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Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century

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Rereading “The Federal Courts”: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century

*Judith Resnik**

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I. INTRODUCTION

Annette Kolodny tells us that:

we read well, and with pleasure, what we already know how to read; and what we know how to read is to a large extent dependent upon what we have already read (works from which we developed our expectations and our interpretative strategies).¹

Can we do otherwise? Or are we forever trapped in the story of “the Federal Courts”—as told to us first by Felix Frankfurter, James Landis, Wilber Katz, and Harry Shulman, then by Henry Hart and Herbert Wechsler, now by Paul Bator, Paul Mishkin, Daniel Meltzer,

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1. Annette Kolodny, *Dancing Through the Minefield*, in Elaine Showalter, ed., *The New Feminist Criticism: Essays on Women, Literature, and Theory* 144, 155 (Pantheon, 1985) (essay originally published in Annette Kolodny, 6 *Feminist Studies* 1 (1980)).

and David Shapiro, with slight variations on these themes offered by casebook and treatise writers such as David Currie, Mark Tushnet, Howard Fink, John Jeffries, Peter Low, Martin Redish, Charles Alan Wright, Richard Posner, and Erwin Chemerinsky? Are we inevitably and irretrievably locked in what Richard Fallon characterizes as an "oedipal" struggle?²

I am neither father nor son, so it is not surprising that I don't feel "in" the story. Of equal importance, I have a very different story to tell about "the Federal Courts" and its subject matter, texts, and subtexts, its ideas, and its contemporary work. What follows is a brief overview.³

II. THE "FEDERAL COURTS": AN INSTITUTION IN QUEST OF DEFINITION

A first enterprise in understanding and reframing⁴ Federal Courts jurisprudence is to locate, descriptively, "the Federal Courts." This activity—identifying the topic—may seem too obvious for comment, but I hope to show its utility. One must start with a bit of history, going back to the "beginning" of this body of jurisprudence. The relevant date is 1928, when Felix Frankfurter and James Landis, who began this conversation, published their book, *The Business of the Supreme Court: A Study in the Federal Judicial System*.⁵ Three years

2. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 Vand. L. Rev. 953 (1994).

3. For further discussion of some of these themes, see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989); Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 Ga. L. Rev. 909 (1990); Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682 (1991).

4. To borrow Ann Althouse's penchant for architectural metaphors. See Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 Vand. L. Rev. 993 (1994).

5. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (Macmillan, 1928). Several books predate that of Frankfurter and Landis; these treatises address the practice, procedure, and structure of the federal courts. See, for example, John C. Rose, *Jurisdiction and Procedure of the Federal Courts* (Matthew Bender, 2d ed. 1922); Rebert M. Hughes, *Handbook of Jurisdiction and Procedure in United States Courts* (West, 1904 & 2d ed. 1913); C.L. Bates, *Federal Procedure at Law* (T.H. Flood, 1908); A.H. Garland and Rebert Ralston, *A Treatise on the Constitution and Jurisdiction of the United States Courts* (T. & J.W. Johnson, 1898); A.J. Peeler, *A Treatise on Law and Equity as Distinguished and Enforced in the Courts of the United States* (Swindells, 1883); Samuel T. Spear, *The Law of the Federal Judiciary: A Treatise* (Baker, Voorhis, 1883); Orlando F. Bump, *The Title Judiciary in the Revised Statutes of the United States, and the Rules Promulgated by the Supreme Court, and Forms* (Cushings & Bailey, 1881); Benjamin R. Curtis, *Jurisdiction, Practice, and Peculiar*

later, in 1931, Felix Frankfurter, then joined by Wilber G. Katz (and later by Harry Shulman), published accompanying teaching materials, *Cases and Other Authorities on Federal Jurisdiction and Procedure*.⁶

That book argued for a place in the curriculum for what was then a new course, and one that was (as the authors put it) distinct from "practice."⁷ Frankfurter and his colleagues⁸ wanted a course appropriate to the "university law school."⁹ Most of the topics they picked and the organization used in 1931 are the very categories typically addressed in Federal Courts courses today: jurisdictional questions such as the meaning of "case" and "controversy"; the original and appellate jurisdiction of the United States Supreme Court; the power of federal courts to make federal common law; the relationship between the state and federal courts; habeas corpus.¹⁰

Jurisprudence of the Courts of the United States (Little, Brown, 1880); Benjamin V. Abbott, *A Treatise Upon the United States Courts and Their Practice* (Diossy, 1871).

6. Felix Frankfurter and Wilber G. Katz, eds., *Cases and Other Authorities on Federal Jurisdiction and Procedure* (Callaghan, 1931); Felix Frankfurter and Harry Shulman, eds., *Cases and Authorities on Federal Jurisdiction and Procedure* (Callaghan, rev. ed. 1937) ("*Frankfurter and Shulman*"). For a detailed history of Frankfurter's role in crafting contemporary federal courts jurisprudence, see Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 Ga. L. Rev. 697 (1993).

7. Frankfurter and his co-editors drew a distinction between "intellectual issues" and "the immediately practical." *Frankfurter and Shulman* at vii (cited in note 6).

8. Frankfurter's co-authors, Landis, Shulman, and Katz, had all been his students. See McManamon, 27 Ga. L. Rev. at 740-41, 756 (cited in note 6).

9. Frankfurter had already begun to teach such a course at Harvard. While some believe that a "federal courts course" dates from 1924, McManamon, 27 Ga. L. Rev. at 751, the AALS directory of 1931 listed Frankfurter and several others as having taught such courses for more than a decade. See *Association of American Law Schools, Directory of Teachers in Member Schools* 153 (West, 1931). Prior to 1931, teachers were listed alphabetically, with courses taught noted after their names, and by law school; in 1931, the AALS added a third category, listing teachers by courses taught and thus making this kind of information more accessible.

10. Many also share Frankfurter's view that the federal judiciary should remain very small. See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 506 (1928) (if one inflated the number of district courts, it would "result[] in a depreciation of the judicial currency and the consequent impairment of the prestige of the federal courts . . ."). More recent commentary in agreement includes Richard A. Posner, *The Federal Courts: Crisis and Reform* 95-102, 129 (Harvard U., 1985); Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. Pa. L. Rev. 2215, 2216 (1989) ("The federal courts were created to be small. . . . The natural limits of expansion were not reached until very recently . . ."); Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234 (1976); Address by Antonin Scalia to the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), reprinted in 34 Fed. Bus. News & J. 252, 254 (1987) (expressing concern that the growing caseload creates pressure to increase the size of the federal judiciary, which in turn "aggravates . . . the problems of image, prestige, and (ultimately) quality"). Some commentators disagree, at least in part. See Erwin Chemerinsky and Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 69-74 (disagreeing with the "usual arguments against increasing the size of the federal bench" but noting that some concerns remain when "large numbers of new judges" are appointed).

In 1953, when Hart and Wechsler published their casebook,¹¹ they expanded on but did not profoundly change the Frankfurterian framework.¹² They were very much the heirs, and specifically the sons, of Frankfurter, Landis, Shulman, and Katz. The question of a title for their book might not have given them any pause. The label, *The Federal Courts and the Federal System*, seemed self-explanatory. At that time, Hart and Wechsler had a ready referent: "the Federal Courts" were understood as comprised of the roughly 280 life-tenured judges who sat on the then-three tiers of the federal bench: the federal district, appellate, and Supreme Courts.¹³

Two decades later, in 1973, and then again in 1988, the next generation, Paul Bator, Paul Mishkin, David Shapiro, and Daniel Meltzer, sons and grandsons, continued the tradition.¹⁴ Of course, one can sketch in a good deal more detail the history of the course, the other authors who participated, and the body of thought now called "the Federal Courts,"¹⁵ but these are the contours. These are the materials, in Annette Kolodny's terms, that are "already read," the familiar landmarks of a canon we share and know.¹⁶ This canon, while intricate and laced with complex doctrinal developments, is

11. Henry M. Hart, Jr. and Herbert Wechsler, *The Federal Courts and the Federal System* (Foundation, 1953).

12. For discussion of the dimensions they added, see Fallon, 47 Vand. L. Rev. 953 (cited in note 2). For discussion of the ways in which they follow in Frankfurter's footsteps, see McManamon, 27 Ga. L. Rev. at 741-42 nn.267, 268 (cited in note 6) (Hart had been one of Frankfurter's students and worked on the project of "the business of the Supreme Court"); id. at 768-70 ("The Hart and Wechsler book was clearly a descendant of Frankfurter's casebook"). Frankfurter also reviewed the Hart and Wechsler manuscript, id. at 769, and is the person to whom the book is dedicated.

13. United States Government Organization Manual 1953-54 (revised July 1, 1953).

14. Paul M. Bator, Paul J. Mishkin, David L. Shapiro, and Herbert Wechsler, eds., *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation, 2d ed. 1973); Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, eds., *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation, 3d ed. 1988). See also Akhil Amar, *Law Story*, 102 Harv. L. Rev. 688 (1989) (reviewing the third edition (edited by Bator, Mishkin, Shapiro, and Meltzer) of *Hart and Wechsler's The Federal Courts and the Federal System* (1988)).

15. Several textbooks and treatises designed for teaching predate Frankfurter and Shulman. See Harold R. Medina, *Cases and Readings on the Federal Jurisdiction and Procedure* iii (West, 1926) (stating its goal as one of laying a "solid foundation of principle and precedent" but including some "details of practice"); George Washington Rightmire, *Cases and Readings on the Jurisdiction and Procedure of the Federal Courts* v (W.H. Anderson, 1917) (describing the case method "as highly desirable" for teaching federal jurisdiction). In addition, in the 1940s, Charles T. McCormick and James H. Chadbourn authored *Cases and Materials on Federal Courts* (Foundation, 1946); Armistead Dobie and Mason Ladd wrote *Cases and Materials on Federal Jurisdiction and Procedure* (West, 1940) (with a second edition, edited by Ray Forrester, *Dobie and Ladd: Cases and Materials on Federal Jurisdiction and Procedure* (West, 2d. ed. 1950)). For additional discussion of the development of the course "Federal Courts," see Resnik, 56 U. Chi. L. Rev. at 684-86 (cited in note 3); McManamon, 27 Ga. L. Rev. at 756-70 (cited in note 6).

16. See note 1 and accompanying text.

comfortable. It is an exegesis of the constitutional text and structure. The field might also be called "Toward a Theory of Article III."

Although seven decades have passed, the canon has remained remarkably stable. Certainly, new cases have been added and "supplemental materials" tacked on; the revised editions of Hart and Wechsler also reveal some alterations in the substantive approach to legal questions.¹⁷ But no major reorganization of the structure has occurred.¹⁸

The facts, however, have changed. Although one would not know it by reading most Federal Courts casebooks, we must ask what is meant by the phrase, "the federal courts." We could be talking about the same set of life-tenured judges to whom Hart and Wechsler referred: now 800 life-tenured judges on the trial, appellate, and Supreme Courts.¹⁹ But if we continue to talk about these judges as

17. Amar, 102 Harv. L. Rev. at 711-14 (cited in note 14) (different analyses of the Eleventh Amendment and of congressional control over federal courts' jurisdiction, and of the impact of school desegregation cases on an understanding of the role of the federal courts).

18. See Fallon, 47 Vand. L. Rev. 953 (cited in note 2). The casebooks other than Hart and Wechsler, as well as the treatises, largely reiterate its structure and themes. Sometimes a bit more procedure is added. See, for example, Howard P. Fink and Mark V. Tushnet, *Federal Jurisdiction: Policy and Practice* (Michie, 2d ed. 1987). Sometimes the focus is more directed towards civil rights. See, for example, Peter W. Low and John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* (Foundation, 2d ed. 1989). Other casebooks include Ray Forrester and John E. Moyer, *Cases and Materials on Federal Jurisdiction and Procedure* (West, 3d ed. 1977); Martin H. Redish, *Federal Courts: Cases, Comments, and Questions* (West, 3d ed. 1989); David P. Currie, *Federal Courts, Cases and Materials* (West, 4th ed. 1990); Charles T. McCormick, James H. Chadbourn, and Charles Alan Wright, *Cases and Materials on Federal Courts* (Foundation, 9th ed. 1992). The treatises include Charles Alan Wright, *The Law of Federal Courts* (West, 4th ed. 1983); Richard A. Posner, *The Federal Courts: Crisis and Reform* (Harvard U., 1985); Erwin Chemerinsky, *Federal Jurisdiction* (Little, Brown, 1989); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Michie, 2d ed. 1990). But no major re-creation exists as a published teaching text.

A few new "federal courts" casebooks are about to be or have just been published. Some of these books promise to shift the themes to some extent. See, for example, Donald L. Doernberg and C. Keith Wingate, *Federal Courts, Federalism, and Separation of Powers* (West, 1994) (focusing, according to the advertisement, on "whether Congress or the Supreme Court is the guardian of federalism and separation of powers" and on § 1983 litigation); Louise Weinberg, *Federal Courts: Cases and Comments on Judicial Federalism and Judicial Power* (West, forthcoming 1994) (the advertisement describes it as "assimilat[ing] changes . . . offering needed reformulations. . . yet retain[ing] the feel of a classic Federal Courts casebook"; additions include discussion of preemption, nonacquiescence, and public interest and large-scale litigation); Robert Clinton, Michael G. Collins, Richard A. Matasar, *Federal Courts: Theory and Practice* (Little Brown, forthcoming 1995) (which will include more historical materials and federal Indian law). See further Ann Althouse's call for computer renditions, without the formalization or codification of a textbook. Althouse, 47 Vand. L. Rev. at 1014-15 (cited in note 4).

19. 1992 Annual Report of the Director of the Administrative Office of the United States Courts 99 ("1992 Annual Report"). For some, the expanded size of the life-tenured federal judiciary has already worked profound changes. See Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 1 (stating that "the federal courts today bear little resemblance to those existing . . . in 1958"). The changes in size have been

"the Federal Courts," we will miss the "other" federal judges *in*—literally *in*—the Federal Courts. These are the full-time magistrate and bankruptcy judges who are judges without Article III protection of tenure and salaries, whose combined numbers (about 700) make them a larger trial bench than the life-tenured, district court judges.²⁰

Although relatively invisible, bankruptcy and magistrate judges do a vast amount of federal adjudication. Federal bankruptcy judges receive some 900,000 petitions annually.²¹ Magistrate judges preside over some 500,000 judicial proceedings, including social security "appeals," habeas petitions, evidentiary hearings, pretrial conferences, and more than 5000 civil trials, heard on the consent of the parties.²²

And there are yet other judges employed by the federal system but not in the federal courts. These are the 1140 administrative law judges who now populate federal agencies,²³ a venue for federal adjudication as busy as "the Federal Courts"—even in these days amidst cries of overcrowded dockets. In one year, the Social Security Administration has a caseload larger than the federal courts' civil docket.²⁴

When Hart and Wechsler wrote in 1953, there were no magistrate or bankruptcy "judges." When Hart and Wechsler wrote in 1953,

accompanied by changes in the means by which cases are handled at both trial and appellate levels. See Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982) (analyzing revisions of the role of trial judges); Lauren Robel, *Private Justice and the Federal Bench*, 68 Ind. L. Rev. 891, 898-904 (1993) (discussing the appellate bench's reliance on unpublished opinions, the lack of oral argument in a significant percentage of the caseload, and the use of staff attorneys).

