolish diversity jurisdiction in the near future. The importance of diversity and alienage jurisdiction may well, in fact, increase. They may continue to be the source of jurisdiction over national cases based on state law or on the law of foreign countries or involving foreign nationals.

We provide substantial discussion of issues of federal venue, transfer and law applied in diversity and alienage cases because of this continued importance and in recognition that these subjects more and more are being given short shrift in curtailed civil procedure courses in the first year.

An entirely new area, which was hardly mentioned in the earlier federal courts casebooks, is the threat to the predominance of Article III courts and Article III judges — constitutionally life tenured and protected from salary reduction — from escalating reliance by Congress on other forums to resolve federal rights. Given the volume of litigation caused by federalizing so many rights — such as protection of battered women — and the volume of federal criminal cases with which Article III courts have to deal — such as drug prosecutions — there is an increasing impulse to place more judicial power outside of the Article III courts and into legislative courts or administrative agencies whose judges do not have constitutional tenure protection. There is also

continuing pressure to use more adjuncts to Article III courts — such as magistrate judges and bankruptcy judges — to do the day-to-day work of federal courts. We explore what constitutional issues this tendency will raise. Thus we will stress, more than in other casebooks, issues of distribution of power *within* the federal court system itself, and indeed see the federal system as a much more complex organization than was portrayed in earlier casebooks.

We have tried to present these issues in a straight-forward and approachable fashion, using our own exposition when that is the simplest and most easily grasped, and the

edited text of cases when they present the best summary of the issues. We think that the book, which runs to under 1,000 pages — and is much more compact than most other current casebooks — is entirely usable in one semester.

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