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Reflections on the Hart and Wechsler Paradigm

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Reflections on the Hart and Wechsler Paradigm

*Richard H. Fallon, Jr.**

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I. INTRODUCTION

The Federal Courts field may be experiencing a methodological crisis, but if so, it is a methodological crisis of a peculiar kind. The problem is not that new methodologies threaten traditional modes of analysis. On the contrary, the difficulty is that we have been doing largely the same thing for more than forty years—asking much the same questions formulated by Henry Hart and Herbert Wechsler in the first edition of *The Federal Courts and the Federal System*¹ and

1. Henry M. Hart, Jr. and Herbert Wechsler, eds., *The Federal Courts and the Federal System* (Foundation, 1953). Although my discussion in this Article will focus largely on the first edition of the casebook, two subsequent editions have appeared. The second, published in 1973, was edited by Paul Bator, Paul Mishkin, David Shapiro, and Herbert Wechsler. Paul M. Bator, et al., eds., *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation, 2d ed. 1973). The editors of the third and current edition, which came out in 1988, are Paul Bator, Daniel Meltzer, Paul Mishkin, and David Shapiro. Paul M. Bator, et al., eds., *Hart and Wechsler's The Federal Courts and the Federal System*, (Foundation, 3d ed. 1988). For an insightful assessment of the casebook's evolution from one edition to the next, see Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688 (1989).

trying to answer them with roughly the same techniques. Not surprisingly, a number of people would like to throw off the Hart and Wechsler yoke and get on with something else. But what?

The restiveness that I sense among many Federal Courts teachers brings to mind two metaphors. The first is that of oedipal rebellion.² Arguably, it is past time when self-respecting legal academics would have demolished conventions established by such long-dominant authority figures as Hart and Wechsler. I have my own share of oedipal urges. On the fourth floor of Harvard Law School's Griswold Hall, no more than twenty-five feet from my office, hangs a larger-than-life portrait of Henry Hart. As I gaze at Professor Hart each morning, I often experience awe at his scholarly achievements, as reflected not only in the Hart and Wechsler casebook but also in the equally profound and influential materials on *The Legal Process* that he co-authored with Albert Sacks.³ But it is not always gratifying to work in the shadow of a legend. Among other things, I know that many colleagues in other fields view work in Hart's shadow as dull work indeed. When I began teaching Federal Courts twelve years ago, a former teacher of mine⁴ described the field as an "intellectual backwater." It was an area ripe for imaginative revision, he thought. Yet no fundamental reorientation has occurred in the interim. Why not?

This question evokes a second metaphor—the notion of a fruitful "paradigm" for thought and research, as made famous by Thomas Kuhn in his book *The Structure of Scientific Revolutions*.⁵ In Kuhnian terminology, a paradigm is a set of assumptions that defines both a series of problems worth solving and a framework within which to seek answers.⁶ In the Federal Courts field, Hart and Wechsler estab-

2. I use this metaphor very loosely. Compare Sigmund Freud, *The Complete Introductory Lectures on Psychoanalysis* 329-38 (Liveright, 1977) (discussing the "oedipus complex," which arises from male children's sexual jealousy of their fathers, and its role in shaping the male adolescent's "great task of detaching himself from his parents"). Many modern writers follow Freud in attributing later-life impulses to rebel against authority to unconscious desires that themselves are rooted in childhood urges and vulnerabilities. See, for example, Charles Brenner, *An Elementary Textbook of Psychoanalysis* 242-58 (Int'l U., 1973). Compare Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* 109-10 (Oxford U., 1973) (analogizing the psychological impulse driving "strong poets," who struggle to demonize and misread their predecessors with the goal of supplanting and surpassing them, to what Freud termed the "oedipus complex").

3. Henry M. Hart, Jr. and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, Mass., Tentative ed. 1958).

4. The former teacher was Bruce Ackerman.

5. Thomas S. Kuhn, *The Structure of Scientific Revolutions* (U. of Chicago, 2d ed. 1970).

6. See id. at 23-51.

lished the reigning paradigm. The question suggested by Kuhn is whether we can imagine a new paradigm that might make revolt against their dominance fruitful and successful. Or, to revert to the metaphor of oedipal rebellion, is fuming against Hart and Wechsler just so much adolescent frustration—psychologically necessary, perhaps, but a bit hackneyed and juvenile?⁷

I want to examine these questions by offering a thesis about why Hart and Wechsler have had such pervasive influence on Federal Courts teaching and scholarship. My submission is that Hart and Wechsler defined the field as we now know it, and, what is more, that their definition links the subject matter of Federal Courts inquiries almost inextricably to the Legal Process methodology that they likewise pioneered. If this thesis is correct, the dominant influence of Hart and Wechsler may be impossible to escape as long as we accept the current definition of what constitutes Federal Courts teaching and scholarship. After developing this argument, I offer a qualified defense against the charge that Federal Courts is an intellectually benighted backwater, and I explore some possible directions of future scholarship—including the possibility of creative work that pushes beyond the Hart and Wechsler mold.

II. THE HART AND WECHSLER PARADIGM

Although the pervasive influence of Hart and Wechsler on Federal Courts scholarship is widely acknowledged, there may be less agreement on the nature of that influence and the reasons for its duration. A focus on the substantive positions taken by Hart and Wechsler does more to mislead than illuminate. The genius of Hart and Wechsler lay in linking a definition of Federal Courts inquiry to a method of legal analysis and thereby giving rise to what fairly can be called an analytical “paradigm.”

A. *Stances Toward Hart and Wechsler*

Hart and Wechsler’s most famous substantive positions undoubtedly contribute to the worry that contemporary Federal Courts scholarship occurs in a time warp. Indeed, a substantive review in-

7. Compare Erik H. Erikson, *Identity: Youth and Crisis* 247 (Norton, 1968) (discussing why, in order to forge an independent identity, “youth often rejects parents and authorities and wishes to belittle them as inconsequential”).

vites questions about why the casebook's original edition did not fall stillborn from the press.⁸

The first edition of Hart and Wechsler came out in 1953—the year of Earl Warren's nomination as Chief Justice of the United States and the year before *Brown v. Board of Education*.⁹ In the Preface, the authors introduced three substantive themes that dominated the book. The first concerned federalism: the role of the federal courts in a federal system that includes state governments, state officials, and state courts.¹⁰ To Hart and Wechsler, preserving spheres of state sovereign autonomy was a matter of foremost importance.¹¹

The second theme dominating the original Hart and Wechsler casebook involved the separation of powers. Reflecting the legacy of Legal Realism and the New Deal,¹² Hart and Wechsler adopted a loose, functionalist approach. They raised no objection of principle to administrative agencies or broad reliance on administrative adjudication; they embraced a law-making role for the federal courts in the development of federal common law;¹³ they eschewed starkly positivist, intent-based approaches to statutory interpretation.¹⁴ But Hart and Wechsler viewed Congress, not the federal courts, as the appro-

8. Compare David Hume, *My Own Life*, in David Hume, *An Inquiry Concerning Human Understanding* 4 (Liberal Arts, 1955) (asserting that no "literary attempt was more unfortunate than my *Treatise of Human Nature*. It fell deadborn from the press.")

9. 347 U.S. 483 (1954).

10. See Hart and Wechsler, *The Federal Courts* at xi (1st ed.) (cited in note 1) (explaining that "[o]ne of the consequences of our federalism is a legal system that derives from both the Nation and the States as separate sources of authority and is administered by state and federal judiciaries, functioning in far more subtle combination than is readily perceived. The resulting legal problems are the subject of this book.")

11. See, for example, *id.* at 1083 (referring to the "great principle of intergovernmental comity"). See also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 542 (1954) (lauding a federal system that allows spheres of independence and local experiment as one that "maximizes the opportunities for coping effectively with the problems of social living").

12. The relationship of Hart and Wechsler and the Legal Process tradition to Legal Realism has been widely noted. See, for example, Amar, 102 Harv. L. Rev. 688 (cited in note 1); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609 (1991); Gary Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J. L. Ref. 561 (1988).

13. See Hart and Wechsler, *The Federal Courts* at 686-90, 708 (1st ed.) (cited in note 1). See also Hart, 54 Colum. L. Rev. at 530, 534 (cited in note 11).

14. See Hart and Wechsler, *The Federal Courts* at 750-51 (1st ed.) (suggesting approval of a more restrictive interpretation of the statutory provision conferring "arising under" jurisdiction than Congress apparently intended). The casebook's general stance seems consistent with the "purposive" approach to statutory interpretation for which Hart and Sacks's Legal Process materials have become celebrated. See Hart and Sacks, *The Legal Process* (cited in note 3).

priate principal agent of change and policy development.¹⁵ Notoriously, they also regarded Congress as having broad powers to define the limits of federal judicial power and to substitute state for federal courts.¹⁶

The final, main issue addressed by Hart and Wechsler was "what courts are good for—and are not good for."¹⁷ In general, the editors believed that courts were good at, and indeed essential for, resolving concrete, narrowly focused disputes. As conceived by Hart and Wechsler, resolution of properly justiciable controversies was not a simple or mechanical process; adjudication ideally required a reasoned understanding of the surrounding facts and institutions and called for the formulation of principles of decision that would provide clear guidelines for future cases.¹⁸ But Hart and Wechsler thought the courts ill-suited both to decide "polycentric" disputes involving the clashing interests of a range of litigants¹⁹ and to develop policy, except in the interstices of statutory or constitutional commands.

1. The Unmet Challenge of *Brown*?

From the moment of its publication, the Hart and Wechsler casebook was hailed as a work of unparalleled creativity and insight.²⁰ Within the field, it has continued to enjoy high esteem over three editions and more than four decades.²¹ But why?

To a child of the Warren Court, as many of us in law teaching now are, the substantive themes of the original Hart and Wechsler casebook have a vaguely antediluvian aspect.²² Indeed, it may be puzzling that the forces loosed by the Warren Court in general, and

15. See Amar, 102 Harv. L. Rev. at 698 (cited in note 1) (noting that Hart and Wechsler viewed the federal courts as having only a "modest role vis-a-vis Congress").

16. That Congress possesses broad power to define the limits of federal jurisdiction is a recurrent theme of Professor Hart's *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. 1362 (1953) ("*Dialogue*"), reprinted in Hart and Wechsler, *The Federal Courts* at 312-40 (1st ed.) (cited in note 1).