20. As of 1992, there were 291 full-time bankruptcy and 374 full-time magistrate judges, plus 35 authorized but not-yet-funded bankruptcy positions. *1992 Annual Report* at 99-101. See also Bankruptcy Judgeship Act of 1992, Pub. L. No. 102-361, 106 Stat. 965, codified as amended in scattered sections of Title 28 of the United States Code. As of that date, there were approximately 650 federal district court judges. *1992 Annual Report* at 99.

21. *1992 Annual Report* at 80 (cited in note 19). Compare the docket of the roughly 650 life-tenured, Article III trial judges, who receive filings of some 230,000 civil cases and some 48,000 criminal cases annually. *Id.* at 55.

22. *Id.* at 83.

23. As of September of 1993, the U.S. Office of Personal Management Workforce Information DataBase recorded 1137 ALJs. Conversations with personnel of the United States Office of Personal Management (Dec. 30, 1993).

24. In 1988, over 250,000 hearings before administrative law judges were requested. Anthony Taibi, Note, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 Duke L. J. 913, 916 (citing Staff of the House Committee on Ways and Means, 101st Cong., 1st Sess., *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means* 51 (Table 4) (the Ways and Means Committee "Green Book")). See also Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. Rev. 461, 481.

agency adjudication was still nascent, cabined by the regime of *Crowell v. Benson*,²⁵ in which the Supreme Court announced its anxiety about congressional delegation of the judicial function. *Crowell* is an important baseline. Recall the question: Can Congress constitutionally send factfinding (about injuries protected by the Longshoremen's and Harbor Workers' Compensation Act) away from the federal courts and to an agency?²⁶ The Court upheld the congressional scheme,²⁷ but issued a warning: Be careful not to invade what it called "the essential attributes of judicial power."²⁸ Article III judges had to retain the power to undertake factfinding, de novo, on disputed claims of what the Court described as "fundamental" or "jurisdictional" facts.²⁹ To do otherwise would, in the Court's words,

sap the judicial power as it exists under the Federal Constitution, and . . . establish a government of a bureaucratic character alien to our system.³⁰

The Supreme Court did not define "the essential attributes of judicial power," but the Court seemed to have assumed that it had meaning: that life-tenured *trial* judges had roles Congress could not divest; that federal judges had an identity that was unique; that fact-finding (even in cases in which small monetary claims were made) was a task important to the life-tenured federal judiciary.³¹

25. 285 U.S. 22 (1931).

26. Specifically, the United States Employees' Compensation Commission, created pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. According to Justice Brandeis's dissent (joined by Justices Stone and Roberts), in 1931, the deputy commissioners had dealt with 30,383 nonfatal cases, and held hearings in 729 of them. *Crowell*, 285 U.S. at 94 n.31 (Brandeis, J., dissenting). Under the legislation, federal courts remained the venue for challenges that awards were not "in accordance with law" and for enforcement of those awards. *Id.* at 44-45.

27. Congressional authority over maritime law was "beyond dispute." *Crowell*, 285 U.S. at 39. The Court analogized the Act to the worker compensation laws of the states and concluded that, like those acts, the due process objections were unavailing. *Id.* at 41-48 ("The use of the administrative method . . . assuming due notice, proper opportunity to be heard, and that findings are based on evidence, falls easily within the principle of the decisions sustaining similar procedure[s] against objections under the due process clauses. . .").

28. *Id.* at 51.

29. *Id.* at 54-55. Justice Brandeis, in dissent, criticized the indeterminacy of the characterization. *Id.* at 94-95 n.33 (Brandeis, J., dissenting).

30. *Id.* at 57 (Hughes, C.J., writing for the Court).

31. *Crowell* can be read in two ways. One reading recognizes the breadth of power that the case acknowledged Congress held. The dispute involved what the Court characterized as "private rights" between two disputants. *Id.* at 50-51. Therefore, when the Court accepted congressional relocation of the dispute into an administrative forum, that decision could be understood as the critical springboard to the current administrative adjudicatory state.

On the other hand, the Court reserved the power of federal judges to redetermine "fundamental" and "jurisdictional" facts, *id.* at 54-55, and raised concern about Congress's effort to "substitute for constitutional courts, in which the judicial power of the United States is vested, an

Over the intervening half-century, agency adjudication and other forms of non-Article III federal courts emerged and flourished.³²

administrative agency." *Id.* at 56. The Court warned that Congress could not "completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department." *Id.* at 57. Compare the subsequent approach in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (upholding final authority of arbitrators of disputes about payment among applicants under the Federal Insecticide, Fungicide, and Rodenticide Act).

Chief Justice Hughes also spoke of the jury and special masters as under the control of the judge, and noted that masters and commissioners work in a capacity "essentially advisory." *Crowell*, 285 U.S. at 61. Both Brandeis's dissent in and the contemporary commentary on *Crowell* read these aspects of the case with concern and criticize the Court for withholding power from agencies. See *id.* at 65, 73-77, 80-84, 89-94 (Brandeis, J., dissenting); Comment, *Judicial Review of Administrative Findings--Crowell v. Benson*, 41 *Yale L. J.* 1037, 1047-48, 1053 (1932) ("*Crowell v. Benson* injects into the administration of the . . . Act inconvenience and confusion which will materially obstruct attainment of its ends. . . . Injured workmen will be subjected to a great deal of litigation. . . . And herein lies the greatest significance of the case; the harm for which it will be most remembered."); Note, *Crowell v. Benson: Inquiries and Conjectures*, 46 *Harv. L. Rev.* 478 (1933) (calling "questions of judicial review of administrative findings of fact" "troublesome"); Note, *Administrative Tribunals--Workmen's Compensation--Scope of Federal Judicial Review Under Longshoremen's and Harbor Workers' Compensation Act*, 30 *Mich. L. Rev.* 1312, 1314-15 (1932) (facts established by an administrative agency should not "go for naught"); Note, *Worker's Compensation--Power of District Court to Grant Trial De Novo on Appeal*, 10 *N.Y.U. L. Q. Rev.* 98, 100-101 (1932) (although allowing a trial de novo "would destroy much of the effectiveness of the Act . . . the District Courts will probably continue to limit themselves to a review of the findings of the commissioner"); John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 *U. Pa. L. Rev.* 1055 (1932) (the "practical result" of allowing trial de novo after an administrative hearing "is to undermine the effectiveness of the administrative action").

32. From the current vantage point, it might be hard to remember that not all that long ago, administrative adjudication was not a site of enormous activity. Thus, details of the growth in two areas—federal benefits and tax—help to enable appreciation of the changes over the course of the century.

The Social Security system developed slowly from its inception in 1935 to 1950. In 1950, only 16% of those people over age 65 received social security benefits. Robert M. Ball, *The Original Understanding on Social Security: Implications for Later Developments*, in Theodore R. Marmor and Jerry L. Mashaw, eds., *Social Security: Beyond the Rhetoric of Crisis* 17 (Princeton U., 1988) ("*Beyond the Rhetoric*"). The hearings and appeals system for the programs in existence until the mid-1950s (old-age and survivors insurance) "protected well-defined rights and protect[ed] against administrative error" on issues such as eligibility based on age, retirement, or marital status. Edward D. Berkowitz, *Disability Insurance and the Social Security Tradition*, in Gerald D. Nash, Noel H. Pugach, and Richard F. Tomasson, eds., *Social Security: The First Half-Century* 292-93 (New Mexico, 1988) ("*The First Half-Century*"). According to some commentators, decisions about social security did not permit much discretionary judgment. Ball, *Original Understanding*, in Marmor and Mashaw, eds., *Beyond the Rhetoric* at 27. See also *An Overview of American Social Security, 1935-1985*, in *The First Half-Century* at 15. However, at least some potential recipients did not agree with the decisions rendered; according to another description, the Social Security Board received "nearly 100" requests for hearings (protesting the prior decision of the Bureau of Old-Age and Survivors Insurance) a month, and a "knowledge . . . of the hearing and review procedure necessary for the settlement of claims" was of growing "importance to lawyers everywhere." Carl H. Harper and Bernard M. Niezer, *Appeals Procedure Under Old-Age and Survivors Insurance*, 16 *Ind. L. J.* 440, 441 n.5 (1941).

To the extent conflicts emerged, "referees" determined appeals of applicants denied benefits, but the relatively limited set of issues appears to have prompted relatively few formal disputes. Harper and Niezer describe a "tremendous volume of claims" and speak of the "imperative to

Congress passed dozens of statutes creating litigation schemes that incorporated administrative adjudication, and law schools responded with another body of jurisprudence, "Administrative Law." In 1968, Congress transformed the "commissioner" system into a corps of judicial officials named federal "magistrates."³³ Congress then renamed magistrates, giving them, in 1990, the title "magistrate judge."³⁴ In the 1970s, Congress replaced the referee system with bankruptcy judges.³⁵ And during these past decades, the United States Supreme

employ an *informal* procedure." *Id.* at 442. I have yet to find data on the numbers of hearings before referees prior the 1950s. Documentation of rising numbers of claims is available thereafter. From 1950 to 1960, the percentage of those aged 65 and over (some 17 million people) who were receiving social security benefits rose to 60%; by 1990, 90% of all persons aged 65 and over (nearly 29 million people) were receiving such benefits. Ball in *Beyond the Rhetoric* at 28 (Figure 1.1). When the disability program was added in 1956, and the kinds of decisions made by the Agency consequently altered, requests for hearings increased by more than 500% within a few years.

The number of administrative law judges grew from the 1950s onward, from 30 in 1956 to 110 in 1960 to more than 800 in 1988. Berkowitz, *Disability Insurance*, in *The First Half-Century* at 292-93. By 1975, disability appeals before administrative law judges numbered some 150,000 per year. By 1983, the number of such appeals was 364,000. Jerry L. Mashaw, *Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights*, in *Beyond the Rhetoric* at 166. As of 1991, requests for a hearing before an administrative law judge numbered 327,000. Robert S. Haberman and David G. Hatfield, *The Role of the Appeals Council in the Administrative Adjudicative Process: Unveiling the Mystery*, 39 Fed. Bar News & J. 444, 447 (1992). For more history of the Social Security system, see Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale U., 1983); *Social Security Hearings and Appeals* (The National Center for Administrative Justice, 1978).

A second example is the Tax Court, which in 1924 was established as the Board of Tax Appeals and later called the Tax Court of the United States. In 1969, the Board moved from its status as an agency to become classified as a "court"; in both forms, the "members" (of the Board) and later the "judges" (of the court) were appointed by the President. Harold DuBruff, *The United States Tax Court: An Historical Analysis* 165 (Commerce Clearing House, 1979); 20 U.S.C. § 7441 (1989). From 1924 to the late 1970s, the number of members or judges remained constant at 16. DuBruff, *The United States Tax Court* at 52-53. In 1980, in response to increased responsibilities, "the growth of complex tax litigation . . . , and the increase in the number of petitions filed," Congress increased the number of judges from 16 to 19. Senate Report No. 96-993, 96th Cong., 2d Sess., in 1980 U.S.C.C.A.N. at 3948; Pub. L. No. 96-436, 94 Stat. 1878 (1980), codified at 26 U.S.C. § 7443(a) (1989). In October of 1986, the Tax Court had a "record high of more than 84,000 cases," but "the Court is proud to have made substantial progress in reducing its inventory [of cases] to less than 46,000 as of April 30, 1991." Arthur L. Nims, III, *Tax Court Management of Jumbo Cases: The New Challenge*, 38 Fed. Bus. News & J. 330, 330 (1991).

33. The Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1108 (1968), codified at 18 U.S.C. §§ 3401-3402, 3060 (1985), 28 U.S.C. §§ 604, 631-639 (1993). See generally Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. Rev. 1297 (1975).

34. Judicial Improvement Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117. See 28 U.S.C. § 631 (1988 & Supp. IV 1992). According to the legislative history, the name change to add the word "judge" was "designed to reflect more accurately the responsibilities and duties of the office." H.R. Rep. No. 101-734, 101st Cong., 2d Sess. 31 (1990) (Federal Courts Study Committee Implementation Act of 1990).

35. In 1973, when the United States Supreme Court promulgated the Rules of Bankruptcy Procedure, they retitled the referee a bankruptcy "judge." See Bankruptcy Rules, Rule 9001(4) (defining "bankruptcy judge") (adopted Apr. 24, 1973); Asa S. Herzog and Lawrence P. King, eds.,

Court has generally acceded to congressional decisionmaking about how much delegation of the judicial function (whatever that is) is permissible.³⁶

By 1982, when a plurality of the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*³⁷ decided that Congress had actually gone too far in delegating power to bankruptcy judges, the Court could not exactly explain why or how. Justice Brennan, for a plurality, invoked the phrase "essential attributes of the judicial power" but could not define those attributes.³⁸ Justice White argued, in dissent, for great deference to Congress, which he thought was permitted (subject to some scrutiny by the Court) under the Constitution to generate a myriad of non-life-tenured, federal adjudicators.³⁹

A few years later, in 1986, a case posed the question of whether Congress had given too many adjudicatory powers to the Commodities Futures Trading Commission. Justice O'Connor for the majority adopted a version of White's balancing test.⁴⁰ Courts must consider, in her words, the "concerns that drove Congress" to fashion non-Article III adjudication.⁴¹ By 1989, the Supreme Court punted on the issue of whether bankruptcy judges have the constitutional authority to conduct jury trials,⁴² and by 1990, a special committee of the Ninth Circuit concluded that "magistrate [judges] now possess the authority

Collier on Bankruptcy ¶ 9001.07 (15th ed. 1994). In 1978, when Congress enacted the Bankruptcy Reform Act, it continued and enshrined the title "bankruptcy judge." Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, codified at 11 U.S.C. § 101 et seq. (1988).

36. See, for example, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

37. 458 U.S. 50 (1982).

38. *Id.* at 78 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932), but changing its phrasing from "essential attributes of judicial power" to "essential attributes of the judicial power").

39. *Northern Pipeline*, 458 U.S. at 113-18 (White, J., dissenting).

40. *Schor*, 478 U.S. 833. Whether *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), fundamentally alters that approach awaits the next Supreme Court opinion addressing the problem.

41. *Schor*, 478 U.S. at 851.