17. Hart and Wechsler, *The Federal Courts* at xii (1st ed.).

18. See, for example, Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 99 (1959).

19. See Hart and Sacks, *The Legal Process* at 686-87 (cited in note 3).

20. See, for example, Philip Kurland, Book Review, *The Federal Courts and the Federal System*, 67 Harv. L. Rev. 906 (1954); Paul Mishkin, Book Review, *The Federal Courts and the Federal System*, 21 U. Chi. L. Rev. 776 (1954).

21. See, for example, Amar, 102 Harv. L. Rev. at 688 (cited in note 1).

22. Here, and throughout this paragraph, my argument largely tracks that of Akhil Amar. See *id.*

*Brown v. Board of Education*²³ in particular, did not render the book an immediate anachronism. Throughout the 1950s and 1960s, invocations of "federalism" frequently appeared as apologies for race-based repression and deprivations of constitutional rights.²⁴ In the domain of the separation of powers, the federal courts quickly assumed a larger, more assertive role. *Flast v. Cohen*²⁵ allowed a taxpayer suit challenging expenditures voted by Congress. In cases such as *Mapp v. Ohio*²⁶ and *Miranda v. Arizona*,²⁷ the Supreme Court undertook a quasi-legislative responsibility for developing a judicially enforceable code of criminal procedure applicable in state and federal courts alike. Finally, with respect to Hart and Wechsler's stance on the question of what courts are good for, the federal judiciary swiftly turned from desegregating the schools to redistricting state legislatures.²⁸

Despite the controversiality of the Warren Court,²⁹ these developments had a dual, lasting significance. First, the Warren Court altered the basic allocations of power in American government in ways that subsequent Courts have found difficult, if not impossible, to reverse.³⁰ Second, *Brown v. Board of Education*, in particular, emerged as the central, intellectually formative case for a new generation of lawyers and professors and shaped their basic approach to law in the way that *Lochner v. New York*³¹ and *Erie Railroad Co. v. Tompkins*³² had affected the generation of Henry Hart and Herbert

23. 347 U.S. 483 (1954).

24. See John Morton Blum, *Years of Discord: American Politics and Society, 1961-1974* at 91-98 (Norton, 1991) (noting that *Brown* "triggered angry reassertions in a new dress of the antebellum doctrine of nullification and states rights" and documenting attempted reliance on state and local law to thwart the implementation of Supreme Court mandates).

25. 392 U.S. 83 (1968).

26. 367 U.S. 643 (1961).

27. 384 U.S. 436 (1966).

28. For a path-breaking study of how public law litigation required changed assumptions about the nature of a justiciable case and the judicial role, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

29. Writing in 1970, Alexander Bickel attempted to substantiate the charge that the Warren Court deserved censure "for erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions, and for imagining too much history." Alexander Bickel, *The Supreme Court and the Idea of Progress* 45 (Harper & Row, 1970). The Warren Court did not lack defenders. See, for example, Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (Harvard U., 1968); Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3 (1970); and J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769 (1971).

30. Even those most critical of Warren Court doctrines acknowledge the claims of stare decisis. See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 155-59 (Free Press, 1990).

31. 198 U.S. 45 (1905).

32. 304 U.S. 64 (1938).

Wechsler.³³ Yet *Brown* threatened Hart and Wechsler's substantive views perhaps more than any other decision. *Brown*, which inspired new conceptions of constitutional decisionmaking, reflected the judiciary in a leadership role, undermining traditions of federalism, and sliding gradually into the remedial problems of public law litigation.

By the time of Henry Hart's death in 1969, anyone might have expected the Hart and Wechsler casebook to be regarded as an arcane relic of a bygone age. No revised edition had appeared. Perhaps Hart, the "profound and passionate student and teacher" eulogized in the dedication to the second edition,³⁴ lacked the requisite sympathy with the emerging federal system to accept the challenge of rationalizing it with the same admiring insight he had applied to the old.

2. The Puzzling Persistence of Hart and Wechsler

Amazingly, however, Federal Courts professors throughout the country continued to teach Hart and Wechsler. Competitors emerged, but the best scholars continued either to work within the basic organizing structures Hart and Wechsler had employed or, when they took divergent stances, to treat Hart and Wechsler as having defined a challenge that needed to be met. Numerous scholars have questioned and rejected Hart and Wechsler's particular substantive positions. Indeed, the editors of the second and especially the third edition have revised the casebook's substantive stance in a number of important respects.³⁵ But the book retains an unmistakable continuity. The editors still work in the same conceptual universe as did Henry Hart and Herbert Wechsler, still ask the same kinds of questions, and still employ the same basic methodology. So do most of us who teach and write about Federal Courts issues. This apparent stasis explains why it is so embarrassingly plausible for outsiders to view Federal Courts as an intellectual backwater, and so natural for those in the field to wonder why we cannot develop a more contemporary agenda.

B. Sources of Influence

In thinking about where we are and where we are going, in contemplating oedipal revolt or paradigm shift, we should begin by

33. See Amar, 102 Harv. L. Rev. at 702-03 (cited in note 1).

34. See Hart and Wechsler, *The Federal Courts* at xv (2d ed.) (cited in note 1).

35. See Amar, 102 Harv. L. Rev. at 710-14 (cited in note 1).

clarifying the nature of Hart and Wechsler's enduring thrall. First, Hart and Wechsler substantially defined the Federal Courts curriculum as we know it. Second, Hart and Wechsler supplied a "Legal Process" method of analysis that plays a crucial role in unifying Federal Courts issues.³⁶ When these two achievements are put together, Hart and Wechsler's shadow may prove ubiquitous as long as Federal Courts continues as the subject that we now put under that rubric.

1. The Definition of the Federal Courts Field

Virtually every topic or issue within the conventional domain of a Federal Courts course could easily be assigned to some other subject in the law school curriculum—Administrative Law, Civil Procedure, Civil Rights, Conflicts of Laws, Constitutional Law, Constitutional Interpretation, Criminal Procedure, Injunctions, Remedies, or Statutory Interpretation, for example. Something similar is true, I suppose, of many subjects now taught in American law schools. Even so, Federal Courts seems an extreme case. The Federal Courts course characteristically groups together a set of questions that need not be linked. In fact, these issues were not grouped together until well into this century—until Hart and Wechsler linked them in *The Federal Courts and the Federal System*.³⁷

36. Reflecting their formative influence, scholars often have labelled the characteristic, defining questions of Federal Courts inquiry "Legal Process" questions. Even more than the Hart and Wechsler casebook, the central text of the Legal Process movement is Hart and Sacks, *The Legal Process* (cited in note 3). Valuable secondary works include Amar, 102 Harv. L. Rev. 688 (cited in note 1); William N. Eskridge, Jr. and Philip P. Frickey, *Legislation and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691 (1987); Wells, 71 B.U. L. Rev. 609 (cited in note 12); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 Ariz. L. Rev. 413 (1987); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279 (1973).

37. See Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 Ga. L. Rev. 697, 757 (1993) (noting that "[b]efore the 1930s, there were very few schools with a course on federal jurisdiction and procedure"). See generally Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 681-83 & n.44 (1989) (discussing early scholarship on the federal courts). The first federal jurisdiction casebook was not published until 1917, and it, like those that soon followed, principally addressed the practical details of federal practice and procedure. See McManamon, 27 Ga. L. Rev. at 757-60. Sophistication of treatment gradually increased, but prior to Hart and Wechsler, nearly all of the leading casebooks dealt predominantly with issues of federal procedure, rather than allocations of decision-making authority in the federal system. See *id.* Exceptions included Harold R. Medina, *Cases on Federal Jurisdiction and Procedure* (West, 1926), and, more importantly, two casebooks edited by Felix Frankfurter: Felix Frankfurter and Wilber G. Katz, eds., *Cases and Other Authorities on Federal Jurisdiction and Procedure* (Callaghan, 1931), and Felix Frankfurter and

As defined by Hart and Wechsler, the central, organizing question of Federal Courts doctrine involves allocations of authority: *Who* ought to have authority to give conclusive determinations of *which* kinds of questions? For example, who should determine the scope of federal jurisdiction? If Congress has some political discretion, how much? Which questions should be allocated to state tribunals? Why? If a particular tribunal is to decide in the first instance only, by whom should those decisions be reviewed? What standards of review should apply? When, if ever, can Congress or a state legislature preclude judicial review or judicial remedies? In the context of a Constitutional Law course, questions of institutional competence such as these stir impatience; they may seem to reflect obfuscation, a refusal to address the merits of hard questions.³⁸ In the Federal Courts course as structured by Hart and Wechsler, however, there are no other questions—only these and their practical and methodological corollaries.

Hart and Wechsler linked these questions with a single, controlling insight. Simply stated, authority to decide must at least sometimes include authority to decide wrongly. This Legal Process notion is so familiar now that we no longer may be able to conceive of it as an insight without imaginative effort. But familiarity renders the idea no less generative. Once the point is recognized, it becomes evident that constitutional federalism and the separation of powers can be illuminated by painstaking attention to the question of *where* ultimate responsibility for certain kinds of questions, including the power to make uncorrectable mistakes, should lie. It is entirely possible, after all, to imagine something called a “Federal Courts” or “Federal Jurisdiction” course in which quite different questions were asked. For an example of a different approach, it is necessary only to notice the alternative conception that Hart and Wechsler explicitly

Harry Shulman, eds., *Cases and Other Authorities on Federal Jurisdiction and Procedure* (Callaghan, rev. ed. 1937). These books prefigured Hart and Wechsler by focusing less on procedure and more on issues of federalism and judicial power and competence. See McManamon, 27 Ga. L. Rev. at 761-68. When the first edition of Hart and Wechsler came out in 1953, it “was clearly a descendant of Frankfurter’s casebook,” *id.* at 769, but an original and transformative contribution to the field nonetheless. First, Hart and Wechsler were much more successful than Frankfurter in persuading other Federal Courts teachers and casebook editors to conceive of “the course as one about the intellectual issues presented by the federal court system,” and about federalism in particular, “rather than simply about the procedure of that system.” *Id.* at 769-70. Second, Hart and Wechsler introduced a distinctive theme involving the necessary role of courts and remedies in a system of law. For further discussion of this theme, see notes 55-57 and accompanying text.