42. *Granfinanciera*, 492 U.S. 33. Subsequently, the Second Circuit ruled that both the bankruptcy statute and the Constitution permit a bankruptcy judge to preside at a jury trial in a "core" proceeding. *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990). The Supreme Court initially granted certiorari in the case (sub. nom. *Ins. Co. of the State of Pennsylvania v. Ben Cooper, Inc.*, 497 U.S. 1023 (1990)), but later sent the case back to the Second Circuit for reconsideration of a jurisdictional issue. 498 U.S. 964 (1990). On remand, the Second Circuit upheld its jurisdiction and reinstated its previous judgment. 924 F.2d 36 (2d Cir. 1991). In contrast, several of the other circuits have held that bankruptcy judges may not preside at jury trials. See, for example, *In re Stansbury Poplar Place, Inc.*, 13 F.3d 122, 126-28 (4th Cir. 1993) (citing cases from the 6th, 7th, 8th, and 10th Circuits to the contrary and joining those circuits in finding that bankruptcy judges have no statutory authority to conduct jury trials).

to handle, under appropriate circumstances, virtually any matter normally decided by district judges, except for felony trials and sentencing."⁴³

I am not suggesting that all the legal questions have been decided. Courts and commentators still debate the edges of authority permissible to grant to non-Article III federal judges.⁴⁴ Richard Fallon urges that we draw the line at factfinding, which he believes can be fully delegated to non-Article III judges, who in turn should be subjected to appellate review by a life-tenured judge.⁴⁵ Justice Antonin Scalia argues for a different line. When Congress creates something called "a public right" and the United States is a party, Justice Scalia would give Congress full control ("plenary" power) over how to fight about such rights.⁴⁶ In my view, those public right cases in which the United States is a party and Congress has provided the governing rules are precisely the category of cases in which life-tenured judges are most needed.⁴⁷

Whatever line is drawn, the point is that the major assumption underlying the debate is the existence of these other, *federal*, non-Article III judges who get some substantial amount of federal adjudicatory power.⁴⁸ Indeed, a specially chartered committee of the

43. *Report of the Ninth Circuit Judicial Council's United States Magistrate Advisory Commission, Study of Magistrate Within the Ninth Circuit Court of Appeals* 9 (Apr. 15, 1990) (recommending that magistrate judges be given additional authority and that the public be educated about their qualifications). More than a decade earlier, Representatives Drinan and Kindness commented that "[f]rom the standpoint of appearance, procedure, and function, an impartial observer will not be able to tell the difference between a magistrate and an Article III judge." H.R. Rep. No. 1364, 95th Cong., 2d Sess. (1978) at 37 (statement of Reps. Drinan and Kindness).

44. Some of these issues are decided as a matter of statutory interpretation; others depend on reading Article III and the Due Process Clause. See, for example, *Gomez v. United States*, 490 U.S. 858 (1989) (interpreting the "additional duties" clause of 28 U.S.C. § 636 as not authorizing, absent the consent of the defendant, the delegation of jury selection in felony trials to magistrate judges); *Peretz v. United States*, 111 S. Ct. 2661 (1991) (in light of the defendant's consent to magistrate voir dire in a felony case, the magistrate judge's activities fell within the "additional duties" clause and did not violate Article III); *Reynaga v. Cammisa*, 971 F.2d 414 (9th Cir. 1992) (magistrate judge lacks statutory authority to stay a prisoner's civil rights action); *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888 (3d Cir. 1992) (magistrate judges lack statutory authority under 28 U.S.C. §636(e) to adjudicate criminal contempt committed in proceedings before them); *Austin v. Healy*, 5 F.3d 598, 603 (2d Cir. 1993) (finding that "a general authorization to magistrates of the authority to conduct extradition hearings does not violate Article III"). See also note 42.

45. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988).

46. *Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring).

47. Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. Colo. L. Rev. 581, 592-602 (1985).

48. This assumption is also reflected in the popular press. See, for example, a recent headline in the New York Times, "U.S. Judge Frees Daily News from Maxwell Case Claim"; the

Administrative Office of the United States Courts (that is, the organization of Article III judges themselves) concluded that there is both "growing confidence in the magistrate judges system" and that there is "little likelihood that significant elements of existing magistrate judge authority will be declared unconstitutional."⁴⁹

Return to the problem of the canon and the rereading of what has been "already read." In 1953, Hart and Wechsler could use the words "the Federal Courts" as a part of the title of their book, and readers knew what set of judges they meant. Today, if the same referent is used—and it is—one misses much of the adjudicatory action in the federal system, and one misses the fact that life-tenured judges are not doing it.⁵⁰ One can reiterate the words "the Federal Courts" and read what has been "already read," as if the world still existed as it had, half a century earlier.⁵¹

III. WHAT NEW READINGS BRING

Unless one changes the story, revises the meaning of the words "federal judges," lets in a little of that lowly world of "practice" and talks about whom a litigant sees when she or he walks into the federal courthouse and appears before a "judge," adds texts to make visible the magistrate and bankruptcy judges,⁵² the administrative judiciary, and their powers, one misses several central insights.

opening line of the story reads, "A Federal bankruptcy judge yesterday ruled invalid a claim of more than \$92 million against the American corporation that owned The Daily News of New York when it was controlled by Robert Maxwell." Michael Janofsky, *U.S. Judge Frees Daily News from Maxwell Case Claim*, N.Y. Times C1 (Mar. 10, 1994).

49. *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 271-72 (Administrative Office of the U.S. Courts, 1993).

50. Thereby amending Henry Monaghan's comment that "[l]itigants and their lawyers can function in a system for a long time after its intellectual underpinnings have eroded," to add that legal academics can do so as well. See Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 Harv. L. Rev. 344, 357 (1985) (Book Review of Richard A. Posner, *The Federal Courts: Crisis and Reform* (Harvard U., 1985)).

51. Even were one to continue to focus exclusively on the life-tenured judiciary, many within it claim that profound transformations have also reordered that world. See, for example, Rehnquist, 1993 Wis. L. Rev. 1 (cited in note 19).

52. See, for example, Christopher E. Smith, *From U.S. Magistrates to U.S. Magistrate Judges: Developments Affecting the Federal District Courts' Lower Tier of Judicial Officers*, 75 *Judicature* 210 (1992); Christopher E. Smith, *United States Magistrates in the Federal Courts* (Praeger, 1990); Christopher E. Smith, *Who Are the United States Magistrates?*, 71 *Judicature* 143 (1987); Carroll Seron, *The Roles of Magistrates: Nine Case Studies* (Federal Judicial Center, 1985). Insofar as I am aware, relatively little information provides overviews of the roles of and individuals who sit on the bankruptcy courts. For empirical work on those subjected to the bankruptcy laws, see Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, *As We*

First, as a descriptive matter, the federal courts are no longer a three-tier judicial system. A fourth tier now stands at the bottom of the hierarchy and is composed of two sets of trial judges who work in the federal courts but lack life tenure. While the idea of a "fourth tier" in the federal courts is not novel, the discussion of such a tier currently relates to the desirability of creating an additional *appellate* court, sitting between the current courts of appeals and the United States Supreme Court.⁵³ If we want to add another appellate layer, that layer will be number five.⁵⁴

Second, at an analytic level, the invisibility of the current fourth tier (magistrate and bankruptcy judges) affects federal courts scholarship. The lack of widespread commentary within the Federal Courts' canon on the work of these new lower-court judges⁵⁵ demonstrates contemporary disinterest in the activity of factfinding, a phenomenon of importance to those of us thinking about "the Federal Courts," as well as about the relationship between the work of state courts, federal courts, and other adjudicatory tribunals. Federal Courts theorists debate the allocation of authority between state and federal judges. One prong of the discussion assumes the importance of

Forgive Our Debtors: Bankruptcy and Consumer Credit in America (Oxford U., 1989); Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 Mich. L. Rev. 1506 (1990).

53. See, for example, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (Commission on Revision of the Federal Court Appellate System, 1975) (known as the Hruska Commission after its chair, Senator Reman Hruska). See also Symposium, *The Federal Courts: The Next 100 Years*, 38 S.C. L. Rev. 593, 597-98 (1987) (bibliography on the debate about an Intercircuit Panel).

54. Similarly, the current debate about the size of the federal judiciary misstates the number of federal judges. Once magistrate and bankruptcy judges are understood to be federal judges, the magical "1000" limit that some have proposed for the federal courts has already been passed. Compare Jon O. Newman, *1,000 Judges--The Limit for an Effective Federal Judiciary*, 76 *Judicature* 187 (1993) (arguing that increasing the federal judiciary beyond 1000 "would make it a vast, faceless bureaucracy" and threaten its proper functioning), with Stephen Reinhardt, *Are 1,000 Federal Judges Enough?* N.Y. Times, A17 (May 17, 1993) (arguing that limiting the federal judiciary's size to 1000 would make it "an elitist institution," unjustifiably curtailing public access to the federal courts); Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 ABA J. 52 (Jan. 1993). See also Posner, *The Federal Courts* at 26 (cited in note 10) (discussing the "thousands" of other federal judges who lack life tenure and his decision not to consider them a part of the federal judiciary but rather as an "alternative court system"); Posner, 137 U. Pa. L. Rev. 2215 (cited in note 10).

55. As contrasted with scholarship on the constitutionality of their existence. See, for example, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. J. 233 (1990), followed by a symposium discussion with essays including Frank H. Easterbrook, "Success" and the Judicial Power, 65 Ind. L. J. 277 (1990); Larry Kramer, *The Constitution as Architecture: A Charette*, 65 Ind. L. J. 283 (1990); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 Ind. L. J. 291 (1990); and David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 Ind. L. J. 307 (1990).

federal factfinding. Some commentators argue that federal factfinding offers unique qualities that justify re litigation of certain kinds of questions, such as habeas corpus review of the constitutionality of criminal convictions, decided initially in states.⁵⁶ An implicit assumption is that life-tenured judges make this special contribution. But (with insights gleaned from the world of "practice"), one knows that magistrate judges now do a substantial proportion of habeas adjudication.⁵⁷ If one wants to make a claim about the desirability of federal factfinding, one can no longer rest it on the special quality of the *life-tenured* judge as factfinder. Theories will have to change.⁵⁸

Third, there is a problem categorizing this array of "other" federal judges. Recall that the Hart and Wechsler format (as well as the case law, until recently) spoke of something called "legislative courts," as do many law review articles on the subject. We (who wrote and spoke about these questions) used to speak about two categories—either Article I judges or Article III judges. We cannot do that any longer. Magistrate and bankruptcy judges are neither fish nor fowl, neither Article I nor Article III judges. They are non-Article III judges in the Article III judiciary. Administrative agencies present yet another example of institutions, central to United States government in 1993, but not easily fit into constitutional categories.

That we have no constitutional category for magistrate and bankruptcy judges or for agencies is the *key*. This gap reveals a central problem for contemporary Federal Courts theory, teaching, and scholarship. If the current structure of "the Federal Courts" does

56. On the special role of federal factfinding, see, for example, Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. Rev. 991 (1985); Barry Friedman, *Pas de Deux: The Supreme Court and the Habeas Courts*, 66 S. Cal. L. Rev. 2467, 2489, 2493 (1993); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L. Rev. 2331, 2378-81 (1993).

57. Habeas corpus petitions constitute 40% of the magistrate judges' dockets. See Director of the Administrative Office of the U.S. Courts, *Annual Report* 25, 140 (1990). See also Seron, *The Roles of Magistrates* at 83 (cited in note 52) (stating, "Magistrates' . . . duties are often seen as synonymous with prisoner petitions and Social Security cases."); Smith, *United States Magistrates in the Federal Courts* at 151 (cited in note 52) (noting that in 1987, magistrates handled 27,000 prisoner cases, including about 10,000 habeas petitions). Barry Friedman reminds me that in addition to the magistrate judges, our attention should be turned to the administrative apparatus (including the Judicial Conference of the United States, the Administrative Office of the United States Courts, and the Federal Judicial Center) that has grown around the federal judiciary. Letter from Barry Friedman, Professor of Law, Vanderbilt University, to the author (Jan. 21, 1994) (on file with the author).

58. For example, could one develop a parallel argument for a federal preference based on the fact that other federal judges are employees of the federal government, rather than the states? Would one want to advocate that the life-tenured judiciary attempt to socialize their non-life-tenured colleagues to imbue them with a sense of affiliation and purpose akin to that said to be possessed by life-tenured judges?

not mirror the constitutional framework nor fit easily into it, maybe the Constitution itself cannot be used to tell the Federal Courts story.⁵⁹ And, since the Frankfurter/Hart/Wechsler Federal Courts story is a constitutional story, maybe it is time for exactly the major reconception to which Richard Fallon alludes.⁶⁰

Frankfurter, Hart, and Wechsler tell not only a constitutional story, they also tell what I call a "cheerful" story⁶¹ (and perhaps this is what Richard Fallon means when he terms it a "complacent" story).⁶² The basic claim is that, in 1789, the United States Constitution both provided the framework for the institutions of government and solved the basic problem of the terrorizing fear of too much power. The Constitution is a compact, a consensual document that imposed legal constraints that have guided the nation ever since. Sure, there have been "bumps" along the way (such as slavery, the Civil War, and the race riots of the twentieth century), but we, as in "We the People," have persevered. If it has not come out all right yet, it will soon; what is needed is patience, and constitutional faith.

The casebooks are not quite so direct, but their subtexts assume and convey these points. Look at the current governing canonical regime. Several Federal Courts casebooks⁶³ begin with *Marbury v. Madison*,⁶⁴ which is used to state the basic principles: that the states or their people⁶⁵ came together and bestowed power on the federal government by forming a compact; that the government of the United States is one of "powers limited"; that the Supreme Court holds the power to decide when other branches of the federal government have unconstitutionally "transcended" their powers; and that the

59. Or at least not without addendum à la Bruce Ackerman's "constitutional moments." Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L. J. 453, 456-61, 488-89 (1989) ("Ackerman, *Constitutional Politics*").

60. Fallon, 47 Vand. L. Rev. at 983-85 (cited in note 2).

61. I believe that this perspective is evident not only in Federal Courts but also in much of the constitutional law curriculum of which the Federal Courts course is a part. See Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 Stan. L. Rev. 1525 (1993).

62. Fallon, 47 Vand. L. Rev. at 975 (cited in note 2). [Vanderbilt]

63. See, for example, *Hart and Wechsler* at 72 (3d ed.) (cited in note 14); Low and Jeffries, *Federal Courts and the Law of Federal-State Relations* at 1 (cited in note 18); David P. Currie, *Federal Courts: Cases and Materials* 19 (West, 3d ed. 1982). But see Fink and Tushnet, *Federal Jurisdiction* at 3-22 (cited in note 18) (beginning with a discussion of the "allocation of power between state and federal courts").

64. 5 U.S. (1 Cranch) 137 (1803).

65. Depending on one's view of the debate about whether states or the people made the original compact. See Akhil Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425 (1987).

Constitution is the repository of statements of those powers and limits on the federal government's authority.

I do not want to be interpreted as painting with an overly broad brush.⁶⁶ *Marbury* also exemplifies rights unremedied and the conflict between institutional obligations of restraint and individual liberties. One reading of the much-read Hart and Wechsler "Dialogue" is that it is replete with confessions that the system may provide no remedy for constitutional injuries.⁶⁷ Further, many of the "big" cases taught in traditional courses include distressing examples of government power. The Federal Courts' canon is full of sad examples, unanswered questions, and doctrinal tensions; the very word "tensions" is aptly placed in the title of one of the hornbooks for the course.⁶⁸

However, even with these tensions, comfort can be found. While the meaning of "powers limited" is complex, as each account of the Federal Courts story quickly develops, we (readers) are guided through a maze of arguments. For example, when considering the power of Congress over the jurisdiction of the federal courts, questions soon emerge about the breadth of authority granted in Article III to the Congress. Congress is often said to have "plenary power" over the jurisdiction of the federal courts—but then, not quite. Most commentators assume that somewhere in the Constitution, there are limits.⁶⁹ Lawrence Sager used the hypothetical of a Congress "restricting jurisdiction to plaintiffs of a particular race, religion, or political affiliation" as an illustration of the limits of Congress's power, circumscribed not by Article III but by the Fourteenth Amendment.⁷⁰

66. I can hear echoing a line from the Hart and Wechsler "Dialogue": "There you go oversimplifying again." *Hart and Wechsler* at 398 (3d ed.) (cited in note 14).

67. *Hart and Wechsler* at 393-423 (3d ed.). But see the ending paragraphs of that dialogue in which we are reminded that the state courts are "the primary guarantors of constitutional rights," that their jurisdictions cannot be regulated "unconstitutionally" by Congress, and that "jurisdiction always is jurisdiction only to decide constitutionally." *Id.* at 423.

68. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (cited in note 18).

69. See, for example, essays such as Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960) (presenting a structural argument for Supreme Court jurisdiction based on its "essential" functions of uniformity and supremacy). Compare Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984).

70. Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 26-30 (1981). See also *Hart and Wechsler* at 383 n.5 (3d ed.) (cited in note 14) (stating that if Congress were to add "a proviso to section 1331 closing the doors of the federal courts in federal question cases to plaintiffs who were black, or Jewish," it would violate the Fifth Amendment).

Thus, while Federal Courts doctrine and scholarship are always working at the edges, at the permissible scope of one institution's power and the potential for incursion on another, Federal Courts doctrine and scholarship have a generally comforting bottom line.⁷¹ In this case, while Congress has enormous power, it is not utterly unfettered; the Constitution serves as a safety net.

Constitutionality is at the heart of discussions of the Federal Courts. From the principle of limited governmental powers constrained by constitutional commitment (if not always by the text itself) problems arise: How do we explain and rationalize the growth of national powers in the context of a history of dual sovereignty, of a government founded on the idea that the states or the people have consented to a form of simultaneous yet non-identical power held by state and federal governments? The recurring questions of the current canon are: Who (the federal government or the states) has the authority to decide what issues? What kind of deference do federal courts owe to the states? Richard Fallon's excellent essay, *The Ideologies of Federal Courts Law*,⁷² captures these themes very well, as he outlines the struggle between the federalist and nationalist models.⁷³

However that struggle plays out, the operative assumption is that the struggle is a bounded one, made all right because it is played out within a constitutional terrain that allocates power, that checks, that balances. Thus, the two central ideas of the subject matter—power and sovereignty—are tamed, domesticated, made safe first by the imagined moment of consent that authorizes both sovereignty and power and second by the Constitution that explicates the rules and makes that power safe. We know it can work every time we hear the phrase "our federalism."⁷⁴

71. Another line from the Hart and Wechsler "Dialogue" comes to mind: "Well, I'll admit that all this makes *Sheldon* and *McCardle* a little less frightening. But only a little less so." *Hart and Wechsler* at 401 (3d ed.) (cited in note 14).

72. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141, 1151-64 (1988). See also Amar, 102 *Harv. L. Rev.* at 698-710 (cited in note 14).

73. Fallon's discussion for this symposium also illuminates Hart and Wechsler's methodological assumptions; as he terms them, the "principles" of "institutional settlement, of anti-positivism, of structural interpretation, of the rule of law, of reasoned elaboration, and of neutrality," guide readers through a tour de force of legal analysis, Fallon, 47 *Vand. L. Rev.* at 963-69 (cited in note 2), that (as Henry Monaghan put it) offers "beauty in details." Henry Monaghan, Commentary at the American Association of Law Schools Panel Discussion on the Future of Federal Courts Scholarship and Teaching (Jan. 8, 1994).

74. The coining of the phrase is generally attributed to Justice Black. See *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). For Frankfurter's role in crafting this jurisprudential stance, see McManamon, 27 *Ga. L. Rev.* at 703-712, 731-68 (cited in note 6). "Our" is an important aspect

But here again (as in the meaning of the very words "the Federal Courts"), events and information, once added, pull the rug out from under this comfortable, "well read" story, and make it less easy to "read with pleasure." Moreover, the facts that need be added here are not only ones of recent vintage,⁷⁵ produced by decades of new legislation and changing worlds, but also old facts, discretely omitted from the original telling. It is worth looking at what is omitted, because out of the omissions competing, disturbing, but interesting narratives emerge.

Let's start with the great grandfather himself, Felix Frankfurter.⁷⁶ *Railroad Commission of Texas v. Pullman Co.*⁷⁷ is one of his landmark contributions to the Federal Courts terrain. In that case, Frankfurter announced the doctrine of *Pullman* abstention, an important rule of federal courts' jurisprudence: the "avoidance of needless friction with state policies."⁷⁸ Federal courts should decline jurisdiction and not decide federal constitutional questions in a "sensitive area of social policy,"⁷⁹ if deference to state court interpretation of unclear state statutes or regulations could avoid the need for federal constitutional law explication.

It sounds plausible, a modestly benign accommodation that shores up assumptions of limited federal powers and works out some of the kinks of dual sovereignties.⁸⁰ Further, with Martha Field's help, we (Federal Courts teachers) know how to explain the analytic premises of abstention and how it intersects with other doctrinal developments.⁸¹

The casebooks let a reader know that at issue is a complaint brought by people then called "Negro" porters against a Texas Railroad Commission rule that required conductors, not porters, to be

of the claim, and a poignant one, given the many who feel excluded. See note 85 and accompanying text.

75. Such as the creation of the judgeships for the bankruptcy court and magistrate judges. See notes 19-50 and accompanying text.

76. See *McManamon*, 27 Ga. L. Rev. 697 (cited in note 6).

77. 312 U.S. 496 (1941).

78. *Id.* at 500.

79. *Id.* at 498.

80. Frankfurter might have described his doctrinal invention as an example of what he had earlier called for in an essay on the allocation of power between the state and federal courts—not "moral issues to be tested by abiding truths . . . [but] the domain of administrative effectiveness and [procedural] adaptations,—matters not of principle but of wise expediency." Frankfurter, 13 *Cornell L. Q.* at 506 (cited in note 10).

81. See Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071 (1974); Martha A. Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590 (1977).

in charge of the sleeping cars on trains. As Justice Frankfurter explained, "As is well known, porters on Pullmans are colored and conductors are white."⁸² But neither Frankfurter's opinion nor the casebooks tell one much about how painful the record of the case was. The testimony in *Pullman* is filled with discussion of how white women feel "a little bit safer . . . with a white man conductor in charge of that car." Take one of the questions: "would [it] be safer for [white girls'] protection for them to be under the care of a conductor than it would be for them to be only under the care of a negro porter?"⁸³ Further, in an effort to prop up the porters' claims, the record also includes testimony aimed at distinguishing "the Pullman porter[s]," as "pretty high-classed colored men," from those other kinds of "colored men."⁸⁴

Race, class, and gender, and the effects thereof, are discretely downplayed. These elements are not highlighted in the "Federal Courts story," as handed down to us. In 1941 it was, I take it, not obvious how federal constitutional law would decide this question. It was not easy because national norms did not readily trump local customs and prejudices, indeed because national norms may well have shared such prejudices. Thus, the case was "sensitive," the engagement between federal and state law fraught with anxiety, and if some other point of law could determine the outcome without having to consider announcing federal constitutional rules about discrimination based on race, more the better.⁸⁵

But we who discuss *Pullman* in 1994 should not look upon it as a quaint relic of bygone days because today, we so easily engage with these problems. White women fearing black men is not an easy con-

82. *Pullman*, 312 U.S. at 497. This phrase is cited in most of the casebooks. See, for example, *Hart and Wechsler* at 1354 (3d ed.) (cited in note 14). In the movie "The Palm Beach Story" (directed by Preston Sturgis, produced by Paul Jones, for Paramount Pictures, released in 1942), the appearance of a lone "negro porter" makes vivid the segregated world that the *Pullman* case knew.

83. Record of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), microformed on U.S. Supreme Court Records and Briefs (Microform, Inc.) at 23-27.

84. *Id.* at 27.

85. As Henry Monaghan reminded me, the United States Army remained segregated in 1941 as well. See Exec. Order Nos. 9980 & 9981, 3 C.F.R. §§ 720-722 (1948) (President Truman prohibiting "discrimination because of race, color, religion, or national origin" in the civil service, and mandating the "equality of treatment for all persons in the armed services without regard to race, color, religion or national origin"); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499, 510-22 (1991) (analyzing the military's history of exclusion by race). As Susan Bandes pointed out, the casebooks do not much question why a Texas statute "to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroad" could be assumed a ready vehicle for responding to racial discrimination. *Pullman*, 312 U.S. at 499 (quoting the statute). Letter from Bandes to the author (Jan. 24, 1994) (on file with the author).

versation today, because those fears (and others) still animate federal policy. "Our" federal government has a penalty structure for drug crimes that punishes crack more harshly than it punishes powdered cocaine.⁸⁶ Given the demographics of the users of the two forms of the drug, "our" federal policies affect black men and women differently than whites.⁸⁷ Further, "our" Supreme Court has specifically declined, in the *McCleskey* case, to consider broad-based challenges to the death penalty on racial grounds.⁸⁸

Thus, the "sensitive" issues of race, gender, and class remain sensitive today, as in the era when *Pullman* was decided; how federal jurisdictional doctrine should express that disquietude is a problem for the present day as well. It is incumbent upon me to speak of the pain of federal law—jurisdictional and otherwise—as I tell my students this part of "our" story, our contemporary (not only our historical) story.⁸⁹ Further, the racism is not only "out there"—in Congress's sentencing guidelines, in the states' death penalty systems, in the

86. The Federal Sentencing Guidelines set the penalty for "unlawful manufacturing, importing, exporting, trafficking or possession" of cocaine base (crack) higher than for cocaine. For example, a person can be sentenced to from 15 to 46 months imprisonment for having 25-50 grams of cocaine and receive the same sentence for having 250-500 milligrams of crack. United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1993) (Level 22 offense: cocaine - 300 <> 400 g, base - 3 <> 4 g; 41-105 months imprisonment; Level 34 offense: cocaine - 15 <> 50 kg, base - 150 <> 500 g; 151-327 months imprisonment).

87. For discussion of the possible disparate racial impact of these guidelines, see Samuel L. Meyers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. Colo. L. Rev. 781, 790 (1993) (stating that "evidence seems to suggest that blacks were more likely to use crack cocaine than whites," and therefore punishing crimes involving crack more harshly than those involving cocaine may have a discriminatory "effect . . . against blacks"; also discussing other factors used in sentencing and/or parole that can have discriminatory effects); William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. Cal. L. Rev. 405, 408 (1992) (stating that "it is quite likely that mandatory minimums have a disproportionate racial impact because of the higher penalties for the sale and distribution of crack compared with those for powder cocaine") (footnote omitted). Courts have responded to these claims, sometimes finding that the classifications are irrational and/or animated by impermissible discriminatory effect or purpose. See, for example, *United States v. Clary*, 1994 WL 68288, *26-*27 (E.D. Mo.) (finding unconstitutional—as arbitrary and irrational, and animated by "unconscious racism"—federal legislation that mandates punishment of crack cocaine "100 times greater" than for powder cocaine); *State v. Russell*, 447 N.W.2d 886 (Minn. 1991) (finding that statutory distinction between crack and cocaine powder violated the state's equal protection clause). Other courts have not so found. See, for example, *United States v. Lattimore*, 974 F.2d 971, 976 (8th Cir. 1992) (finding no racially discriminatory purpose and that a racially discriminatory impact does not suffice for federal equal protection challenges); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992) (finding that no suspect class or fundamental right is implicated by the distinction made between crack and powder cocaine, nor is the classification arbitrary or irrational).

88. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

89. See generally Toni Morrison, *Introduction: Friday on the Potomac*, in Toni Morrison, ed., *Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality* (Pantheon, 1992).

rules of the Texas Railroad Commission. There is a growing, thick, and depressing documentation that the federal courts are sometimes themselves places of discrimination.

Many Federal Courts commentators are happy to revise the Hart and Wechsler Federal Courts story to make a place for the civil rights revolution of the 1960s and to locate the federal courts at the center of the battle for equal protection.⁹⁰ These can be understood as moments for civic pride, and one's view of the likelihood and desirability of federal court action to protect civil rights affects the kinds of claims made to explain a preference for federal adjudication.⁹¹

But how do the data, about the federal courts as places in which discrimination on the basis of race, gender, and ethnicity can occur,⁹² fit into theories of preferences for federal versus state adjudication?⁹³ What are we to make of the leadership role of the state court systems in responding to these concerns before federal courts began to take up these subjects?⁹⁴ Once we know about the

90. Fallon, 74 Va. L. Rev. at 1158-59 (cited in note 72), details the impact of the Civil War and the civil rights movement of this century on the "Nationalist" model of Federal Courts' doctrine; Amar, 102 Harv. L. Rev. at 703 n.71 (cited in note 14), criticizes the 1988 edition for failing sufficiently to take the impact of post-*Brown v. Bd. of Educ.* developments into effect. For the view that the question of whether to prefer state or federal courts is an empirical one without answer, and that the choice should belong to plaintiffs, see Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 235-37 (1988).

91. See, for example, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

92. As of 1994, task forces examining the effects of gender, race, ethnicity, and/or religion on federal courts are underway in several circuits, including the First, Second, Eighth, Tenth, Eleventh, and that of the District of Columbia. The Ninth Circuit's Gender Bias Task Force has issued both a preliminary and a final report. See *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force* (1993), to be reprinted in 67 S. Cal. L. Rev. (forthcoming 1994) (Ninth Circuit, *The Effects of Gender*); *Ninth Circuit Gender Bias Task Force, Preliminary Report* (July 1992); *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 Stan. L. Rev. 2153 (1993). See also Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 Stan. L. Rev. 2143 (1993); Deborah Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 Stan. L. Rev. 2187 (1993); Judith Resnik, *Gender Bias: From Classes to Courts*, 45 Stan. L. Rev. 2195 (1993).

93. One form of that debate involves discussion of whether and how to compare federal and state court adjudication. See, for example, Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.Y.U. L. Rev. 593 (1991); Chemerinsky, 36 UCLA L. Rev. 233 (cited in note 90); Neuborne, 90 Harv. L. Rev. 1105 (cited in note 91); Fallon, 74 Va. L. Rev. at 1143-44 (cited in note 72); Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. Rev. 369 (1988); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329 (1988).

94. In 1982, New Jersey became the first state to commission a task force on gender bias. See *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (New Jersey, 1984). See generally Shirley S. Abrahamson, *Feminist Jurisprudence and Procedure*, 61 U. Cin. L. Rev. 1209 (1993). See also the 1988 Resolution of the Chief Justices of all the state courts, *Conference of Chief Justices Resolution XVIII, "Task Forces on Gender Bias and*

women who practice in the federal courts but describe it as a place in which they feel awkward, as if they were in an exclusive white male club, does that affect how one sings the praises of the federal courts?⁹⁵ What is the impact on the theme of federal courts' leadership on race relations of the fact that, as of 1992, the entire Ninth Circuit had 64 sitting bankruptcy judges, none of whom was a person of color and all of whom were appointed by the appellate court?⁹⁶ Under which of the Hart and Wechsler topics should we discuss that federal judges are reportedly uninterested in Title VII sex discrimination claims?⁹⁷ That the Chief Justice of the United States Supreme Court campaigned against federal jurisdiction over the Violence Against Women Act and explained that the federal courts were a "scarce national resource," to be reserved for problems of national import?⁹⁸ That doctrines, like the "domestic relations exception to diversity jurisdiction," set up a

Minority Concerns, 26 Ct. Rev. 5 (Fall 1989) (calling for study of bias); Conference of Chief Justices, *Resolution Urging Further Efforts for Equal Treatment of All Persons* (adopted Jan. 28, 1993), in Ninth Circuit, *The Effects of Gender* at A-13 (cited in note 92).