38. See, for example, Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L. J. 1063 (1980).

rejected—an advanced course in Civil Procedure.³⁹ Hart and Wechsler were no more interested in identifying normatively ideal answers to purely procedural questions (if there are any) than in assessing what substantive principles of constitutional law should govern the merits of particular cases after the jurisdiction of a tribunal was established.⁴⁰

In short, to study Federal Courts law as we know it is to work in a subject area whose definition can be traced directly to Hart and Wechsler.⁴¹ To reject all reminders of their influence would require redefinition, if not abandonment, of Federal Courts teaching and scholarship.

2. Legal Process Methodological Assumptions

In attempting to understand the pervasive influence of Hart and Wechsler, it is not enough to note that the field is defined by a set of doctrinal and policy questions that they linked. Taken individually, most of Hart and Wechsler's doctrinal and policy questions were not original even in 1953. Similar questions have been raised at least since Congress addressed the question of how to allocate judicial power in the first Judiciary Act.⁴² In addition, Felix Frankfurter had framed many (although not all) of these questions in the Federal Jurisdiction casebooks that he edited in the 1930s.⁴³ Indeed, Hart and

39. See Hart and Wechsler, *The Federal Courts* at xii (1st ed.) (cited in note 1) (observing that "[t]he study of federal jurisdiction has commonly been coupled with that of federal procedure. It is uncoupled here."). The procedural emphasis was very strong in what was perhaps the leading Federal Courts casebook before the publication of Hart and Wechsler's first edition, Charles T. McCormick and James H. Chadbourn, *Cases and Materials on Federal Courts* (Foundation, 2d ed. 1950), as it had been in most of the early works in the field. See note 37 (discussing earlier casebooks).

40. This is not to suggest that Hart and Wechsler were unconcerned with substantive issues, only that their concern was more wholesale or aggregate—involving the comparative competence of decisionmakers to reach acceptable decisions in broad *categories* of cases—than retail or case-specific. For a further discussion of this distinction, see notes 84-94 and accompanying text.

41. See Amar, 102 Harv. L. Rev. at 690 (cited in note 1).

42. The implications of federal judicial jurisdiction for federalism and the separation of powers have been recognized throughout American constitutional history. See generally Felix Frankfurter and James Landis, *The Business of the Supreme Court* (Macmillan, 1928); William R. Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. Rev. 1001 (1985).

43. See Frankfurter and Shulman, eds., *Cases and Other Authorities* (cited in note 37); Frankfurter and Katz, eds., *Cases and Other Authorities* (cited in note 37).

Wechsler dedicated the first edition of their casebook to "Felix Frankfurter, who first opened our eyes to these problems."⁴⁴

Pushing beyond Frankfurter's texts, Hart and Wechsler linked the now-characteristic Federal Courts questions by pioneering a mode of analysis that exemplifies the Legal Process school.⁴⁵ I am not a legal historian, and I cannot pretend to do justice to the complex body of work sometimes grouped under that rubric.⁴⁶ But when I read Hart and Wechsler in conjunction with the Hart and Sacks book,⁴⁷ from which the Legal Process school derived its name if not its canon, Hart and Wechsler's methodological stance seems to reflect at least six characteristic Legal Process assumptions.

a. The Principle of Institutional Settlement⁴⁸

Hart and Wechsler assumed a proposition for which the Hart and Sacks materials later offered detailed argument: questions of how decision-making authority should be allocated are of foremost importance.⁴⁹ In a post-Realist world, legal norms are frequently indeterminate. Moreover, in a demonstrably pluralistic society, we cannot expect consensus about appropriate answers to many urgent questions of substantive justice. But most of us, Hart and Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions. On this assumption rest our hopes for the rule of law.

44. Hart and Wechsler, *The Federal Courts* at ix (1st ed.) (cited in note 1).

45. See Amar, 102 Harv. L. Rev. at 690-91 (cited in note 1); Peller, 21 U. Mich. J. L. Ref. at 566-72 (cited in note 12); Wells, 71 B.U. L. Rev. at 619-29 (cited in note 12).

46. For valuable secondary works, see the sources cited in note 36.

47. Hart and Sacks, *The Legal Process* (cited in note 3).

48. This principle was so labelled by Hart and Sacks: "The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding on the whole society unless and until they are duly changed." *Id.* at 4.

49. Precisely because consensus on substantive outcomes could not be expected, Hart and Sacks termed procedural understandings, including the allocations of decision-making authority presupposed by the principle of institutional settlement, "more fundamental than . . . substantive arrangements." *Id.* at 3.

b. The Anti-Positivist Principle

Second, we should understand the "law" bearing on allocations of institutional responsibility as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules.⁵⁰ Any particular legal directive must be seen and interpreted in light of the whole body of law.⁵¹ More generally, legal interpretation should be purposive,⁵² not rigid or mechanical, and the variety of sources of law to which a legal interpreter can appeal includes principles and policies as well as canonical texts.⁵³ This principle applies to both constitutional and statutory interpretation.

c. The Principle of Structural Interpretation

In disputes about the proper allocation of decision-making authority, the principles and policies underlying federalism and the separation of powers deserve special weight. But we should understand federalism and the separation of powers themselves in light of a functional concern to "release to the utmost the enormous potential"⁵⁴ of myriad private and governmental structures to establish justice and promote prosperity.

d. The Principle of the Rule of Law

The rule of law implies courts.⁵⁵ Although decisions by Congress and the President enjoy a special democratic legitimacy, and Congress enjoys a broad competence to allocate jurisdiction among

50. See *id.* at 101; Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 Harv. L. Rev. 929, 930 (1951) (arguing that "[l]aw as it is is a continuous process of becoming" and that, since morality has a role in influencing what law becomes, it is part of what law already is) (emphasis in original); Wellman, 29 Ariz. L. Rev. at 429-34 (cited in note 36).

Somewhat regrettably, in *The Legal Process* materials in which the anti-positivist principle is exposed most fully, "Hart and Sacks specify neither the origin of legal norms nor the source of their authority." Wellman, 29 Ariz. L. Rev. at 432.

51. See Hart and Sacks, *The Legal Process* at 101 (cited in note 3); Wellman, 29 Ariz. L. Rev. at 459-60, 462-65.

52. See Hart and Sacks, *The Legal Process* at 1157, 1415; Wellman, 29 Ariz. L. Rev. at 462-65.

53. See Hart and Sacks, *The Legal Process* at 158-60; Wellman, 29 Ariz. L. Rev. at 419-21, 429-34, 459-61, 462-65.

54. Hart, 54 Colum. L. Rev. at 490 (cited in note 11).

55. See Hart, *Dialogue*, 66 Harv. L. Rev. at 1372 (cited in note 16).

tribunals and to establish limits on the judicial role,⁵⁶ the courts have irreducible functions. The rule of law also requires the availability of judicial remedies sufficient to vindicate fundamental legal principles.⁵⁷

e. The Principle of Reasoned Elaboration

Reason and reasoned elaboration are the stuff of the judicial process.⁵⁸ When reasons of fairness, prudence, practicality, coherence, or convenience strongly support a particular principle, courts should "use every possible resource of construction"⁵⁹ to arrive at the result that is so prescribed. Interstitial crafting of federal common law comes within the function of reasoned elaboration; so does insistence that other institutions with frontline decision-making responsibility follow processes designed to produce substantively sound results. But while the judicial role is irreducibly creative in some respects, it is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers.

f. The Neutrality Principle

Hart and Wechsler assume that courts must be principled in their reasoning.⁶⁰ Courts are part of a structure of government; they must respect the prerogatives of other institutions and explain their decisions in a way that makes the notion of "the rule of law" meaningful.⁶¹ Courts should avoid making law or policy out of whole cloth. They should decline to impose substantive judicial judgments on disputes not capable of resolution through the application of neutral principles to sharply defined sets of facts.

56. See *id.* Hart's "Dialogue" was reprinted in the first edition of the Hart and Wechsler casebook and has been retained, with updated footnotes, in both subsequent editions.

57. See *id.* at 1386-1402. Although the argument was not always framed in explicitly rule-of-law terms, the first edition of Hart and Wechsler maintained a drumbeat of criticism against an excessively broad construction of the sovereign immunity doctrine, which often precludes people whose rights have been violated from seeking relief from the government. See, for example, Hart and Wechsler, *The Federal Courts* at 1151-52, 1156, 1161, 1175-77, 1208, 1230-31 (1st ed.) (cited in note 1).

58. See Hart and Sacks, *The Legal Process* at 161, 165-68, 487 (cited in note 3); Peller, 21 U. Mich. J. L. Ref. at 595 (cited in note 12); White, 59 Va. L. Rev. 279 (cited in note 36).

59. Hart, *Dialogue*, 66 Harv. L. Rev. at 1399 (cited in note 16).

60. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Hart, 73 Harv. L. Rev. at 99 (cited in note 18); Hart, 54 Colum. L. Rev. at 534 n.179 (cited in note 11).

61. See Hart, 73 Harv. L. Rev. at 99.

3. The Assumptions' Current Status

Of these six methodological assumptions, the first four, in particular, continue to provide the framework within which Federal Courts analysis is predominantly conducted. The first assumption—involving “the principle of institutional settlement”—seems to me to be irresistible. As I have suggested already, it comes close to defining the Federal Courts field all by itself.

Something similar to the second assumption, “the anti-positivist principle,” is needed to explain a number of important Federal Courts doctrines that are difficult to reconcile with original understandings or the framers' intent.⁶² I do not question that very good reasons exist to adhere to original understandings in many circumstances; the principle of institutional settlement assumes as much.⁶³ But Federal Courts scholars, as legal scholars generally, need a theory of law that allows them to reject the reactionary and dysfunctional thesis that non-originalist decisions and doctrines are somehow not really “law” at all.⁶⁴

The third assumption, “the principle of structural interpretation,” expresses the widely shared experience that considerations of federalism and the separation of powers lend thematic unity to Federal Courts issues.⁶⁵ Interpretive uncertainties frequently are resolved by reference to larger conceptions of appropriate relations among institutions of government.⁶⁶ The general responsibilities of

62. For an effort, which is very much in the Legal Process tradition, to explain some of these as reflections of a settled principle recognizing judicial discretion in exercising jurisdiction conferred by Congress, see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985).