In contrast, in 1990, the Federal Courts Study Committee, chartered by Congress, concluded that study of such biases in the federal system was not needed and that education would suffice. The Federal Courts Study Committee, *The Report of the Federal Courts Study Committee* 169 (Apr. 2, 1990). However, in 1992, the Judicial Conference of the United States adopted a resolution calling for each circuit to study and conduct education programs on bias. *Report of the Proceedings of the Judicial Conference of the United States* 64 (Sept. 22, 1992) (Bias in the Federal Judiciary), in Ninth Circuit, *The Effects of Gender* at A-11 (cited in note 92).

95. See Ninth Circuit, *The Effects of Gender* at 21-23, 27-28 (cited in note 92); Christine Carr, *Ninth Circuit Gender Bias Task Force Surveys: The Survey Instruments and the Compilation and Analysis of the Margin Comment Responses, Working Paper, Ninth Circuit Gender Bias Task Force* (June 1993).

96. 28 U.S.C. § 152(a)(1)(1988) (authorizing appointment of bankruptcy judges); *Report of the Conference, Ethnicity, Race, and Religion and the Ninth Circuit* 4 (Jan. 27, 1993). Several states have commissioned task forces on the effects of race, minority status, and ethnicity on courts. See, for example, *Final Report of the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts* (Michigan, 1989); *New Jersey Supreme Court Task Force on Minority Concerns, Final Report* (New Jersey, 1992); *Minority and Justice Task Force: Final Report* (Washington, 1990). These studies document widespread concerns about unequal treatment, perhaps requiring that, under the "parity" debate, federal courts scholars compare whether the claims of biased treatment vary by federal and state court.

97. Ninth Circuit, *The Effects of Gender* at 125 (cited in note 92).

98. William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 *The Third Branch* 1, 1-2 (1992) (urging Congress to follow the conclusions of the Judicial Conference then opposing the legislation). See also *Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence* 6 (Sept. 1991) (the report, which argued against federal jurisdiction, was prepared by the special ad hoc committee appointed to study the legislation by the Judicial Conference of the United States). In 1993, the Judicial Conference of the United States changed its position, based again on work from its Ad Hoc Committee, reconvened with the Honorable Stanley Marcus as its chair. The Conference voted to take "no position on specific provisions" of the proposed legislation and endorsed Title V, which encouraged "circuit judicial councils to conduct studies with respect to gender bias in their respective tribunals." See *Judicial Conference Resolution on Violence Against Women* (Mar. 1993), reprinted at Appendix A-11 of Ninth Circuit, *The Effects of Gender* (cited in note 92).

public/private distinction not even discussed in many of the casebooks? That the casual treatment of this abstention doctrine replicates women's experiences of exclusion from the federal courts?⁹⁹

What else is not said by Hart and Wechsler and their sons that helps to maintain the gloss? Missing is discussion of the problematic nature of the claim that consent justifies federal power. First, take the states. As is familiar, the original thirteen states signed on to the Constitution; however, this country was also ripped apart by a civil war, in which several states opted out. As Bruce Ackerman has detailed, the revisions of the Constitution that followed the Civil War cannot fairly be described as enacted in a "constitutionally" correct fashion.¹⁰⁰

The Fourteenth Amendment is hailed as the major remaking of the Constitution that retrieved the country from Justice Thurgood Marshall's accusations of its essential racism. But the Fourteenth Amendment may not have been added legally, in the sense that the requirements of Article V of the Constitution were not met. Although the Amendment was proposed by two-thirds of both the House and the Senate, as required by the Constitution, representatives from the Southern states were excluded from that Congress.¹⁰¹

The constantly contested constitutional framework could easily be made plain in the context of contemporary federal courts classes. Most of the books include the case of *Ex Parte McCardle*.¹⁰² But just like *Pullman*, the discussion of *McCardle* that appears in several casebooks is relatively benign. One does not know (from reading case books) the words for which William H. McCardle, an editor of a newspaper, The Vicksburg Times, was imprisoned. He published an editorial, stating that the Northern generals, then governing the South, were:

each and all infamous, cowardly, and abandoned villains, who, instead of wearing shoulder straps and ruling millions of people, should have their heads shaved, their ears cropped, their foreheads branded, and their persons lodged in a penitentiary.¹⁰³

99. See Resnik, 66 N.Y.U. L. Rev. at 1696-1700, 1730-50 (cited in note 3).

100. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L. J. 1013, 1065-69 (1984); Ackerman, 99 Yale L. J. at 457-59, 500-10 (cited in note 59); Bruce A. Ackerman, *We the People: Foundations* 44-47 (Belknap, 1991).

101. Ackerman, 93 Yale L. J. at 1066, 1068 n.103; Ackerman, 99 Yale L. J. at 502-03.

102. 74 U.S. (7 Wall) 506 (1868).

103. William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 236 n.42 (1973) (quoting the Vicksburg Times, Nov. 6, 1867).

The North locked him up for those words; he tried to gain release from the United States Supreme Court, and the Supreme Court held the case until after Congress took away the Court's jurisdiction, enabling the Court to duck having to decide the constitutionality of Reconstruction.¹⁰⁴

McCordle is not the best example of a constitutional vision that the union is predicated on either the concept of "powers limited" or of consent. Congress's repeal of the Court's jurisdiction was driven, according to Ackerman, by its "anxiety" that an "adverse judicial determination might well have jeopardized the Congress/Convention's effort to reconstruct the South in a way that would ensure enactment of the Fourteenth Amendment."¹⁰⁵ While *McCordle* stands, in the Federal Courts casebooks, for the proposition of deep federal court deference to congressional restructuring of Supreme Court jurisdiction,¹⁰⁶ few books detail Mr. McCordle's First Amendment claim to enable students to see that the Court's act of deference is deeply problematic to contemporary sensibilities.¹⁰⁷ The Federal Courts

104. In 1868, the Supreme Court had deferred decision on a habeas petition challenging Reconstruction. When, overriding the President's veto, Congress passed the Act of March 27, 1868, ch. 34, 15 Stat. 44, Congress repealed the jurisdictional route by which *McCordle* had reached the Supreme Court. However, in *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), the Court considered a similar habeas petition, reaching the Court by an alternative jurisdictional provision, the Judiciary Act of 1789, which provided for the Court to have habeas jurisdiction over cases in which persons were in custody under the authority of the United States. When *McCordle* is read in light of *Yerger*, some commentators argue that *McCordle* does not stand for total congressional control over the Supreme Court's jurisdiction. See the discussion in note 107; Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) (dialogue also reprinted in the *Hart and Wechsler* casebook); Ratner, 109 U. Pa. L. Rev. at 179-80 (cited in note 69).

105. Ackerman, 93 Yale L. J. at 1066 n.98 (cited in note 100). Ackerman sees the Court's "abdication in *McCordle*" as not validating congressional activities but rather as having "emphasized their anomalous character." *Id.*

106. *McCordle*, 74 U.S. at 514 ("We are not at liberty to inquire into the motives of the legislature.").

107. See *Hart and Wechsler* at 364-66 (3d ed.) (cited in note 14) (citing Van Alstyne, 15 Ariz. L. Rev. 229 (cited in note 103), as a "splendid account" and mentioning the detention as prompted by "the publication of articles alleged to be incendiary and libelous in a newspaper of which he [McCordle] was editor").

Several of the casebooks do add note materials that talk about the Reconstruction strife. See, for example, Currie, *Federal Courts: Cases and Materials* (cited in note 63), who provides a fuller discussion, beginning with the observation that "[j]udicial opinions do not always tell the whole story." *Id.* at 100-04 (describing the imprisonment for "incendiary and libellous articles," that *McCordle*'s claim was that the Reconstruction Acts "were unconstitutional," and that "President Johnson had the courage to veto the jurisdiction bill during his own imprisonment trial"). See also Low and Jeffries, *Federal Courts and the Law of Federal-State Relations* at 167-71 (cited in note 18) (on one hand, discussing more of the details of the Reconstruction battle but on the other hand stressing, at note 2, how *McCordle* can be read more narrowly and that the "Court knew perfectly well that it was not giving up much"); Fink and Tushnet, *Federal Jurisdiction* at 247-50 (cited in note 18) (in notes both describing the "political background" and how *Yerger* may limit

casebooks make little of the point that "our federalism" is founded in part on conquest, with the power of the guns of the North subduing the South, or of the role judicial "anxiety" has played upon occasion in animating separation-of-powers doctrine. Conquest for good reasons but conquest nevertheless, complete with the nastiness and violation of all sorts of civil liberties principles that are common features of war and conquest.¹⁰⁸ Conquest and a court that stood by, perhaps appropriately anxious in light of its own fragility, perhaps not.¹⁰⁹

One possible response for today's scholars and teachers is that the battles were fought more than 100 years ago, and hence should not and do not frame current doctrine and discussion. One might be tempted to agree, were there not contemporary examples of conquest: the federal government's continuing control over groups denominated (by the federal government) as "federal Indian tribes."¹¹⁰ While the issue of sovereignty is a central problem of federal courts scholarship, and while federal law recognizes that tribes have something called "sovereignty"—more accurately, "dependent sovereignty"—federal courts casebooks and jurisprudence make little mention of the relationships among Indian tribes, the federal government, and the states.

The absence of discussion of federal Indian law is, at one level, odd. The case law on tribal sovereignty and the case law about state sovereignty use many of the same terms and work on parallel analytic problems: the respective reaches of executive, judicial, and congressional authority; the allocation of power between states, tribes, and

McCardle); Redish, 36 UCLA L. Rev. at 223-30 (cited in note 93) (including a lengthy excerpt of Van Alstyne's analysis of how the Bill of Rights constrains congressional authority over federal jurisdiction).

108. See, for example, *Korematsu v. United States*, 323 U.S. 214 (1944). See also *Ex Parte Quirin*, 317 U.S. 1 (1942) (upholding the secret trial before a military commission while civilian courts were available and functioning); Robert E. Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case*, 28 Cornell L. Q. 54 (1942) (discussing how the eight alleged saboteurs were arrested, tried in the United States by military tribunals, and several were executed; the Supreme Court upheld the powers of the military tribunal).

109. Federal Courts casebooks do devote a good deal of attention to the question of prudential limitations on federal court jurisdiction; the question is how clearly the casebooks focus on how those doctrines have been used when the judiciary perceives itself directly threatened.

110. Other instances of problematic exercises of "plenary power" come from immigration law (see, for example, the litigation about the rights of Haitians, "intercepted" by the United States, as detailed in *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993), and those 125,000 who came to the United States from Cuba via the 1980 "Mariel" boatlift, many of whom remain in federal detention, see *Barrera-Echavarria v. Rison*, No. 93-56682, 1994 WL 111491 (9th Cir. (Cal.)), as well as from the prosecutorial powers of the Executive. See, for example, *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2192-93 (1992) (obtaining jurisdiction by forcible abduction does not offend the Due Process Clause, nor federal treaty provisions).

the federal courts; the attributes and prerogatives of sovereignty; sovereign immunity; taxation powers; preemption; federal common-law-making powers; comity, abstention, and deference to other courts' decisions.¹¹¹

On the other hand, the absence from the Federal Courts canon of federal Indian law is wholly understandable. How can one repeat the comfortable description of consent and powers limited when one has to grapple with the language and the decisions that require no research into records or secondary materials, such as in *Pullman* or *McCardle*, but are on the face of opinions and statutes on federal Indian law? Take, for example, the United States official policies, named in the nineteenth century "relocation" of tribes and then (in the 1950s) "termination" of Indian tribes. These decisions exemplify federal power undertaken without any reference to a document like the Constitution, for which, ostensibly, consent was given by those governed. How does one cope with repeated Supreme Court announcements of "plenary" federal power over Indian tribes? With statements like "all aspects of Indian sovereignty are subject to defeasance by Congress?"¹¹²

Recall Lawrence Sager's hypothetical of whether Congress has constitutional authority to draw jurisdictional laws according to race.¹¹³ The negative answer gave us comfort, because it demonstrated that while Congress may have tremendous power, that power was not ultimately so "plenary" as to breach norms of equal treatment.¹¹⁴ But jurisdictional doctrine, under federal Indian law, depends on race or national political identifications,¹¹⁵ specifically

111. Consider the title of the workshop, held at the very same time as the one that was the basis of the symposium, of the Native American Rights Section: Conflicts Between Tribal and State Sovereignty. Jan. 8, 1994, AALS. See Native American Rights Section, American Association of Law Schools, Oral Argument Newsletter (Nell Jessup Newton, Sept. 4, 1993).

112. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 n.10 (1985) (quoting *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984)).

113. Sager, 95 Harv. L. Rev. at 26-30 (cited in note 70).

114. Compare Gunther's "skepticism" that Sager's (and others') efforts to find "internal and external limitations" on congressional power can be based on "textual, historical, and principled bases," Gunther, 36 Stan. L. Rev. at 921 (cited in note 69). On the other hand, Gunther appears to subscribe to limits based on the "unconstitutionality of racially (and otherwise arbitrarily) discriminatory devices." *Id.*

115. The question of how to characterize Indian tribal membership—as racial, ethnic, and/or political—is a topic of federal Indian law scholarship. See Carol Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. Rev. 169 (1991); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991).

whether an individual has "Indian blood."¹¹⁶ And the United States Supreme Court has drawn lines of jurisdiction based on whether one is a member of a particular tribe.¹¹⁷

How do we explain Congress's power over the Indian tribes? For that matter, how do we explain the United States Supreme Court's power over Indian tribes? What do we make of our Federal Courts heroes, such as Chief Justice Marshall, who explain that federal power emerged from a right of "discovery."¹¹⁸ No claim is made that the United States Constitution justifies these exercises of federal power. Not even weak theories of consent are offered to cushion the blows of federal force. In short, once the federal law of the conquest of Indian tribes is added to the canon, once *McCardle* and *Pullman* are read in full, once one knows about problems of racism and gendered assumptions in Federal Courts' law, a complacent story (let alone a cheerful one) can no longer be told.

IV. THE RICHNESS THAT EMERGES

A central analytic issue for Federal Courts' jurisprudence is the problem of sovereignty. The intellectual domains with which we work are those of sovereignty and of the ways in which it is plausible, desirable, and/or practical to be a member (simultaneously) of multiple

116. See *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (the defendant, a "white man," claimed that he had become a "Cherokee Indian," and therefore was not subject to the jurisdiction of the federal court; the Supreme Court rejected that view, because "he was still a white man, of the white race"). In contemporary cases, courts describe a "two-part test to be used when trying to determine if a person is an Indian for criminal jurisdictional purposes. The first part . . . is whether the person has some Indian blood; the second part looks to whether the person is recognized as an Indian." *United States v. Driver*, 755 F. Supp. 885, 888 (D.S.D. 1991). Federal regulations also use a blood-based definition for eligibility for various services. See, for example, 25 C.F.R. § 20.1(n) (1993) ("*Indian* means any person who is a member, or a one-fourth degree or more blood quantum descendant of a member of any Indian tribe") (emphasis in original).

117. In 1990, the Court held in *Duro v. Reina*, 495 U.S. 676, 677 (1990), that tribal courts had limited criminal jurisdictional authority over the tribe's members but not members of other tribes. Congress overturned that decision and authorized tribal courts to exercise that aspect of their criminal jurisdiction over all Indians. See Dep't of Defense Appropriations Act, Pub. L. No. 101-511 § 8077 (b)-(d), 104 Stat. 1856, 1892-93 (1990), as amended by Criminal Jurisdiction over Indians Act, Pub. L. No. 102-137 § 1, 105 Stat. 646 (1991), codified at 25 U.S.C. §1301(2)-(4). See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held that Indian tribal courts did not have any criminal jurisdiction over "non-Indians," remains good law.

118. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 573 (1823). Justice Story found that problematic. See Joseph Story, *A Brief Exposition of the Constitution of the United States* 14-15 (Hilliard, Gray, 1834) ("It seems difficult to perceive what ground of right any discovery could confer.")

sovereigns.¹¹⁹ Within the land of the United States, at least three entities (states, the federal government, and Indian tribes) regularly assert claims of sovereignty.¹²⁰ But readers of the "already read" Federal Courts canon learn of only two: states and the federal government.

How does the inclusion of issues of Indian tribes illuminate the conversation? Inclusion destroys a central tenet: that all federal power can be explained by reference to the Constitution, or at least its "penumbras." But my enterprise is not by any means one of destruction; the problems within the Federal Courts' rubric are rich, and terribly hard. What is needed in teaching and scholarship in this field is frank discussion of the political and social power struggles of the present and the past and how those issues play out doctrinally and structurally. Looking at the changes in the world since Hart and Wechsler and adding all the misery of the Federal Courts story actually produces several lines of inquiry,¹²¹ none of them stale, arcane, or doctrinally deadening. To conclude, I will sketch a few areas on which we, Federal Courts scholars, could teach and write.

Consider first some of the domestic problems in the United States that have been the recent subject of press coverage, litigation, or federal legislation: the environment, including nuclear waste disposal, acid rain, toxic torts; social services, including education, health care, homelessness, guns, and violence; and subordination on the bases of race, gender, ethnicity, class, and disability. Whatever one's list of priorities, these problems have little respect for the territorial boundaries of the states,¹²² but these are the contexts in which the

119. This issue is very much a part of *Hart and Wechsler*, and its famous "dialogue" illuminates the complexity. The book's longevity may be attributed, in part, to its capacity to be read as laying out competing visions of how to respond. See *Hart and Wechsler* (cited in note 14).

120. Certain religious groups, as well as other associations, assert some forms of sovereignty rights. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983); Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. Cal. L. Rev. 1001 (1983); Aviam Soifer, *Colloquium—On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 Wash. & Lee L. Rev. 381 (1991); Kathleen Sullivan, *Rainbow Republicanism*, 97 Yale L. J. 1713 (1988); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. Family L. 741 (1987-88).

121. See also Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics*, 89 Mich. L. Rev. 1499 (1991) (reviewing Chemerinsky's treatise, *Federal Jurisdiction* (cited in note 18), and questioning its focus on doctrine as the principal tool for understanding legal developments).

122. See Fallon, 47 Vand. L. Rev. at 957 (cited in note 2) (correctly pointing to the central import of the New Deal). Further, technological changes have made possible the transfer of problems—like acid rain—that respect no state's, or nation's, borders, and the rapid transfer of people and papers across jurisdictions.

boundaries of authority between national and state powers are currently being crafted.¹²³

Indeed, both legislative and judicial responses sometimes recognize the limited insights gained by relying on the physical boundaries of the states. Congress has enacted statutes with incentive grants, conditional grants, and joint welfare distributions, melding state and federal functions and linking federal and state structures. Litigation similarly cuts across state and federal lines. In several instances, federal and state judges have responded by sitting together, literally joining court systems. While the formal rules of the Anti-Injunction Act and non-interjurisdictional transfers are respected, de facto, upon occasion, the two court systems merge. One can actually sit in a room called the United States District Court for the Eastern District of New York *and* the Supreme Court of the State of New York.¹²⁴

Given the New Deal, the pressures toward federalization, the national and international nature of the economy, one possibility is that the states are a relic of a bygone age, and we simply cannot see it yet. Federal courts scholarship might work to demonstrate that, while the forms of the conversation remain in place,¹²⁵ and "our federalism" is routinely invoked, the reality is that the states have become subdivisions, quasi-provinces, of the federal government. While Justice O'Connor may attempt to insist that states are not "mere political subdivisions of the United States,"¹²⁶ the forces of federalization, assimilation, and homogenization have been so strong that the two systems have really melded, assimilated, folded into each other; that Robert Cover's hoped-for innovation, borne from redundancy, of related but distinct institutions cannot occur;¹²⁷ that the

123. See, for example, *New York v. United States*, 112 S. Ct. 2408 (1992) (constitutionality of congressional legislation on the disposal of low-level nuclear waste).

124. See, for example, *In re Joint Eastern and Southern Districts Asbestos Litigation*, 772 F. Supp. 1380, 1385-86 (E. & S.D.N.Y. 1991) (describing how Judge Weinstein of the Eastern District of New York and Justice Freedman of the New York Supreme Court "embarked upon a cooperative program for the handling of" asbestos cases from the Brooklyn Navy Yard), modified on other grounds, 971 F.2d 831 (2d Cir. 1992). See also *In re Joint Eastern and Southern Districts Asbestos Litigation*, 129 F.R.D. 434 (E. & S.D.N.Y. & N.Y. Sup. Ct. 1990) (joint appointment of referee). See generally William Schwarzer, Nancy E. Weiss, and Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992).

125. Just as we still speak of a federal trial bench as if they were all life-tenured judges. See notes 19-24 and accompanying text.

126. *New York*, 112 S. Ct. at 2434.

127. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639 (1981).

dialogue Cover and Alexander Aleinikoff called for¹²⁸ cannot exist because the two sets of courts, their judges, lawyers, and those litigants with access are the same set of players; that no kind of case cannot be decided by a federal court; that the sovereignty of the states, just like that of the Indian tribes, is completely "subject to defeasance by Congress."¹²⁹

A second line of inquiry takes the opposite stance. It marvels at the durability of states and their courts, at the continued existence of Indian tribes despite express federal efforts at annihilation. Despite the barrage of federal power and the inadequacy of funding of the judiciaries of both state and federal governments,¹³⁰ both states and tribes are still around, still players, not completely assimilated. Indeed, some have claimed a rejuvenation of state adjudication and see states and their justice systems as a critical source of the development of constitutional norms.¹³¹

128. Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 83 Yale L. J. 1035 (1977).

129. *National Farmers Union Ins. Co.*, 471 U.S. at 851 n.10 (citation omitted). When this vision of federal/state power is adopted, the occasions upon which the Court recognizes state or tribal immunity from congressional legislation are seen as outliers; the doctrinal difficulties, debated in cases such as *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *New York v. United States*, 112 S. Ct. 2408 (1992) (both dealing with states' Tenth Amendment claims), and *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1976) (offering a parallel in which tribes seek the Court's protection from Congress), exemplify the clash between claims of authority independent from the national government and the overwhelming power of the national government. Moreover, doctrines that appear to be supportive of state or tribal sovereignty can be reconceived as undermining that authority by pressuring those "other sovereigns" to assimilate to federal norms. See, for example, *Michigan v. Long*, 463 U.S. 1032 (1983) (independent and adequate state ground doctrine, as reformulated by that case, requires state judges to explain that their rulings are not predicated upon federal law). While potentially empowering, some of the Justices have used that doctrine to point out to the "people" of a state that they have the power to refute state justices' views of individual rights and to bring those judges into line with prevailing federal views of more limited rights. See *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring from a per curiam dismissal of a writ as improvidently granted, because of an independent and adequate state ground). See also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (while the doctrine supports deference to tribal court jurisdiction and decisions, it may also be a vehicle for attempting to assimilate tribal courts' jurisdiction into federal norms because, in practice, doctrines of deference may be predicated on tribal court adoption of federal views on the kind and nature of process "due").

130. See American Bar Association, Coalition for Justice, *Saving Our System: A National Overview of the Crisis in America's System of Justice* 1-11 (Aug. 1993) (reporting that during 1992, eight states closed their civil courts for part of the year and concluding that "the justice system in many parts of the United States is on the verge of collapse due to inadequate and unbalanced funding").

131. See, for example, Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Human Rights*, 23 Rutgers L. J. 727, 728-29 (1992) (seeing a "new chapter in American federalism" and that, in addition to constitutional pronouncement, state common law is an important source of "fairness and justice"); Shirley Abrahamson, *Reincarnation & Reawakening: Long Forgotten by Civil Libertarians, State Courts*

Federal Courts scholars, circa 1994, might take as our task to explain the longevity of the states, the state courts, the tribes, and their courts. What is it, in the sovereignty of states or tribes, that enables that survival, survival in the face of national, official efforts at "termination" (in the context of tribes) and more subtle but nonetheless powerful assimilation pressures in the context of the states?¹³² Is the key to recognize that nothing is intrinsically within one sovereign's domain, essentially "federal" or essentially a matter of "state" control, but that boundaries are fluid and must change over time? Or is the maintenance of sovereignty dependent on the existence of staked-out turf, of something quintessentially the business of the states and not of the federal government?¹³³

A third line of inquiry worries hard about the federal courts; maybe they are in the process of going under. The grand old story of the federal courts assumed that everyone agreed on the superiority of the federal bench. However, in today's world, there are many private, alternative dispute resolution centers, as well as wholesale delegation of adjudication to non-Article III judges. Maybe it is time to see that the federal courts are competing for cases, and sometimes losing that

Are Now Getting the Respect They Deserve, 19 Human Rights 26, 28-29 (1992) ("myth that state judges play in the minor leagues of the American judicial system" is being undermined by state judiciaries who turn increasingly to their own constitutions); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 194 (1984) (state constitutional interpretation poses challenges to contemporary constitutional theory, the focus of which has been on the United States Constitution).

132. See, for example, Herbert Wechsler's own faith in states' capacities to make their mark on Congress and to constrain Congress from minimizing their authority. Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543 (1954). Putting this question in the context of the tribes, how are we to explain why, in 1990, Congress enacted the "Native American Graves Protection and Repatriation Act," 25 U.S.C. §§ 3001-3003 (Supp. IV 1992), which gave tribes and not museums (such as the Smithsonian Institution) authority over the remains of tribal ancestors? That despite all its power and numerical dominance, the federal government responded to tribal complaints about the use of skeletons? See Kara Swisher, *Artifacts, Bones Spark the Last of Indian Battles*, L.A. Times at 13 (Oct. 8, 1989) (discussing the efforts to obtain legislation and agreement by the Smithsonian); Malcolm W. Browne, *As Deadlines Near, Scientists Seek Data from Indian Bones*, N.Y. Times at 1 (Sept. 25, 1990) (activities after the legislation was enacted); Brigid Schulte, *Smithsonian Packs the First Large Shipment of Native Remains to Return to Tribes*, State News Service (Sept. 5, 1991) (same).

133. Here one obvious touchstone is the viability of the concept of "essentialism," as it is applied and used to delineate integral aspects of state sovereignty, and the relationship between the conception of states' intrinsic authority and the allocation of jurisdiction among federal and state courts. For deployment and critique of essentialism in the Tenth Amendment context, see *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and the literature they spawned; for the difficulties of "essentialist" claims in feminist theory, see Nancy Fraser and Linda J. Nicholson, eds., *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism in Feminism/Postmodernism* (Routledge, 1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990).

competition. Certainly, federal courts have busy dockets and a sense of overload,¹³⁴ but many judges bemoan the content of those dockets and argue that what is on the federal docket is not worth their time.¹³⁵

Perhaps the action is moving, as litigants with resources opt out of the federal system and buy their own set of private judges. Maybe the federal courts, like the nation's public schools, are at great risk of losing their hold. Maybe the source of intrusion is not competing judges but congressional delegation of the judicial task or congressional allocation of various grants of jurisdiction to the federal courts or judicial reorganizations that have changed the nature of the work.¹³⁶ Maybe civil adjudication (as contrasted to litigation) is dead, or dying.¹³⁷ Perhaps it is the appellate courts that have undergone a transformation so complete that they no longer resemble the appellate world of a half-century ago,¹³⁸ and appeal as of right will soon be abolished.¹³⁹ Perhaps we should be advising federal judges of the need to develop constituencies, and warning them that they may soon be a quaint remnant of an earlier age.

A fourth set of questions begins by noting the limits of our imagination, as if the choice could only be to live in a world of two sets of courts, state and federal courts. Do not the examples of mass torts and other large scale, state-based causes of action with people from across the country demonstrate the need for invention? Isn't it time

134. See, for example, William W. Schwarzer and Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice* 1 (Federal Judicial Center, 1994) (discussing the "growing trend toward 'federalization' of state crimes and civil causes of action" by the Congress and then outlining and analyzing arguments for and against federal court jurisdiction).

135. Kenneth Conboy, *Trouble in Foley Square*, N.Y. Times at op-ed (Dec. 27, 1993).

136. This aspect of the problem is one very much in the minds of some members of the federal judiciary. See, for example, Chief Justice William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary* at 4 ("Unfortunately, proposed legislative responses [to crime] have expanded—unwisely, in my view—the role of the federal courts in the administration of criminal justice"); Rehnquist, 1993 Wis. L. Rev. at 6-8 (cited in note 19); Schwarzer and Wheeler, *Federalization* at 24-38 (cited in note 134).

137. See Judith Resnik, *Judgment Held for Naught* (Levine Lecture, Fordham Law School, Oct. 1993) (forthcoming, Fordham L. Rev. 1994); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century* (forthcoming, UCLA L. Rev., Aug. 1994); Judith Resnik, *Many Doors? Closing Doors? The Relationship Between Alternative Dispute Resolution and Adjudication* (Schwartz Lecture, Ohio State U. Law School, Mar. 1994) (forthcoming Ohio J. Dispute Resolution 1994).

138. See Monaghan, 99 Harv. L. Rev. at 357 (cited in note 50) ("We lack a theory of the nature of appellate courts that satisfactorily takes into account the great changes that have occurred in the last quarter-century") (footnote omitted).