63. Compare Guido Calabresi, *A Common Law for the Age of Statutes* 1-7, 81-119, 146-81 (Harvard U., 1982) (arguing within the Legal Process tradition that old statutes that would be unlikely to express the values of contemporary majorities sometimes should be subject to being identified as obsolescent and therefore inapplicable by courts).

64. Compare Henry Paul Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 3 (1975) (arguing that a theory of “constitutional common law” is necessary to account for a number of legal doctrines that could not be adequately explained or justified as ordinary constitutional interpretation).

65. For an effort to capture some of the thematic unity in debates about judicial federalism, see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141 (1988). See also Shapiro, 60 N.Y.U. L. Rev. at 580-87 (cited in note 62) (discussing how considerations of federalism and the separation of powers bear on the discretionary exercise of federal jurisdiction in a number of contexts).

66. For an interesting commentary on the appropriateness and limits of what he calls “holistic interpretation,” see Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990).

state and federal institutions, and the structure of relations between them, are thus appropriate objects of study. The principle of structural interpretation also complements the principle of anti-positivism; if courts should decide interpretive questions in light of the entire body of law, principles of federalism and the separation of powers emerge as vital sources of law. Even more important, the principle of structural interpretation provides the centrifugal force that holds much of the Federal Courts course together as something other than a series of isolated episodes of statutory and constitutional interpretation.⁶⁷ Conceptions of federalism and the separation of powers become relevant to, even if not dispositive of, nearly every Federal Courts problem.

The fourth assumption, "the principle of the rule of law," reflects Hart and Wechsler's most important conceptual advance from the materials on Federal Jurisdiction assembled by Felix Frankfurter in the 1930s.⁶⁸ The principle is vague, but it provides a vital reference point for debates about such otherwise disparate issues as the scope of congressional power to limit judicial jurisdiction, the possible necessity of constitutional remedies under *Bivens*⁶⁹ and other doctrines,⁷⁰ and the constitutionally acceptable scope of sovereign and official immunity. Like the principle of structural interpretation, the principle of the rule of law explains the experience, shared by most students and teachers, of a centrifugal power that binds otherwise disparate questions together.⁷¹

The fifth assumption, "the principle of reasoned elaboration," seems to me to be plausible and attractive once the anti-positivist

67. Compare Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1501 (1990) (observing that "[t]he view of federalism and separation of powers one articulates in the context of the jurisdiction stripping debate is likely to have important implications for many other key debates in the field of federal jurisdiction. . .").

68. See Frankfurter and Shulman, eds., *Cases and Other Authorities* (cited in note 37); Frankfurter and Katz, eds., *Cases and Other Authorities* (cited in note 37). See also Frankfurter and Landis, *The Business of the Supreme Court* (cited in note 42).

69. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

70. See generally Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Nonretroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1777-91, 1824-30 (1991) (attempting to develop principles explaining when remedies for constitutional violations are and are not constitutionally necessary under existing doctrine).

71. My own efforts to link issues involving congressional control of jurisdiction, the necessary availability of judicial remedies, and judicial review of executive action have been largely inspired by Hart's incomparable *Dialogue*. See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309 (1993); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988); Fallon and Meltzer, 104 Harv. L. Rev. 1731 (cited in note 70).

principle and the principle of institutional settlement are accepted. This principle is vague, however, and may lack bite. The sixth, "the neutrality principle," leads to the much mooted questions of what constitutes some decisions as principled and others as ad hoc or unreasoned and whether the value of principled decisions sometimes may be outweighed by other values.⁷² I cannot pause to probe these questions here. It seems clear, however, that any systematic study of Federal Courts doctrine would need to explore the nature of principled decisionmaking⁷³ and to assess its importance in comparison with other values.⁷⁴

C. *The Paradigm Within Which We Work*

Hart and Wechsler's definition of Federal Courts inquiry, in conjunction with their Legal Process methodological assumptions, constitutes what fairly can be called the Hart and Wechsler paradigm.⁷⁵ All of us who teach and write about Federal Courts law may not accept every one of the Legal Process assumptions that I sketched above. But we do share the basic definition of the subject matters that constitute Federal Courts law; we also predominantly accept Hart and Wechsler's assumptions linking the questions that comprise the field. It is only against this shared background of assumptions that we find Hart and Wechsler's substantive positions interesting, misguided, outdated, or questionable.

In sum, I think we continue to work in the shadow of Hart and Wechsler, not because they had especially compelling substantive theories about federalism, or the separation of powers, or what courts are good for. We work in their shadow because we accept their most

72. See generally Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982 (1978) (exploring these issues and the debates surrounding them).

73. Among the questions deserving attention is whether existing conceptions of neutrality, principled decisionmaking, and the judicial role reflect implicit biases that might be exposed by feminist or other critical scholarship. See, for example, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877 (1988).

74. For a classic exchange dealing with one corner of this broad issue, compare Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961) (arguing that the Supreme Court need not be principled in its decision of jurisdictional questions, although it must always decide questions on the merits in a principled way), with Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964) (urging that jurisdictional decisions also must be principled).

75. Compare Amar, 102 Harv. L. Rev. at 711 (cited in note 1) (arguing that "[t]he real genius of the first edition [of Hart and Wechsler]—its enduring contribution to American law—lay not in its particular substantive vision, but in its legal process methodology").

basic questions and assumptions. Federal Courts scholars characteristically spend their professional lives addressing Legal Process questions, largely within the Legal Process paradigm that Hart and Wechsler developed.⁷⁶

III. A QUALIFIED DEFENSE OF LEGAL PROCESS INQUIRIES

To assert that Federal Courts is paradigmatically a Legal Process field may do little to dispel, but indeed may tend to nourish, the notion that oedipal revolt should be the order of the day or that a paradigm shift is urgently needed. But that conclusion should not come too hastily. The topics of Federal Courts inquiry have peculiarly strong links to Legal Process analysis, which retains a claim to respect as offering a valuable (though by no means uniquely correct) perspective on the American legal system.

A. *The Rise and Decline of the Legal Process School*

As a general approach to the study of law, the Legal Process movement was undoubtedly a creature of the 1950s. By the post-war era, a rising generation of legal academics had substantially absorbed the anti-formalist claims of Legal Realism.⁷⁷ Most, too, had accepted the worldly view that substantive moral and political philosophy were woolly, bankrupt disciplines.⁷⁸ Yet this same generation, which had witnessed Nazi tyranny and the rise of Communist totalitarianism, had an almost palpable need for a theory of the rule of law.⁷⁹ The Legal Process school, with its principle of institutional settlement and its theories of comparative institutional competences, furnished a theory of law and provided a structure for distinctively legal analysis; it substantially addressed the threat of judicial subjectivity introduced by Legal Realism, but without relying on the metaphysical pretenses that had brought moral and political philosophy into bad repute. In

76. See Peller, 21 U. Mich. J. L. Ref. at 569 (cited in note 12) (asserting that "the Hart & Wechsler *Federal Courts* casebook was (and still is) the paradigm for the Legal Process approach").

77. See, for example, *id.* at 567.

78. See John Hart Ely, *Democracy and Distrust* 53-54 (Harvard U., 1980) (recalling that "[w]hen I was a lad studying philosophy in the late 1950s, epistemology and logic were all the rage, and moral and political philosophy were sneered at by knowledgeable: after all, one couldn't really *reason* about ethical issues, could one?") (emphasis in original).

79. See Peller, 21 U. Mich. J. L. Ref. at 579-91 (cited in note 12).

short, Legal Process analysis responded magnificently to the intellectual and emotional needs of academic lawyers in the 1950s.

Today, however, much has changed. Lawyers trained in other disciplines—ranging from economics to semiotics—now analyze doctrine with techniques that may make Legal Process analysis seem quaint and old-fashioned by comparison.⁸⁰ Moreover, the conviction has hardened in other fields that questions of substantive justice cannot be avoided and, what is more, that the resources for resolving these questions can be found in economic, moral, or political theory.

B. *Why Legal Process Now?*

If I am correct that Federal Courts teaching and scholarship continue to be dominated by a Legal Process paradigm that many other academic areas have abandoned, is the most plausible explanation that Federal Courts teachers are intellectually backward, if not bankrupt? I do not think so. My analysis has two parts.

1. The Lack of a Better Alternative

First, whatever may be most illuminating for the study of other subjects, no one has yet advanced a better paradigm for the study of Federal Courts issues than the Legal Process paradigm pioneered by Hart and Wechsler. Indeed, to suggest that we should be seeking another may be to misunderstand the nature of the subject and its problems as viewed from the perspective of Federal Courts experts. In the history of science, Thomas Kuhn has argued, new paradigms have tended to be developed when old paradigms could no longer deal in an acceptable way with developments in a field.⁸¹ I do not believe that this is the case with Federal Courts law. As I have argued already, our subject is defined by questions involving the allocation of authority to decide particular kinds of legal questions. We cannot avoid issues of institutional authority and comparative institutional competence. Nor, once these questions arise, can most of us imagine how to answer them without accepting Hart and Wechsler's leading methodological assumptions.

80. For a useful survey, see Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761 (1987).

81. See Kuhn, *The Structure of Scientific Revolutions* at 66-91 (cited in note 5).

2. "One View of the Cathedral"

Second, quite apart from the way that the Federal Courts field looks from the inside, the Legal Process approach that we predominantly pursue is one that deserves to be rooted somewhere in the legal academy. If an approach to the study of law limited itself to questions of comparative institutional competence to decide particular kinds of issues, it would indeed be defective. But as an aspect of the study of law—as a perspective from which to get “one view of the cathedral”⁸² of American constitutionalism—the Legal Process paradigm is indispensable. The study of the American constitutional system would be radically impoverished without the insights—partial though they undoubtedly are—that questions about the appropriate allocation of decision-making authority and the design of decision-making structures can generate.⁸³

C. *Objections and Responses*

Some scholars, of course, appear to deny even the limited claims that I have made on behalf of Hart and Wechsler's characteristically Legal Process approach to Federal Courts issues. In particular, the argument commonly is made that the abstract concepts upon which Legal Process arguments depend are as indeterminate as substantive concepts were shown to be by Legal Realism and that, at bottom, decisions allocating responsibility to one or another institution or court are nothing but thinly disguised substantive decisions.⁸⁴ This challenge takes at least three different forms.