139. See *id.* at 357-58 (to save what he describes as the Learned Hand-Henry Hart "model" of appellate judging, Monaghan argues that elimination of appeal as of right may be required; in the alternative, revision of the theory of appellate adjudication will be necessary); Judith Resnik, *Precluding Appeals*, 70 Cornell L. Rev. 603, 605-06 (1985) (reviewing proposals to abolish appeal as of right).

that we call for the creation of a third set of courts, "national state courts," to adjudicate state-law cases in which citizens of many states are litigants?¹⁴⁰

A fifth endeavor asks normative questions: Which of these different possibilities should we want to promote? The story of the state courts as subdivisions of the national government? The theme of the vitality of states as quasi-independent sovereigns?¹⁴¹ The importance of divergent norms? The triumph of shared values? And what role do courts, as instruments of their governments, play in shoring up either theme? When do courts of one sovereignty herald the generativity of alternative visions and urge deference and comity, and when do they assert and insist on their own power?¹⁴² These are obviously questions about pluralism, multi-culturalism, the willingness to tolerate a range of behaviors called "legal," and a sense of the degree to which one set of norms must/should/could (try to) control the country. All of these questions should be a part of both our teaching¹⁴³ and our scholarship.

Let me conclude with a direct response to the question asked of all of us as symposium participants. I do not believe that Federal Courts as a domain of either scholarship or legal education is dead,

140. Judith Resnik, *From "Cases" to "Litigation,"* 54 L. & Contemp. Probs. 5, 52-57 (1991) (sketching this possibility).

141. Whether Ann Althouse's work (for example, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485 (1987); *Tapping the State Court Resource*, 44 Vand. L. Rev. 953 (1991)) exemplifies this approach is an interesting question. On one hand, Althouse appears to call for more understanding of the generativity of state courts. See, for example, Althouse, 44 Vand. L. Rev. at 956. On the other hand, Althouse's willingness to respect state courts is a limited one, dependent on Justice Black's vision of state sovereignty as serving national interests. See, for example, Althouse, 100 Harv. L. Rev. at 1524-27 ("Has the State Earned Respect for Its Separateness?"); id. at 1537-38 (state "potential for enforcing federal law" sounds more like the model of states as subdivisions of the federal courts rather than as a "separate sphere"); Althouse, 44 Vand. L. Rev. at 956 (state as a "resource to be exploited, encouraged, and improved"); id. at 960 (use of state courts at first instance because of their quantity and to conserve federal courts' resources).

Another view—which would take the state and tribal sovereignty theme much further—would be that we all live in a better world when there are different loci of power, and that respect for separateness should not depend on good behavior. Robert M. Cover's essay, *Nomos and Narrative*, 97 Harv. L. Rev. 4 (cited in note 120), values communities for their jurisgenerative power; he is also willing, however, to use the state's violence against such communities' expressions when it is deployed to destroy "apartheid in America" or to "reform institutions when the other officials fail." Robert M. Cover, Owen Fiss, and Judith Resnik, *Procedure* 729-30 (Foundation, 1988).

142. The tribal cases, such as *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), could be read with *Monroe v. Pape*, 365 U.S. 167 (1961), and *Younger v. Harris*, 401 U.S. 37 (1971).

143. Examples of how I have come to these views by teaching some of what is described above are provided from the Appendix, a syllabus from my 1994, 3-unit class.

dying, or moribund. Instead, it is overflowing with possibilities, once we agree not to see the world with the vision provided only by the official fathers.

APPENDIX

My understanding of the questions in Federal Courts jurisprudence has emerged from and been influenced by my teaching. To exemplify how the two are currently interrelated, I provide a syllabus for the class I taught in the spring of 1994. A few introductory comments are in order. I use a syllabus as a means of providing an outline for students of the course. In the syllabus, I state questions at the outset and occasionally along the way. I also include on a syllabus items that may be read at a student's option as well as those required for the semester. The outline that follows was designed for a class that meets three hours a week; not all of the readings below were in fact assigned. In my experience, a fourth hour is a lovely luxury.

Syllabus, Federal Courts, Spring 1994

Introduction to Students

During the first session, we will discuss the themes of the course:

- a) the relationship between the federal courts and the other branches of the federal government, particularly the Congress, and to a lesser extent, the Presidency and the agencies;
- b) the relationship among state, federal, and Indian tribal courts; and
- c) the idea of sovereignty and the role of courts' exercise of their jurisdiction as expressing either respect for sovereignty or intrusion on others' sovereignty.

As you read the introductory materials, and before you come to class, ask yourself the following questions, which we will ask many times over the course of the semester, in different contexts:

- 1) What are the claimed special qualities of the federal courts? the sources? What is your understanding of the reach of congressional control over the federal courts? of executive control? How does Article III of the United States Constitution inform your thoughts on these issues?
- 2) Do you care if a case is litigated in state, federal, or Indian tribal court? Why? What prompts you to have a preference for one forum over the other?

3) Do you have views that particular kinds of issues are ones for the federal as compared to state or tribal *courts* to decide? For federal as compared with state or tribal *governments* to decide? What are the bases for your understanding that something is "federal" as compared to "state" or "tribal"?

4) Is there any way to think—at a general level—about the respective realms of authority of state, tribal, or national courts? Or should consideration of the question always depend on the context? Does your view depend on which political party controls which government? On what you believe a decision coming from a particular court is likely to be?

5) Do your views on issues of gender, race, and ethnicity and on which forms of government are more or less aware of and concerned about these issues affect your ideas about any of the questions above?

The class materials will include:

a) Hart and Wechsler's *The Federal Courts and the Federal System*, Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro (3d ed. 1988) [hereafter "H & W"];

b) Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (3d ed. Supp. 1993) [hereafter "H & W 1993 Supp."].

c) Handouts, distributed in or before class.

d) A Federal Rules Sourcebook, such as Robert M. Cover, Owen M. Fiss, and Judith Resnik, *The Federal Procedural System: A Sourcebook* (Foundation, 1991).

I. Introduction

To help you think about these issues (and to give you something of a preview of coming attractions), as well as to remind you of the constant and contemporary manifestations of the issues we will think about together, please read for the first class:

Article III of the U.S. Constitution, H & W, xci-xcii; and the articles in Handout I, specifically,

A. Federalization

Brief Description of 1992 Proposed Federal
Legislation (all creating proposed new federal

causes of action), excerpted from *The Third Branch* at 10 (July, 1992).

The Hon. Kenneth Conboy, *Trouble in Foley Square*, New York Times (Dec. 27, 1993) at A15.

B. De-federalization

Proposed Bills S. 583 ("To limit the jurisdiction of the courts of the United States in matters relating to abortion"), 97th Cong., 1st Sess (1981), and H.R. 867 ("To limit the jurisdiction of the Supreme Court and the district courts in certain cases"), 97th Cong., 1st Sess (1981) (Handout I).

C. The Composition of the Federal Life-Tenured Judiciary

Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *Judicature* 282 (1993).

Robert A. Carp, Donald Songer, C.K. Rowland, Ronald Stidham, and Lisa Richey-Tracy, *The Voting Behavior of Judges Appointed by President Bush*, 76 *Judicature* 298 (1993).

D. The Relationships Among the States and the Federal Government

Isabel Wilkerson, *Airport Battle Grows in Chicago*, New York Times (Jan. 9, 1991) at A10.

Robert Reinhold, *States, Failing to Cooperate, Face a Nuclear Waste Crisis*, New York Times (Dec. 28, 1992) at A1.

E. Claims of Sovereignties

Lindsey Gruson, *Town in Seneca Nation Learns Indians Are Taking It All Back*, New York Times (Dec. 2, 1991) at B12.

In addition, sometime during the first two weeks, please read the overview, provided in H & W, of the Development of the Judicial System: pages 1-64. Much of the material contained therein will be familiar to you from procedure and constitutional law, but a reminder of the history is useful.

II. The Relationship Among the Branches of the Federal Government

After we discuss the introductory, overview materials, we will then turn to the first major substantive topic, the relationship among the branches of the federal government (which often goes under the name "separation of powers"). The central issue for this section is who (the courts, Congress, and the Presidency) has what powers (jurisdiction, review, appointment, salaries, etc.) over whom.

A. Judicial Review of Congressional and Executive Action

Read *Marbury v. Madison*, H & W, 72-79 and notes 1, 3, 4, and 5, found at 79-86.

B. Congressional Control Over Federal Court Jurisdiction

Here the focus is on what limits, if any, exist under the Constitution of Congress's control over the jurisdiction of the federal courts. The first cut is whether Congress can control the courts via jurisdictional grants and their repeal.

Reread Article III, as you will many times, as well as Article II, section 2. Also read:

Ex Parte McCordle, H & W, 364-65.

Ex Parte Yerger, H & W, note 1 found at 365.

For our discussion in class: Consider *Marbury* in light of the proposed legislation (in Handout I) to limit the federal courts' jurisdiction. What are the sources for Chief Justice Marshall's decision that the Court lacked jurisdiction in *Marbury*? How do the issues in *McCordle* differ from those in *Marbury*? Why do you/might you care whether the Supreme Court has jurisdiction in any of these cases? Why might Congress seek to limit or expand the federal jurisdiction?

Then read: S.1647 ("Neighborhood School Transportation Relief Act of 1981"), 97th Cong., 1st Sess (1981) (Handout II).

Review: S.583 and HR 867 (Handout I).

What light do *McCordle* and *Yerger* shed on the constitutionality of H.R. 867 or S. 583? How does S. 1647 differ? As you look at these bills, consider the differences: which attempt to restrict the

appellate jurisdiction of the Supreme Court? the jurisdiction of the lower federal courts? the remedial powers of the courts? jurisdiction over statutory claims? constitutional claims? Why, were you in the legislature, might you make any of the above distinctions? What distinctions are made in Article III? To sort these issues through, also review:

Statistical Recap of Supreme Court's Workload During Last Three Terms, 62 Law Week 3124, Aug. 17, 1993 (Handout II).

Judicial Workload Indicators Fiscal Years 1991 and 1992 (Handout II).

United States v. Klein, H & W, 368-69.

Robertson v. Seattle Audubon, H & W 1993 Supp. 57-58.

Sheldon v. Sill, H & W, 362-63.

Ankenbrandt v. Richards, 112. S. Ct. 2206 (1992)

(Handout II — the majority opinion, section II B).

Notes, H & W, 366-68 (Justice Story's views); 370-87

(the general arguments made); H & W 1993 Supp. 59-60.

C. Congressional Creation of Non-Article III Courts

The next set of issues relate to whether Congress can "control" federal jurisdiction by moving sets of cases into non-Article III courts. Read the class problem: Article III\Article I "Courts" (Handout II).

Then read the relevant case law:

1. The Example of the Bankruptcy Courts: "Units" of the Federal Courts

Northern Pipeline, H & W, 425-53; notes, H & W, 465-73.

Justices' Lobbying, NY Times (Dec. 12, 1982) at 21 (Handout II).

Bankruptcy Amendments, 28 USC §§ 151, 152, 157-58 (Handout II).

Grandfinanciera, S.A. v. Nordberg, H & W 1993 Supp. 62-64.

2. Agencies

Crowell v. Benson, H & W, 387-93.

CFTC v. Schor, H & W, 454-65.

Christopher Ladd, *CFTC Judges Claim Agency*

Undermines Their Role, Legal Times

(Feb. 8, 1988) at 1 (Handout II).

S.950, ("Administrative Law Judge Corps Act"), 100th Cong., 1st Sess (1987) (Handout II).

3. Magistrate Judges

28 USC §§ 621-635 (skim), § 636 (read) (Handout II).

Christopher Smith, *Who Are the U.S. Magistrates?*, 71 *Judicature* 143 (1987) (Handout II).

Notes, H & W, note 10, 472-73.

Notes, H & W 1993 Supp. 65-66.

4. Court-appointed Arbitrators

28 USC §§ 651-658 (Handout II).

5. "Court Reform"

Antonin Scalia: Remarks on the Work of the Federal Courts, 34 *Federal Bar News & Journal* 252 (1987) (Handout II).

D. Congressional Control Over Article III Judges' Work

Yet another possibility is congressional direction to Article III judges about the nature and context of their work. Consider:

Hayburn's Case, H & W, 89-93, 95-97.

The Tidewater Issue, H & W, 473-478.

Mistretta v. U.S., 488 U.S. 361 (1989).

E. Executive and Congressional Control Over the Judiciary: Judicial Nomination, Selection, Promotion, and Impeachment

Another aspect of control relates to the composition of the judiciary and the respective realms of executive, judicial, and congressional authority to appoint and impeach federal judges.

Gender, Race, and the Politics of Supreme Court Nominations:

The Import of the Anita Hill/Clarence Thomas

Hearings, 65 S. Cal. L. R. 1279 (1992) (excerpts).

Essays on the Supreme Court Appointment Process: The

Nomination of Robert Bork, 101 Harv. L. Rev. 1146

(1988) (excerpts).

Nixon v. United States, 113 S. Ct. 732 (1993).

F. The Federal Courts' Control Over Their Own Jurisdiction

Yet another vehicle for control is played out in the discussions about which branch of government has the capacity to decide the meaning of the word "case" and when an issue is "justiciable."

Hayburn's Case began our discussion, which we will continue by reading *Lujan* (on standing and causes of action) and *Nixon* (on the political question doctrine). While we could do much more with these issues, the rest of the assignments are listed to show you what else you might read, but we will not discuss them in class.

1. The Interpretations of "Cases" and "Controversies"

Standing/ Causes of Action

Lujan v. Defenders of Wildlife

H & W 1993 Supp. 17-34; Notes, 34-37.

2. Doctrines of Deference to Other Branches

The Political Question Doctrine

Nixon v. United States, 113 S. Ct. 732 (1993).

(See also H & W, 270-95).

3. Interpretation of Congressional Grants of Jurisdiction

Congress can attempt to "mandate" that courts decide particular kinds of issues. The success and lack thereof of this technique can be seen in the following materials.

The Original Jurisdiction of the Supreme Court

H & W, 295-361.

The Former Certiorari/Appeal Distinctions and Practice

H & W, 692-748.

H & W, 1993 Supp. 209-16.

III. The Relationship Between the Federal and State Systems:

Supreme Court Review of State Courts

The Independent and Adequate State Ground Rule

A. The Background

The Basics

H & W, 533.

Fox Film, H & W, 534-35.

Martin v. Hunter's Lessee, H & W, 504-16.

Notes, H & W, 516-21.

Murdock v. City of Memphis, H & W, 521-30.

Notes, H & W, 530-32.

B. Independent

Michigan v. Long, H & W, 539-47.

Florida v. Casal, 462 U.S. 637 (1983) (Handout III).

Elizabeth Kolbert, *In Civil Liberties Cases, New York's Court Leans on the State Constitution*, NY Times (Jan. 8, 1990) at A1 (Handout III).

Notes, H & W 1993 Supp. 39-41.

C. Adequate

Ward v. Love, H & W, 581-84.

H & W 1993 Supp. 77-78.

Henry v. Mississippi, H & W, 610-18.

Note 2, 619-20; note 8(c), 625-27.

James v. Kentucky, 466 U.S. 341 (1984) (Handout III).

Problem: When Is a Decision Independent and Adequate? (Handout III).

IV. The Reconsideration of Other Courts' Decisions by the Lower Federal Courts

A. Habeas Corpus

1. The Process of Conviction

Dudley Clendinen, *Race and Blind Justice Behind Mixup in Court*, NY Times (Nov. 3, 1985) at A26 (Handout IV).