Construed in one way, the argument that judgments allocating decision-making responsibility reflect substantive commitments raises no real challenge to the Legal Process view as correctly understood. There is undoubtedly one sense in which decisions about institutional authority cannot be made intelligently without a view of what would count as good outcomes. If, for example, federal courts ordinarily should not be allowed to enjoin state criminal proceedings, it must be

82. Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

83. See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 Ga. L. Rev. 343, 374-82 (1993).

84. See, for example, Peller, 21 U. Mich. J. L. Ref. at 615-16 (cited in note 12); Michael Wells, *Rhetoric and Reality in the Law of Federal Courts: Professor Fallon's Faulty Premise*, 6 Const. Comm. 367 (1989); Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 Wm. & Mary L. Rev. 499 (1989).

because allowing injunctions would have consequences that should be adjudged bad in some normative sense. If Congress is allowed to provide for administrative adjudication, it should be because administrative adjudication, overall, reasonably can be expected to do more good than harm from the perspective of constitutional and social values. But I do not understand the Legal Process school to deny notions such as these.⁸⁵ Certainly Henry Hart did not.⁸⁶ As Hart once

85. According to Michael Wells, the Legal Process approach and the principle of reasoned elaboration in particular presuppose that the values applied by judges must be objectively identifiable in the sense that they would be recognized as relevant by any professionally competent judge; a judge's personal values must play no role in adjudication. See Wells, 71 B.U. L. Rev. at 642 (cited in note 12). Today, Wells argues, the ideal of adjudication that is objective or value-free in this strong sense can no longer be sustained, and the Legal Process paradigm cannot survive the collapse of this ideal. See *id.* I certainly do not deny that the identification of legally relevant values is frequently an interpretive enterprise that may require contestable moral judgments. See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987) (discussing the role of moral values in constitutional interpretation). But it is far from clear that Hart and Wechsler believed value-neutrality, in the sense demanded by Wells, to be either necessary or possible. As Kent Greenawalt has noted, even in his celebrated brief for "Neutral Principles," Herbert Wechsler "does not contend that judges can decide constitutional cases without weighing conflicting values. He explicitly recognizes that judges must often make difficult choices among values and does not suggest that the judge can somehow be neutral among those values." Greenawalt, 78 Colum. L. Rev. at 991 (cited in note 72) (footnotes omitted). Whatever Hart and Wechsler may have thought, I see no reason why contemporary adherents of the Legal Process paradigm cannot simply acknowledge that legal interpretation sometimes requires contestable value judgments about which reasonable judges can sometimes disagree. What seems crucial to the notion of reasoned elaboration is that the value judgments occur within a process of legal reasoning, rather than being imposed from the outside as a judge's personal, dictatorial preferences. As Wells recognizes, a sophisticated theory that makes moral judgment internal to legal interpretation is developed by Ronald Dworkin. Wells, 71 B.U. L. Rev. at 642-43 & n.204 (discussing Ronald Dworkin, *Taking Rights Seriously* (Harvard U., 1977), and Ronald Dworkin, *Law's Empire* (Harvard U., 1986)). Professor Wellman has argued that Dworkin's approach overlaps to a considerable degree with the Legal Process methodology developed by Hart and Sacks in *The Legal Process* (cited in note 3). Wellman, 29 Ariz. L. Rev. 413 (cited in note 36). Modern adherents of the Hart and Wechsler paradigm as I have described it easily could accept a jurisprudential theory in which sometimes contestable value judgments are recognized as an aspect of legal interpretation.

86. But see Wells, 71 B.U. L. Rev. at 627 (arguing that the "substantive implications of jurisdictional rules are unimportant in the Hart and Wechsler framework because ideally there are none"). Wells's interpretation ignores Henry Hart's explicit professions to the contrary. See, for example, text accompanying note 87. It also fails to reckon with Hart and Wechsler's positions on particular jurisdictional issues. For example, Hart and Wechsler developed the concept of "protective jurisdiction" to protect federal interests against state court discrimination even in cases not formally turning on questions of federal law. See Hart and Wechsler, *The Federal Courts* at 745-46 (1st ed.) (cited in note 1). In their generally hospitable stance toward administrative adjudication, they surely grasped the point that Congress frequently assigned adjudicative responsibilities to agencies, rather than to courts, in order to promote more plaintiff and pro-regulatory outcomes. See, for example, Hart, *Dialogue*, 66 Harv. L. Rev. at 1384 (cited in note 16) (noting that administrative agencies frequently are established to be the "champion" of "the protected groups in an administrative program" and suggesting that it reflects "a recognition of the equities of the situation" when those groups lose judicially cognizable

asserted, "you could not think straight about law unless you thought about its purposes and took sides on hard questions about which purposes should be furthered and which not."⁸⁷ The best Legal Process scholarship continues to consider issues of how to get the "best" performances from various institutions of government, including courts.⁸⁸

Second, and more challengingly, some critics suggest that determinations about decision-making authority necessarily reflect concealed substantive judgments on the merits of the particular cases in which they are rendered.⁸⁹ Although this argument contains a germ of truth, it is much overstated. At the margin, Legal Process questions such as whether a decisionmaker has exceeded her jurisdiction, or whether a party has had a "full and fair" opportunity to litigate her claim, may require a judicial peek at the merits to determine whether the challenged judgment was one that a reasonable decisionmaker could have made.⁹⁰ But the determination, even in cases of this kind, is not whether the institution with frontline decision-making authority decided "rightly," but only whether its decision satisfies some standard of reasonableness. There is a crucial difference. To deny this difference is to impute judicial responsibility for the correctness of every application of law to fact by every decisionmaker whose judgments are subjected to judicial challenge. Yet to conceive that judges might possess or accept this responsibility is to indulge a fantasy. Although the line between norms allocating decisional authority and norms defining substantive rights sometimes may blur, the Legal Process approach correctly assumes that there are clear cases. Moreover, at its best, the Legal Process methodology contributes the most in exposing what is at stake in cases in which the line is fine, blurry, and even vanishing—for example, when reasoned elaboration

"procedural and litigating rights" and must instead "stand or fall" with the agency's determinations). Indeed, Hart was the initial proponent of the thesis that constitutional claims initially litigated in state courts might justifiably be relitigated on federal habeas corpus "on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court." See Hart, 73 Harv. L. Rev. at 106-07 (cited in note 18).

87. Henry M. Hart, Jr., *Thomas Reed Powell*, 69 Harv. L. Rev. 804, 804 (1956).

88. To cite just one example, the question of how best to use state courts as a resource to ensure maximally effective protection of federal rights is a recurring theme in the work of Ann Althouse. See, for example, Ann Althouse, *Tapping the State Court Resource*, 44 Vand. L. Rev. 953 (1991); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485 (1987).

89. See Peller, 21 U. Mich. J. L. Ref. at 615-16 (cited in note 12).

90. See *id.*

shades into policymaking or substitution of substantive moral judgment.

Third, critics sometimes contend that Federal Courts law has no integrity—that judges routinely manipulate jurisdictional doctrines in order to arrive at whatever substantive outcomes they happen to prefer.⁹¹ Certainly, manipulation of this kind sometimes occurs. But the strong form of the hypothesis—that Federal Courts doctrine does not matter at all—is transparently false.⁹² And any weaker form is much less threatening to the Legal Process paradigm. Legal Process scholars could not sensibly claim to model judicial reasoning or predict the outcome in every case; debates about the extent of the paradigm's illuminating and predictive powers should be welcome. A threat would of course re-emerge if it were suggested that some other model had greater explanatory power⁹³—for example, a model suggesting that judges regularly manipulate jurisdictional doctrine to promote their preferred substantive outcomes in each individual case. But this suggestion at least approaches the strong claim that doctrine has no constraining force, and the strong claim is impossible to sustain in its bald form.⁹⁴ There is not much space in which to build a plausible alternative model.

A final, important argument against the Legal Process school dismisses its approach as apologetic and complacent: the Legal Process methodology tends to assume the moral legitimacy of the status quo, to worry less about the desirability of reform than about institutional competence to effect change, and generally to idealize

91. See Wells, 6 Const. Comm. at 372-81 (cited in note 84); Wells, 30 Wm. & Mary L. Rev. at 636-41 (cited in note 84).

92. Significantly, I do not understand Professor Michael Wells, who is the most prominent proponent of the thesis that "substantive factors exert a powerful and often unrecognized influence over the resolution of jurisdictional issues," Wells, 30 Wm. & Mary L. Rev. at 499, to make this claim. Wells maintains instead that the Supreme Court characteristically crafts jurisdictional doctrine—which thereafter does exert a significant influence on outcomes—with the hope or expectation of providing a litigating advantage to representatives of preferred substantive interests in the relevant category of cases. See *id.* at 506-07 (distinguishing the acknowledged effect of jurisdictional rules from the motivations that lie behind them). In other words, Wells offers what I describe as a "weaker" form of the argument that judges routinely manipulate Federal Courts doctrine to promote preferred substantive ends.

93. Even if some other model did have greater descriptive power, this fact would not be fatal to the normative claims of the Legal Process school. According to the "weaker" form of challenge now under discussion, the Legal Process approach is acknowledged to have a foothold in existing practice that might be expanded as well as contracted.

94. See, for example, Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 Harv. L. Rev. 1695, 1711-13 (1989) (criticizing the assumptions on which the claim that doctrine has no constraining force would apparently need to depend).

elite institutions.⁹⁵ I regard this charge as at least partly accurate, and it helps to persuade me that the Legal Process approach cannot tell us everything we should want to know about how the legal system either does or should operate. Questions of substantive justice deserve attention, not deflection. In identifying the starting point for legal analysis, we partly define ourselves and our moral stances on basic issues.⁹⁶ Nevertheless, even a theory of justice requires authority-allocating as well as substantive norms.⁹⁷ If judges should sometimes push the outer limits of their power to reach substantively just results, they should by no means cease to worry about the sensible and legitimate boundaries of their own authority.⁹⁸

In sum, if anyone takes a holistic approach to legal scholarship, I think those of us in the Federal Courts field, by following what is basically a Legal Process approach, are doing our fair share to illuminate the American legal system. We need not apologize either to our students or to our colleagues. If Federal Courts is a scholarly backwater, it is a backwater with an important place in the ecosystem of public law scholarship.⁹⁹

IV. DIRECTIONS FOR FUTURE SCHOLARSHIP

So far I have offered a somewhat static thesis about what we predominantly do in teaching and writing about Federal Courts doctrine. I have not said much, except possibly by implication, about the actual or desirable directions of future scholarship either within or without the Hart and Wechsler paradigm. I address questions about what we ought to do with some reticence, for my own standards for worthwhile scholarship are rather catholic, and I often admire work that I scarcely could have imagined before I encountered it. With

95. See, for example, Peller, 21 U. Mich. J. L. Ref. at 620-21 (cited in note 12); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 Ohio St. L. J. 223, 252-57 (1981).