Michael McConville and Chester Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. Rev. L. & Soc. Change 652 (1988) (Handout IV).

William Glaberson, *Confronting Assembly-line Justice*, NY Times (Jan. 16, 1990) at B1 (Handout IV).

Harry I. Subin, *230,000 Cases, Zero Justice*, NY Times (Dec. 19, 1991) at A31 (Handout IV).

Note on Right to Counsel, H & W 1993 Supp. 218-19.

2. The Legal Structure

Read 28 USC §§ 2241-2254, and § 2255 (Handout IV).

Introduction, Larry Yackle, excerpts from *Habeas Hagioscope*, 66 S. Cal. L. Rev. 2331 (1993) (Handout IV).

a. Exhaustion of state remedies

H & W, 1552-60.

H & W, 254-55.

b. The role of procedural default

Fay v. Noia, 372 U.S. 391 (1963) (Handout IV).

U.S. ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955) (Handout IV).

Coleman v. Thompson, 111 S. Ct. 2546 (1991) (Handout IV).

Ronald Smothers, *A Shortage of Lawyers to Help the Condemned*, NY Times (June 4, 1993) at A21 (Handout IV).

McCleskey v. Zant, H & W 1993 Supp. 253-54.

Keeney v. Tamayo-Reyes, H & W 1993 Supp. 252-53.

c. The relevance of "collateral attacks"

Teague v. Lane, H & W 1993 Supp. 222-38; notes, 238-45.

Sawyer v. Whitley, H & W Supp. 250, and Justice Blackmun's dissent, 112 S. Ct. 2514 (1992) (Handout IV).

Neil Lewis, *Court Hears Condemned Man's Plea of Innocence*, NY Times (Oct. 8, 1992) at B22 (Handout IV).

H & W 1993 Supp. 247 (*Herrera*).

The standard on review, H & W 1993 Supp. 220-22.

Callins v. Collins, 114 S. Ct. 1127 (1994) (Handout IV).

d. The hostility to claimants

New York Times Editorial, *The High Court v. Habeas Corpus*, NY Times (Jan. 4, 1992) at A12 (Handout IV).

H & W 1993 Supp. 255.

e. The "right" to a federal forum

Barry Friedman, *Pas de Deux: The Supreme Court and the Habeas Courts*, 66 S. Cal. L. Rev. 2467 (1993) (Handout IV).

B. Relitigation in the Federal Lower Courts of Other Federal Rights Litigated or Arguably Litigated in the State Courts

Allen v. McCurry, H & W, 1615-23.

Notes, 1624-27; 1630.

Marrese v. American Academy of Orthopaedic Surgeons,

H & W, 1627-29.

Marrese, on remand, 628 F. Supp. 918 (N.D. Ill. 1986)
(Handout IV).

C. Relitigation of Issues Decided in the Tribal Courts

How is the conversation about federal courts as “intrusive” and criminal law enforcement as essential to sovereignty informed by considering the tribal context?

The Indian Civil Rights Act of 1968, 25 USC §§ 1301, 1302, 1303 (Handout IV).

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Handout IV).

Duro v. Reina, 110 S. Ct. 2053 (1990) (Handout IV).

Katie Hickox, *House Passes Duro Legislation*, State News Service (Oct. 22, 1991) (Handout IV).

Pub. L. 101-511, § 8077, 104 Stat. 1893; as amended by Pub. L. 102-137, (Oct. 28, 1991), 105 Stat. 646 (Handout IV).

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (Handout IV).

Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988) (Handout IV).

S. 2747, (“Indian Civil Rights Act Amendments of 1988”), 100th Cong., 2d Sess. (Aug. 10, 1988) (Handout IV).

V. Other Doctrines of Deference

A. Roles for the Federal Courts: Generative or Destructive?

1. The Idea of Deference: Federal Courts as Jurispathic

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (Handout V).

Excerpts from briefs in *Santa Clara* (Handout V).

Oliphant v. Suquamish Indian Tribes (review from Handout IV).

Model Code Governing Courts of Indian Offenses, 25

U.S.C. § 1311 (Handout V).

2. Many Roles for Sovereigns

Barry Meier, *Casinos Putting Tribes at Odds* NY Times (Jan. 13, 1994) at D1 (Handout V).

3. Celebrating Federal Court Power to Intervene
Monroe v. Pape, H & W, 1229-39.

B. Deference to the States: Court-made Doctrines of Comity and Abstention

1. "Pullman" Abstention

Railroad Commission v. Pullman, H & W, 1354-56, Notes, H & W, 1356-64.

Excerpts from the record in *Pullman*, 312 U.S. 496 (1941) (Handout V).

England v. Louisiana Board of Medical Examiners, H & W, 1375-78.

2. Diversity, and "Burford" or Administrative Abstention

Lehman Bros., H & W, 1378-81.

New Orleans Public Service. v. Council City of New York, H & W 1993 Supp. 205-13.

Notes, H & W, 1364-67.

"Thibodaux" Abstention:

Notes, H & W, 1368-75.

3. The "Domestic" Relations and Probate Exception

H & W, 1456-59; 1460-64.

Ankenbrandt v. Richards

112 S. Ct. 2206 (1992) (from Handout II).

H & W 1993 Supp. 216-17.

4. Exhaustion of State Court and Administrative Remedies

Preiser v. Rodriguez, H & W, 1638-49.

Notes, H & W, 1049-1652.

Patsy v. Board of Regents, H & W, 1350-51.

H & W 1993 Supp. 200-02.

See *Fair Assessment in Real Estate v.*

McNary, 454 U.S. 100 (1981) (Handout VI) and H & W, 1343-45.

5. Younger: "Our Federalism"

Younger, H & W, 1383-92.

Notes, H & W, 1392-1405.

Steffel v. Thompson, H & W, 1406-15.

Notes, H & W, 1152-56.

Hicks and *Miranda*, H & W, 1416-20.

Notes, H & W, 1424-38.

H & W 1993 Supp. 214.

6. "Colorado River" Abstention

Colorado River Water Conservation District, H & W, 1438-46.

Notes, H & W, 1446-54 (especially *Will v. Calvert* and *Moses Cone*).

Review res judicata (See habeas section), and review *Allen v. McCurry*.

7. Mechanisms for Coordination

William Rehnquist, *Chief Justice's 1993 Year End Report*, 26 Third Branch 1 (Jan. 1994) (Handout V).

Clifford Wallace, *Before State and Federal Courts Clash*, 24 Judges' Journal 36 (1985) (Handout V).

Richard L. Madden, *For a Complex Case, A Singular Mediation Effort*, NY Times (Feb. 5, 1988) at A11 (Handout V).

William W. Schwarzer, Nancy Weiss, and Alan Hirsch, *Judicial Federalism in Action: Coordination of Parallel Litigation in the State and Federal Courts*, 5 FJC Directions 9 (Aug. 1993) (Handout V).

A Synthesis of Participants' Ideas: From a Symposium on State-Federal Judicial Relationships (1992), 5 FJC Directions 3 (Aug. 1993) (Handout V).

Tribal courts/state courts project enters new phase, 19 National Center for State Court Report 2 (Feb. 1992) (Handout V).

C. Deference to the States: The Statutory Context

1. The Tax Injunction Act

28 USC §1342.

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) (Handout V).

Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) (Handout V).

2. The Anti-Injunction Act

Atlantic Coast Railroad Co. v. Brotherhood of

Locomotive Engineers, H & W, 1308-14.
Mitchell v. Forster, H & W, 1315-20.
 H & W 1993 Supp. 197-98.

D. Preemption as a Doctrine of Deference

California Federal Savings and Loan v. Guerra, 479
 U.S. 272 (1987) (Handout V).

E. Preferences, Politics, and Time

Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev.
 1105 (1977) (Handout V).

Nat'l Center for State Courts, 17 Survey of Judicial
 Salaries 10 (1991) (Handout V).

Robert Cover, *The Uses of Jurisdictional Redundancy*,
 22 W. & M. L. Rev. 639 (1981)
 (Handout V).

Richard H. Fallon Jr., *The Ideologies of Federal Courts
 Law*, 74 Va. L. Rev. 1141 (1988) (Handout
 V).

F. Interdependencies

Judith Resnik, *Dependent Sovereigns: Indian Tribes,
 States, and the Federal Courts*, 56 U. Chi. L. Rev.
 671 (1989) (Handout V).

As you read the excerpts from Neuborne, Cover, Fallon, and me, consider: when the author is writing; what is each author's view of how the federal courts approach particular problems might be fairly characterized (as "liberal," "conservative," "activist," "able," "incompetent" etc.); that author's view of the state courts on the same dimensions; what the sources for assumptions about state and federal courts are (i.e., resources? elan? caseload? life tenure? etc.); the claimed differences, if any, between the state and federal courts, and their sources; and the relationship(s) that each author believes is proper for the federal and state courts? Obviously, these issues are not addressed to the same degree in each excerpt, but these questions should serve as a guide to reading the articles and imagining a conversation among the writers.

VI. Other "Sovereigns" as Litigants in the Federal Courts

A. The States as Plaintiffs Seeking Constitutional Protection From Congress

1. Attributes of Sovereignty

Lindsey Gruson, *Town in Seneca Nation Learns Indians Are Taking It All Back*, NY Times (Dec. 2, 1991) at B.12 (See Handout I).

Isabel Wilkerson, *Airport Battle Grows in Chicago*, NY Times (Jan. 9, 1991) at A10 (See Handout I).

Ronald Smothers, *States Battle U.S. and Other States Over Waste*, NY Times (Jan. 28, 1991) at A21 (Handout VI).

2. The Case Law

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (Handout VI).

Fair Labor Standards Amendments of 1985: the Legislative History (Handout VI).

New York v. United States, 112 S. Ct. 2408 (1992) (Handout VI).

3. The Literature

Ruth Lapidoth, *Sovereignty in Transition*, 45 Journal of International Affairs 325 (1992) (Handout VI).

Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Supreme Court Review 341 (Handout VI).

Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Columbia Law Review 543 (1954) (Handout VI).

B. Tribes Seeking Court Protection from Congress

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1976) (Handout VI).

C. The States as Defendants, Seeking Court Protection from Suit

1. The Eleventh Amendment

Hans v. Louisiana, H & W, 1162-66. Notes, 1159-62; 1166-73.

H & W 1993 Supp. 148-50.
Ex Parte Young, H & W, 1173-79.
 Notes, 1179-1182.
Edelman v. Jordan, H & W, 1182-91.
 Notes, 1191-95.
Pennhurst, H & W, 1195-1204.
Atascadero v. Scanlon, H & W, 1204-13.
 Notes, H & W, 1213-21.
Fitzpatrick v. Bitzer, H & W, 1216-18.
Pennsylvania v. Union Gas Co., H & W Supp.
 152-69.
 Notes, H & W 1993 Supp. 170-71.

D. The Immunity of Indian Tribes¹
 (See *Santa Clara Pueblo*, Section V, above)

VII. "Federal" Cases in Federal Courts

A. Diversity Jurisdiction

1. 28 USC § 1332, as amended (1988) (Handout VID)
 H & W, 1656-67.
 H & W 1993 Supp. 263-64, 267-268.
2. Choice of Law
 28 USC §§ 1652 (RDA) and 2072 (REA)
 (Handout VII).
 H & W 1993 Supp. 86-87.
Erie, H & W, 743-87.
Erie and the Federal Rules, Notes, 787-91,
 Hanna, H & W, 818-826, 749-71.
 Notes, H & W 1993 Supp. 88-89.
Stewart Org. v. Ricoh, H & W 1993 Supp. 90-92
 (& *Carnival Cruise*) Multi-forum torts, H
 & W 1993 Supp. 120.

B. Federal Question Jurisdiction

1. The Constitution Grant of Jurisdiction
Osborn v. Bank of the U.S., H & W, 967-75.
Textile Workers Union v. Lincoln Mills, H & W,

1. At times I have also taught other immunity doctrines—statutory constructions that provide immunity for cities (*Monroe to Monell*) and the immunities of judges, prosecutors, members of Congress, and executive officials.

975-82.

Notes, *Verlinden*, H & W, 986-89.

Mesa v. California, H & W 1993 Supp.
130-31.

American National Red Cross v. S.G., 112 S. Ct.
2465 (1992) (Handout VII) or H & W 1993
Supp. 129-30.

2. The Statutory Grant of Jurisdiction

Louisville & Nashville Railroad v. Mottley, H &
W, 989-90.

American Wellworks, H & W, 990-92.

Smith v. Kansas City, H & W, 992-95.

Notes, H & W, 995-99.

Oklahoma Tax Commission v. Graham, 489 U.S.
838 (1989) (Handout VII).

Merrell Dow, H & W, 1007-20.

Notes, H & W, 1020-27.

Franchise Tax, H & W, 1027-38.

Notes, H & W, 1038-40.

Christianson v. Colt Industries, H & W 1993
Supp. 94-95.

Notes, H & W 1993 Supp. 132.

3. The Concept of a Federal "Case": Pendent State
Claims and Ancillary Jurisdiction

Gibbs, H & W, 1040-44.

Notes, H & W, 1044-52.

Review *Pennhurst*.

H & W 1993 Supp. H & W, 134-37,
(*Finley*).

28 USC § 1367 (Handout VII).

C. Sources of Law

1. "There is No Federal Common Law"

Erie Railroad v. Tompkins, H & W, 783-87.

2. Federal Common Law

Note, H & W, 839.

Clearfield Trust, H & W, 854-57.

United States v. Little Lake Misere Land Co., 412
U.S. 580 (1973) (Handout VII).

Note, H & W, 857 (Friendly's praise of the
common law).

Boyle v. United Technologies, H & W 1993 Supp. 96-111
Notes, H & W 1993 Supp. 111-18 (*Miree v. DeKalb, DeSylvia*).
Textile Workers, H & W, 878-83.
Oneida Indians v. County of Oneida, 414 U.S. 661 (1974) (Handout VII).
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (Handout VII); or H & W 1993 Supp. 118-19.

3. Implied Causes of Action

a. Statutory

J.I. Case v. Borak, H & W, 935-38.
Texas Industries v. Radcliff, H & W, 938-43.
Review *Santa Clara Pueblo* (Handout V).
Franklin v. Gwinnett School County Public Schools, 112 S. Ct. 1028 (1992) (Handout VII).
Suter v. Artist M., 112 S. Ct. 1360 (1992) (Handout VII).

b. Constitutional

Bivens v. Six Unknown FBI Agents, H & W, 917-25.
Notes, H & W, 926-35.
H & W 1993 Supp. 121-22, 124 (note: in lieu of note 9 on p. 933).
H & W 1993 Supp. 123 (Fallon & Meltzer on constitutional remedies).

4. Borrowing State Law

a. Statutes of Limitations

Notes, H & W, 953-59.
H & W 1993 Supp. 124-28.
Owens v. Okure, 488 U.S. 235 (1992) (Handout VII).
Felder v. Casey, H & W 1993 Supp. 80-82.

b. Damages

Monessen Southwestern Railroad Co. v. Morgan, 486 U.S. 1306 (1988) (Handout VII).

5. The Federal Common Law of Remedies

Rufo v. Inmates of Suffolk County Jail, 112 S. Ct.
748 (1992) (Handout VII).