96. See J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 Yale L. J. 105, 144-76 (1993).

97. See, for example, John Rawls, *A Theory of Justice* 195-201, 221-43 (Harvard U., 1971).

98. Compare Frederick Schauer, *Rules and the Rules of Law*, 14 Harv. J. L. & Pub. Pol. 645, 674-79 (1991) (endorsing the "presumptive positivist" view that courts typically do and should accept the dictates of existing rules and convention, unless doing so would conflict seriously with values of supervening importance).

99. Nor is it as disconnected with contemporary thought in other fields as sometimes believed. See, for example, Wellman, 29 Ariz. L. Rev. at 467-74 (cited in note 36) (noting continuities between the Legal Process thought of Hart and Sacks and the jurisprudential theories of Ronald Dworkin).

trepidation, however, I shall offer some thoughts about possible future directions of Federal Courts scholarship in three general and overlapping categories: (i) work that occurs within the Hart and Wechsler paradigm, (ii) work that seeks to reshape that paradigm or create a sub-paradigm within it, and (iii) work that attempts to debunk or overthrow the Hart and Wechsler paradigm.

A. Within the Hart and Wechsler Paradigm

An enormous amount of valuable work can be done within the tradition pioneered by Hart and Wechsler. A partial list of tasks that Federal Courts scholars can usefully pursue, reflecting my effort to categorize scholarship that I admire, would include the following: (i) historical research, (ii) critical analysis of cases and doctrines, (iii) proposals for law reform, (iv) efforts to identify immanent values or purposes in light of which bodies of law might be rationalized, (v) depictions of unrecognized patterns or doctrinal failures to treat similar problems similarly, and (vi) development of clarifying models or analytically useful concepts or distinctions. I would single out two kinds of work for special mention.

1. In Praise of Empirical and Political Scientific Research

The first is empirical and political scientific research. The characteristic reasoning of the original Hart and Wechsler casebook could be described as semi-conceptualist. What I have called "the principle of structural reasoning" assumes that concepts such as federalism, the separation of powers, and administrative expertise should have implications for the allocation of decision-making responsibility. As a matter of intellectual first principle, Hart and Wechsler accepted the idea that large abstractions such as these needed to be understood purposively and contextually—in such a way as to, in Hart's words, "release to the utmost the enormous potential of the human abilities" in the society.¹⁰⁰ But judgments reached on purposive and substantive grounds—for example, the judgment that the states should be accorded a broad and sympathetic opportunity to experiment with regulatory structures—have a tendency, even in Hart and Wechsler's hands,

100. Hart, 54 Colum. L. Rev. at 490 (cited in note 11).

to ossify into neutral principles commanding broad federal judicial deference to state institutions.

The clear antidote to excessively conceptual analysis is empirical research. Sensible judgments about how to allocate decision-making power require some sense of the actual competence of existing institutions to make particular kinds of decisions in socially acceptable ways. In considering allocations of decisional responsibility between federal courts and other institutions of state and federal government, most of us could profit from closer attention to more statistical analyses,¹⁰¹ more sociological examinations of decision-making environments in different kinds of institutions,¹⁰² and more case studies aimed at exploring the actual impact of judicial decisions and decrees of various kinds.¹⁰³ I do not mean to imply that no work of this kind currently is done. Some is, and much of it is excellent.¹⁰⁴ Nonetheless, I think that more of us should take Hart and Wechsler's question of what courts are and are not good for out into the field, and those of us who continue to work semi-conceptually should pay more heed to the researchers' results. Far too many of us have been too content with speculative, armchair empiricism.

2. The Changing Face of the Federal Judicial Landscape

A closely related kind of work also deserves mention. Even a small amount of empirical investigation reveals that both the structure and functions of the judicial branch are subject to change. Magistrate judges and administrative law judges now do much adjudicative work in the federal system.¹⁰⁵ Judges preside over staffs of law clerks, who do much of their writing.¹⁰⁶ In addition, judges fre-

101. Examples of this genre include Richard Faust, Tina J. Rubenstein, and Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. Rev. L. & Soc. Change 637 (1990-1991); Theodore Eisenberg and Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321 (1973).

102. One such study is Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale U., 1983).

103. A recent notorious example is Gerald N. Rosenbery, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago, 1991).

104. For critical reviews of some of the relevant literature, see Petor H. Schuck, *Public Law Litigation and Social Reform*, 102 Yale L. J. 1763 (1993).

105. See, for example, Judith Resnik, *Tiers*, 87 S. Cal. L. Rev. 837, 946-47, 974-1005 (1984); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. Rev. 3, 34-36.

106. See Henry Paul Monaghan, Book Review, *Taking Bureaucracy Seriously*, 99 Harv. L. Rev. 344, 345 (1985) (arguing that "[t]he litigation explosion carries with it the increasing

quently take leading roles in pushing parties to enter settlements.¹⁰⁷ Again, I do not mean to imply that scholars have entirely ignored these developments. As a group, however, we in the Federal Courts field have not yet thought carefully enough about how developments such as these bear on traditional conceptions of the judicial process and on issues of appropriate allocation of decision-making authority.

B. Work That Seeks to Reshape the Hart and Wechsler Paradigm or Create a Sub-Paradigm Within It

1. Amar's Neo-Federalism

My claim that Hart and Wechsler created the dominant paradigm for Federal Courts scholarship is almost necessarily vague and, to some extent, even metaphorical. Admittedly, no sharp lines separate work that occurs within the paradigm from work that either enriches or alters it or work that establishes closely analogous yet distinct paradigms. On the one hand, someone can disagree with Hart and Wechsler about a substantive issue, or even about one of their central methodological assumptions, without attempting to transform general understandings of the field. On the other hand, some arguments, if accepted, would have potential implications that could be worked out for a broad range of issues. Akhil Amar's arguments furnish a case in point.

Amar's "neo-federalist" position, as sketched in a number of important articles,¹⁰⁸ seems to accept Hart and Wechsler's definition of the field and most, if not all, of their methodological assumptions. Nonetheless, his substantive views about federalism, the separation of powers, and the rule of law are sufficiently deep, plausible, and interconnected that it is possible to imagine a school of Amar disciples, developing the applications of his views for a number of issues, who

bureaucratization of the federal appellate process, a development that severely undermines the institutional premises" of traditional Legal Process arguments about comparative institutional competence).

107. See, for example, Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 111-67 (Harvard U., 1986) (describing Judge Jack Weinstein's aggressive role in reaching a settlement in the Agent Orange litigation); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 386-90 (1982); Chayes, 89 Harv. L. Rev. at 1298-1302 (cited in note 28).

108. See, for example, Amar, 138 U. Pa. L. Rev. 1499 (cited in note 67); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425 (1987).

would operate within a set of substantive assumptions that could plausibly be viewed as constituting a distinct paradigm spun off from Hart and Wechsler's. This would be a paradigm in a lower-order sense than I generally have used the term, for the ongoing debate about the validity of the spun-off paradigm's substantive tenets would occur within a generally shared set of methodological assumptions associated with Hart and Wechsler. In any event, Amar has demonstrated—if demonstration were needed—that the opportunity exists for doing creative, generative, and even inspiring work without displacing Hart and Wechsler's Legal Process questions and methodology.

2. Toward a Theory of Intertemporal Synthesis

I cannot pretend to foresee what lines of thought and research might lead to scholarship of comparable importance. (If my imagination were better, my own work would be far more impressive than it is.) But I would call attention to one large, recurring problem for those who study, use, apply, and make Federal Courts doctrine, the theoretical solution to which would have very broad repercussions.

This problem, which Bruce Ackerman's recent work on constitutional history has richly illuminated,¹⁰⁹ involves difficulties of what he calls intertemporal synthesis.¹¹⁰ American constitutional and jurisdictional law exhibit the towering influence of three eras of lawmaking. The first surrounds the framing of the Constitution and, especially in the First Judiciary Act, the congruent effort to create a jurisdictional structure for the new republic.¹¹¹ In general terms, the animating vision of the founding era regarded the federal government as appropriately subject to far more constitutional restraints than the states.¹¹² The Civil War and Reconstruction represent a second formative era. The Civil War amendments wrought profound changes in substantive federalism;¹¹³ at the same time, a spate of jurisdictional statutes reflected skepticism about the adequacy of state courts to

109. See Bruce Ackerman, 1 *We the People: Foundations* (Belknap, 1991).

110. See *id.* at 131-62.

111. For discussion of the 1789 Judiciary Act, see, for example, Frankfurter and Landis, *The Business of the Supreme Court* (cited in note 42); Casto, 26 B.C. L. Rev. 1001 (cited in note 42); Amar, 138 U. Pa. L. Rev. 1499 (cited in note 67).

112. See, for example, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (finding the Bill of Rights inapplicable to the states).

113. See, for example, Ackerman, 1 *We the People* at 44-47, 81-83 (cited in note 109).

protect national rights and interests.¹¹⁴ Finally, as Ackerman maintains, the constitutional order was profoundly altered during the New Deal era.¹¹⁵ Previously recognized restrictions on Congress's legislative power gave way. More or less contemporaneously, the bridge was crossed into the modern administrative state, in which federal agencies perform a mix of functions that notably includes adjudication.¹¹⁶ Like the founding and Reconstruction, the New Deal and its aftermath witnessed a surge of statutes redefining the lines between the federal courts and other organs of federal and state government.¹¹⁷

The intertemporal problem, as Ackerman frames it, is one of figuring out how to integrate the lawmaking of the different eras into a coherent, workable whole. To pick on Hart and Wechsler, the editors of the first edition seemed to assume that materials from the framing era should guide judicial decisionmaking on questions of judicial federalism. Professor Hart, for example, staked his claim that state courts enjoy constitutional parity with lower federal courts largely on the debates about Article III at the Constitutional Convention.¹¹⁸ On the whole, Reconstruction seems to have been poorly integrated into Hart and Wechsler's substantive vision. In any event, in contrast with their reliance on the lawmaking of the framing era to answer questions of judicial federalism, Hart and Wechsler seemed largely uninterested in original history when examining questions about the permissibility of administrative adjudication and related questions about the administrative state ushered in by the New Deal.

Problems of intertemporal synthesis are pervasive in the field. Consider, for example, the familiar debates about how to interpret post-Civil War jurisdictional legislation that rather clearly exhibited at least some skepticism about the adequacy of state courts to protect

114. For useful overviews, see Steven Kutler, *Judicial Power and Reconstruction Politics* (U. of Chicago, 1968); William Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 *Am. J. Legal Hist.* 333 (1969).

115. See Ackerman, 1 *We the People* at 44-57, 100-30 (cited in note 109).

116. See, for example, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *Harv. L. Rev.* 421, 430-46 (1987).

117. See *id.* at 437-46.

118. See Hart and Wechsler, *The Federal Courts* at 18 (1st ed.) (cited in note 1) (noting that "[i]t seems to be a necessary inference from the express decision [at the Constitutional Convention] that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary"); Hart, *Dialogue*, 66 *Harv. L. Rev.* at 1363, 1401 (cited in note 16).

federal rights and interests.¹¹⁹ How should that legislation be integrated with earlier legislation and with entrenched doctrines that established norms of deference to state courts, state institutions, and state officials? I think many, if not most, Federal Courts teachers tend to vary the assumptions that they use in interpreting the relevant statutes and identifying their underlying purposes. For example, many of us assume that some aspects of the *Younger*¹²⁰ doctrine¹²¹ are incompatible with congressional intent;¹²² Congress distrusted state courts and state agencies, we reason, and courts should treat Section 1983's¹²³ authorization of injunctive relief as some form of command.¹²⁴ Yet many of us also assume that Congress could not have intended Section 1983 to be taken literally in all contexts—that it should not be read to strip judges of their traditional common-law immunity, for example—because if Congress had wanted to change the law so fundamentally, it surely would have said so.¹²⁵

For me the puzzle is both clear and general. Reconstruction lawmaking must be treated as working large changes in judicial federalism, but reading the legislation to bury the traces of the prior structure would spawn chaos.¹²⁶ How then should we draw interpre-

119. For an overview, see Fallon, 74 Va. L. Rev. 1141 (cited in note 65).

120. *Younger v. Harris*, 401 U.S. 37 (1971).

121. Although *Younger* itself involved only a restriction on federal injunctions against state court proceedings, the Supreme Court has extended its rationale of comity and federalism to bar federal injunctions against civil enforcement actions to which the state is a party, see *Moore v. Sims*, 442 U.S. 415 (1979); to suits between private parties involving the state's interest in the enforcement of its judgments, see *Texaco v. Pennzoil*, 481 U.S. 1 (1987); to state administrative proceedings that are judicial in nature or closely associated with judicial processes, see *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 23 (1982); and to suits to restrain allegedly unconstitutional patterns of conduct by state police and prosecutors, see *Rizzo v. Goode*, 423 U.S. 362 (1976).

122. See, for example, John Ziegler, *A Reconsideration of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L. J. 987; Gene R. Nichol, *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959 (1987); Aviam Soifer and H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 Tex. L. Rev. 1141 (1977); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1 (1984).

123. 42 U.S.C. § 1983 (1988).

124. See, for example, Ziegler, 1983 Duke L. J. at 1017-25 (cited in note 122); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Federal Judicial Function*, 94 Yale L. J. 71, 84-89 (1984).

125. The Supreme Court has taken this approach consistently. See, for example, *City of Newport v. Fact Concerts*, 453 U.S. 247, 258 (1981) (assuming that "members of the 42nd Congress were familiar with common law principles, including defenses recognized in ordinary tort litigation, and they likely intended these common law principles to obtain, absent specific provision to the contrary"). Few commentators have objected to the notion that some form of immunity should be recognized despite the absolute terms in which § 1983 is written.

126. See Fallon, 74 Va. L. Rev. at 1224-44 (cited in note 65).

tive lines? Are we justified in appealing to the intent of a Congress of a past historical era to support our arguments on some issues if we are unwilling to do so consistently? A single example may sharpen the question. Historical evidence suggests that Congress, in enacting the statute providing for general federal question jurisdiction in 1875,¹²⁷ intended the jurisdiction to sweep as far as the Constitution would permit.¹²⁸ Not many of us would argue today that the courts should accept this congressional intent as binding.¹²⁹ But if not, how does this case differ from one in which we do think that congressional intent ought to control?

Perhaps these are just the ordinary questions about how courts should interpret the Constitution and how they should interpret statutes. But Ackerman may be on to something deeper. Statutes, constitutional provisions, and adjudication all reflect assumptions. Although it would be simplistic to assume that uniform assumptions prevail in any particular age, the variance across eras is likely to be even larger. Questions of intertemporal synthesis then arise. The development of a methodologically coherent approach to questions of this kind would make an enormous contribution.

C. Paradigm-Smashing and Paradigm-Making Scholarship

I come finally to possible directions of scholarship challenging head-on, with the aim of displacing, the Hart and Wechsler paradigm. It is certainly possible that some strong and imaginative theorist might, with a single book or article, simultaneously overthrow and replace Hart and Wechsler. Though unable to develop even a glimmer of how it might be done, I acknowledge again the all-too-plain limits of my own imagination.

I can think of only slightly more to say about two other avenues open to those who find the Hart and Wechsler paradigm somehow stultifying. One obvious direction for the bold and challenging of spirit would be to mount a frontal assault, specifically within the Federal Courts domain as conventionally defined, on Hart and Wechsler's Legal Process methodology. Scholars in other subject

127. Judiciary Act of 1875, 18 Stat. 470, codified at 28 U.S.C. § 1331 (1988).

128. See, for example, Ray Forrester, *The Nature of a "Federal Question,"* 16 Tulane L. Rev. 362, 374-75 (1942) (discussing the relevant materials and drawing this conclusion).

129. See Shapiro, 60 N.Y.U. L. Rev. at 568 (cited in note 62) (noting the "accepted wisdom . . . that the statute cannot and should not be so construed; otherwise the federal courts would be inundated with cases that might better be resolved elsewhere").

areas have assaulted Legal Process approaches, with the sharpest challenges coming from the Critical Legal Studies¹³⁰ and Law and Economics¹³¹ movements. But surprisingly little explicitly Federal Courts scholarship has devoted itself to challenging, deriding, or mocking Legal Process assumptions.¹³² Although Gary Peller and Mark Tushnet are both associated with the Critical Legal Studies movement, most of their Federal Courts scholarship has accepted the methodological assumptions of the Legal Process school and has offered familiar arguments to attack particular doctrines or positions.¹³³

By similar token, the Law and Economics scholarship within the Federal Courts field has tended to be surprisingly gentle in its criticism of Legal Process methodology.¹³⁴ Nor has there been much feminist scholarship addressed to Federal Courts issues.¹³⁵ I have suggested that the Legal Process approach exemplified by Hart and Wechsler offers a partial, but nonetheless valuable, perspective on public law issues and that the Federal Courts field is an appropriate place for this perspective to be represented. If others tentatively are disposed to agree with this, it is conceivable that we all might be forced to change our minds if the challenge to Legal Process methodology were persistently and persuasively pressed within our subject area. If so, a genuine methodological crisis would ensue. Nothing could be better calculated to concentrate the best available minds than a suddenly urgent question of how to create a workable intellectual order out of what had been unmasked as confusion.

130. See generally Mark G. Kelman, *Trashing*, 36 Stan. L. Rev. 293 (1984) (explaining and justifying the "trashing" of conventional doctrine and scholarship as a scholarly project).

131. For a lucid introduction to the challenges posed to traditional thought about public law by the "public choice theory" branch of the Law and Economics movement, see Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (U. of Chicago, 1991).

132. Compare Kelman, 36 Stan. L. Rev. at 319-20 & n.65 (cited in note 130) (implying that it is difficult even "to find some argument worth destroying in the standard public law side of the Legal Process school," and particularly in Federal Courts scholarship).

133. But see Peller, 21 U. Mich. J. L. Ref. at 612-17 (cited in note 12) (using Federal Courts examples to argue that the Legal Process method inevitably fails to meet its own criteria of successful application). Somewhat ironically, Michael Wells is perhaps the Federal Courts field's leading exponent of the law-is-politics view often associated with Critical Legal Studies. See, for example, Wells, 71 B.U. L. Rev. 609 (cited in note 12); Wells, 6 Const. Comm. 367 (cited in note 84); Wells, 30 Wm. & Mary L. Rev. 499 (cited in note 84). Despite this substantive outlook, Wells's methodology is traditional, and he claims no association with the Critical Legal Studies movement.

134. See, for example, Richard A. Posner, *The Federal Courts: Crisis and Reform* 288-89 (Harvard U., 1985).

135. Important exceptions include Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682 (1991), and Resnik, 61 S. Cal. L. Rev. 1877 (cited in note 73).

Another possible line of approach follows from my argument that Hart and Wechsler's continuing influence seems all but inescapable given that their questions and methodology largely defined the Federal Courts field as we now recognize it. It is hard for me to imagine how someone might ask deeper questions about, or develop a better methodology to study, a set of doctrines linked by Hart and Wechsler's questions. It is much easier to imagine that someone might group sets of questions, including many now within the standard Federal Courts curriculum, in ways that would generate as much insight as the current arrangement. The next Hart and Wechsler may be a work about Remedies,¹³⁶ Federalism, Local Government Law, Civil Rights Litigation,¹³⁷ or Bureaucracy. The challenge would be to match questions and methods of inquiry to subject matter, and thus to define or redefine what a field is about, in the way that Hart and Wechsler did with Federal Courts.

V. CONCLUSION

I began with the question whether frustration with the Hart and Wechsler model of Federal Courts scholarship reflected mere oedipal resentment or signalled the approach of a Kuhnian paradigm shift. Now, at the end, I am not sure whether my musings add up to an answer. Having attempted to explicate the Hart and Wechsler paradigm sympathetically, I have persuaded myself that developments in the Federal Courts field have not overtaken that paradigm or rendered it obsolete. In this sense, no paradigm shift seems urgently necessary. Moreover, no successor has yet been proposed with a plausible claim to allegiance.

On the other hand, the truest and deepest kind of innovation is inherently unpredictable. For this reason, neither I nor anyone else can say with assurance that the day of successful revolution is not at hand. In addition, I have recognized that criticism of the reigning paradigm is a useful corrective to its partiality and sometime complacency.

136. Compare Owen Fiss, *The Civil Rights Injunction* (Indiana U., 1978); Owen Fiss, *Injunctions* (Foundation, 1972).

137. Compare Peter Low and John Jeffries, *Civil Rights Actions: Section 1983 and Related Statutes* (Foundation, 1988).

For myself, persuaded that being a Legal Process scholar is not a terrible occupation, I would be disposed to look rather carefully before rushing to join in any purported methodological revolution in Federal Courts scholarship. But choice of a scholarly and pedagogical mode is almost necessarily a matter of temperament and taste. A multitude of voices frequently enriches conversation. Others must decide for themselves.

APPENDIX

FEDERAL COURTS AND THE FEDERAL SYSTEM

Professor Fallon, Fall 1993, Four Credit Hours

Syllabus and Assignment List

Unless otherwise indicated, assigned reading is from *Hart & Wechsler's The Federal Courts and the Federal System* (3d ed. 1988). Some assignments also include readings from the 1993 Supplement to Hart & Wechsler ("Supp.") and from a set of photocopied materials ("Materials") available in the Distribution Center.

Unless otherwise advised, please prepare one assignment for each class. Problems included in the Materials are likely to be vehicles for class discussion. Please try to find time to consider how other assigned materials bear on the problems before you come to class.

I. CONGRESSIONAL CONTROL OVER JURISDICTION

A. *Jurisdiction of the Federal Courts*

1. Scope of Congressional Power

Assignment #1: Problems 1a-d, Materials pp. 1-2; U.S. Const., Art. III; pp. 1-2, 10-11, 18-20; 362-70; 376-87; Supp. pp. 57-60; Materials pp. 3-5 ("Historical Limits")

Assignment #2: Problems 2a-b, Materials pp. 6-7; pp. 370-76; 1108-10 n.3; 393-99; Materials pp. 8-19 ("Constitutional Remedies")

2. Adjudication by Administrative Agencies and Related Problems

Assignment #3: Problems 3a-b, Materials pp. 20-21; pp. 387-93; 399-411; Supp. pp. 61-62; Materials pp. 22-24 (*U.S. v. Mendoza-Lopez*)

3. Legislative Courts

Assignment #4: pp. 425-53

Assignment #5: Problem 5, Materials p. 25; pp. 454-73; Supp. pp. 62-66

B. *Federal Authority and State Court Jurisdiction*

Assignment #6: Problem 6, Materials p. 26; 28 U.S.C.

§§ 1441, 1442, Materials p. 27; pp. 479-90 n.4; 492-500; Supp. pp. 67-70; Materials p. 28 ("Note on *Gregory v. Ashcroft*")

II. SUPREME COURT REVIEW OF STATE COURT DECISIONS

A. *Establishment of Supreme Court Review*

Assignment #7: 28 U.S.C. §§ 1254, 1257, Materials p. 29; Supreme Court Rule 10, Materials p. 30; pp. 501-16; 521-32

B. *Supreme Court Jurisdiction: The Relationship Between State and Federal Law*

1. Introduction to the Independent and Adequate State Ground

Assignment #8: Problems 8a-d, Materials p. 31; pp. 533-35; 549 n.4-550; 539-47; 552 n.7; 554-57; Supp. pp. 71-74

2. Problems of "Incorporation" and Federal Protection of State Created Rights

Assignment #9: Problems 9a-e, Materials pp. 32-33; pp. 557-67; 569-81; Supp. pp. 74-77

3. State Remedies for Federal Rights Violations and State Procedures for Enforcing Federal Rights

Assignment #10: pp. 581-88; Supp. pp. 77-78; pp. 628-32; 637 n.8-38; 595-600; Materials pp. 34-42 ("State Court Forfeitures")

4. The Relation of Procedural Default Doctrine to Federal Habeas Corpus Jurisdiction

Assignment #11: Problem 11, Materials pp. 43-44; 28 U.S.C. §§ 2241, 2254-55, Materials pp. 45-46; pp. 1477-88 n.1; 1539-40; 1506-22 n.6; Supp. pp. 220-22; 246-47; Materials pp. 47-49 ("Models of Federal Habeas Corpus")

Assignment #12: pp. 610-23 n.7; Problem 12, Materials p. 50; pp. 1524-38; 1546 n.5-1552; Supp. pp. 248-52; 253-54 ("Note on *McCleskey v. Zant*")

5. Retroactivity

Assignment #13: Problem 13, Materials p. 51; Supp. pp. 222-45

III. ELEMENTS OF FEDERAL QUESTION JURISDICTION

A. *Scope of the Constitutional Jurisdiction*

Assignment #14: Problems 14a-b, Materials p. 52; pp. 967-75; Materials p. 53 ("Questions About Osborn"); pp. 878-81; 975-82; 986-87; Supp. pp. 129-31

B. *Scope of the Statutory Jurisdiction*

1. Basic Structure and the Well-Pleaded Complaint Rule

Assignment #15: 28 U.S.C. §§ 1331, 1337-38, 1441-42, 1446-47, Materials pp. 54-56; pp. 960-66; 989-90; 997-99; 1052-56 n.4; 1767-69; 990-95 n.1; Supp. pp. 131-32

2. Inclusionary and Exclusionary Principles

Assignment #16: pp. 999-1022; Supp. p. 132

3. Jurisdiction Over Declaratory Judgment Actions

Assignment #17: 28 U.S.C. §§ 2201-02, Materials p. 57; pp. 1027-40; Problem 17, Materials p. 58; Supp. p. 133

C. *Pendent Jurisdiction*

Assignment #18: pp. 1040-51; Supp. pp. 134-37; 28 U.S.C. § 1367, Materials p. 59

IV. LAW APPLIED IN THE DISTRICT COURTS: FEDERAL COMMON LAW

A. *Introduction: Judicial Competence and Discretion in the Crafting of Federal Common Law*

Assignment #19: Problem 19, Materials p. 60; 28 U.S.C. § 1652, Materials p. 61; p. 849; pp. 783-87; 854-63; Materials pp. 62-66 (*U.S. v. Kimbell Foods*); Supp. pp. 94-95

B. *Sources of Lawmaking Authority*

1. Proprietary Interests of the United States

Assignment #20A: pp. 854-57 (reprise)

2. Private Litigation Involving Federal Interests

Assignment #20B: Supp. pp. 96-111

3. Implication from Jurisdictional Grants

Assignment #20C: pp. 878-95

4. Federal Common Law Generated by Statutes

Assignment #20D: Problem 20D, Materials pp. 67-68; Supp. pp. 114 n.6-118; 564-66 (reprise)

5. Procedural Rules
Assignment #20E: pp. 628-32 (reprise)

C. *Implication of Remedies*

1. Remedies for Statutory Violations
Assignment #21: pp. 935-43; 945 n.4-950; Supp. pp. 123-24; 42 U.S.C. § 1983, Materials p. 69; pp. 1244(c)-1247(d); Supp. pp. 173-75
2. Remedies for Constitutional Violations
Assignment #22: Problem 22, Materials pp. 70-71; pp. 917-26; 927 n.3-934; Supp. pp. 121-23; pp. 1298 n.6-1301

V. ACTIONS AGAINST THE GOVERNMENT AND ITS OFFICIALS

A. *Sovereign Immunity and the Eleventh Amendment*

1. Foundations
Assignment #23: U.S. Const. Art. III and Amendment 11; pp. 1090-1110; 1114-16 n.4; Materials p. 72 (“Note on Federal Sovereign Immunity”); pp. 1159-70 n.9; 1171 n.11-1173
2. Modern Doctrine
Assignment #24: Problem 24, Materials pp. 73-74; pp. 1173-79; 1182-94 n.5; Supp. pp. 151-71
Assignment #25: pp. 1194 n.7-1204; Supp. pp. 185-86; Materials pp. 75-81 (“Tax Refund Litigation”)

B. *Federal Statutory Protection Against Unlawful State Action*

1. The Scope of the Section 1983 Cause of Action
Assignment #26: Problem 26, Materials p. 82; 42 U.S.C. § 1983, Materials p. 69 (reprise); pp. 1229-44(a); 1259-68; 1269 n.3-1271 n.4(b); 1274 n.7-1276 n.7; Supp. pp. 187-89
2. Proper Defendants, Causal Responsibility, and Immunities
Assignment #27: pp. 1251 n.4-1257 n.6; Supp. pp. 175-86; pp. 1277-92; 1295 n.4-1301; Supp. pp. 190-93
3. Res Judicata
Assignment #28: 28 U.S.C. § 1738, Materials p. 83; Materials pp. 84-90 (“Refresher Examples on Res Judicata”); pp. 1615-30; Supp. pp. 259-60

VI. JUDICIAL FEDERALISM: LIMITS ON DISTRICT COURT
JURISDICTION OR ITS EXERCISE

A. *Statutory Limits on Federal Jurisdiction*

Assignment #29: 28 U.S.C. §§ 2283, 1341, 1342, 2284, Materials p. 91; pp. 1308-33; Supp. pp. 195-97; pp. 1337-42; Materials p. 92 ("Questions on the Anti-Injunction Act")

B. *Non-Statutory Restrictions*

1. The Exhaustion Requirement, *Pullman*, and Related Doctrine

Assignment #30: Problems 30A 1-2, Materials p. 93; pp. 1346-51 n.6; Problem 30B, Materials p. 94; pp. 1354-67 n.10; 1375-77; 1195-1201 (reprise); Supp. pp. 200-03

2. *Younger* Abstention

Assignment #31: pp. 1383-94 n.4; 1397 n.6-1400 n.3; 1406-15

Assignment #32: Problem 32, Materials p. 95; pp. 1416-38; Supp. pp. 203-14

C. *Review*

Assignment #33: Problem 33, Materials pp. 96-100; pp. 1630-38

