

Saint Louis University Law Journal

Volume 53
Number 3 *Teaching Federal Courts (Spring
2009)*

Article 3

2009

Why and How to Teach Federal Courts Today

Richard H. Fallon Jr.
Harvard Law School, rfallon@law.harvard.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Richard H. Fallon Jr., *Why and How to Teach Federal Courts Today*, 53 St. Louis U. L.J. (2009).
Available at: <https://scholarship.law.slu.edu/lj/vol53/iss3/3>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

WHY AND HOW TO TEACH FEDERAL COURTS TODAY

RICHARD H. FALLON, JR.*

INTRODUCTION

The nature of the Federal Courts course, its difficulty, and its relation to the rest of the law school curriculum have emerged over time as subjects of myth, anxiety, and misunderstanding. On the one hand, a myth holds that a sophisticated Federal Courts course should yield insights more profound than those that emerge from any other public law offering. This myth can raise expectations mightily high, among students and also among Federal Courts teachers. On the other hand, many Federal Courts professors feel an increasing anxiety that their field has slipped into intellectual disrepute among their faculty colleagues—that while understanding in other fields has been propelled forward by interdisciplinary studies, Federal Courts subsists in a time warp, still dominated by a 1950s-vintage Legal Process methodology.¹ In my view, both the myth and the anxiety reflect misunderstandings that bear directly on why and how Federal Courts ought to be taught today. In commenting on the why and how of Federal Courts teaching, I thus begin with some reflections on what I take to be the myth and what I know to be a prominent anxiety among Federal Courts professors.

A. *The Myth*

More than fifty years after the publication of the first edition of Hart and Wechsler's *The Federal Courts and the Federal System* (*Hart and Wechsler*),² Henry Hart remains not only the most influential scholar ever to write about

* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. I am grateful to Dan Meltzer for helpful comments on an earlier draft and to Steven Horowitz for outstanding research assistance.

1. I previously reflected on this anxiety in Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994). For a recent, trenchant account of some of the perils of a preference among courts and lawyers to deal with “process” rather than substantive issues, see Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013 (2008).

2. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953). The book is currently in its sixth edition, published in 2009, of which the editors are John F. Manning, Daniel J. Meltzer, David L. Shapiro, and I.

Federal Courts issues, but also, in many minds, the prototypical Federal Courts professor. Hart liked to hold his classes at lunchtime, and his students, who often found his lectures impenetrable, referred to the course as “Darkness at Noon.”³ Yet none, so far as I can gather, ever ascribed the difficulty to Hart’s being inarticulate or unprepared—any more than readers of his famous *Dialogue*⁴ on congressional power to control federal jurisdiction have thought that he employed two characters expressing sometimes opposing views because he lacked the intellectual rigor to work out a consistent position. No, Henry Hart was *profound*. Accordingly, it was more natural than surprising that students might fail to understand the finer points of his analysis—just as, for example, lesser mortals might come up short in their efforts to grasp Einstein’s equations.

No one expects every Federal Courts teacher to replicate the trenchancy of Professor Hart. Nevertheless, the myth has taken hold in some quarters that a deep comprehension of the Federal Courts subject matter necessarily encompasses public law’s foundational truths. To teach Federal Courts competently, this myth suggests, we Federal Courts teachers must at least be able to do the legal equivalent of explicating Einstein’s theories, even if we are not up to original work in quantum mechanics.

In my experience, many students still come to the Federal Courts course with the sense of excitement and trepidation that Henry Hart once inspired. They expect to struggle, but they hope to emerge with a depth of insight to which they could not aspire in other public law classes.

B. *The Anxiety*

The anxiety that surrounds Federal Courts has a dual aspect, reflected differently in students and teachers. Students fear that they will prove unequal to the demands that Federal Courts makes upon them. Despite their best efforts, the course’s insights may elude them.

For professors, the anxiety is different and more demoralizing: It is that the myth of Federal Courts is a fraud. There are no deep mysteries, only complex legal doctrines. What is worse, many Federal Courts teachers worry that what they do—pursuing many of the same kinds of questions that the first edition of the Hart and Wechsler casebook framed in 1953—taints them as antediluvian in the eyes of their colleagues. They fear that Federal Courts is an “intellectual backwater,”⁵ penetrated by none of the interdisciplinary analysis that produces

3. See James E. Pfander, *Fifty Years (More or Less) of “Federal Courts”: An Anniversary Review*, 77 NOTRE DAME L. REV. 1083, 1098–99 (2002).

4. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

5. See Fallon, *supra* note 1, at 955 (quoting Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School).

much of the best work in the legal academy today. From this perspective, the analogue to Henry Hart might not be Einstein but Sigmund Freud—a once-towering figure whose pretension to have pioneered a science of the mind never fulfilled its promise. To adhere to an unreconstructed Freudian theory today would be to exhibit a willful blindness to subsequent progress in medicine, psychology, neurobiology, and, what is more, to the methods of inquiry that have made that progress possible. Could something similar be said of those who continue along paths first marked by Hart and Wechsler?

This thought has sometimes given me pause. When students tell me that they are excited by Federal Courts, or that it has challenged them more than any other course, what should I say? Should I tell them no, they should not be excited, that if the course exhibits a façade of intellectual depth, it is only a façade? This has been among my pedagogical anxieties.

C. *The Misunderstanding*

But the anxiety, I have come to believe, is largely (although not wholly) an outgrowth of the myth of Federal Courts—which is, and probably always has been, a myth. And if the myth reflects misunderstanding, it becomes possible to think that maybe the anxiety reflects misunderstanding as well. The misunderstanding—as I would now describe it—is that Federal Courts is *either* a course in which transcendent insight can be expected *or* one so mired in outdated modes of thought that Federal Courts teachers ought to be ashamed.

Federal Courts is a course about complex legal doctrines, and their relationships to one another, that should be taught in roughly the same way that any other course about complex legal doctrines should be taught today. Teachers should avail themselves of whatever theories, interdisciplinary tools, and methodological perspectives seem most fruitful in examining the issues at hand. There need be nothing un-intellectual, anti-intellectual, or backwater-ish about the way that Federal Courts professors structure their classes or pursue their scholarship.

What is distinctive about Federal Courts is its subject matter, a topic about which I shall say more below. For now, with the focus on pedagogy, suffice it to say that the topics embraced in a Federal Courts course are ones that become possible for students to pursue only near the end of their law school careers, after they have completed many other courses. Federal Courts presupposes knowledge of Constitutional Law, Civil Procedure, Criminal Procedure, and Administrative Law and of the issues of constitutional and statutory interpretation that will have arisen in those and other prior courses. It is thus a capstone course in which students and teachers not only pursue advanced inquiries (as measured by the rest of the law school curriculum), but also assess how parts of the subject matter of those other courses do and should relate to one another. The Federal Courts course permits students to pull

together much of what they have learned in other courses and to achieve a deeper, richer synthesis.

For synthesis to be valuable, it need neither expose nor resolve any ultimate legal mysteries. Federal Courts is just another course in American public law. In some aspects, the tangle of doctrines that makes up the subject matter of Federal Courts is just that—a tangle. If so, Federal Courts professors owe no apology. There should be no extraordinary burden associated with teaching Federal Courts and no extraordinary anxiety.

Just as teachers of any other course would do, we Federal Courts professors should figure out what we want to teach in light of reflections on why we would want to teach it and then determine how best to do so. In the remainder of this essay, I shall offer some personal reflections about the what, the why, and the how of teaching a Federal Courts course.

I. WHAT IS THE FEDERAL COURTS COURSE?

In describing the myth and the anxiety associated with teaching Federal Courts, I have had in mind the kind of course that the Hart and Wechsler casebook, entitled *The Federal Courts and the Federal System*, contemplates. Although I am now a co-editor of that book, my co-editors and I can claim no credit for the book's most extraordinary influence,⁶ which flows predominantly from the first edition, published in 1953, and from the first edition's success in defining the field as we now conceive it.⁷

Judgments concerning the appropriate subject matter of a course on Federal Courts or Federal Jurisdiction do not flow inevitably from the course's title. One obvious way to design the course would be as a study of advanced topics in federal Civil Procedure. But Professors Hart and Wechsler rejected this approach and instead compiled a set of materials on the federal courts *and the federal system*. The italicized words dramatically expand the scope of inquiry by implicating large and recurring issues involving federalism, the separation of powers, and the division of labor between federal courts and state courts. One need only read through the chapter headings of the most recent edition of *Hart and Wechsler*—which continue to span the subject matter of most Federal Courts courses taught today—in order to grasp the breadth and depth of the book's concerns.⁸

6. Indeed, I seldom see Henry Monaghan, a leading scholar for more than three decades, without his telling me that my colleagues and I have “ruined” *Hart and Wechsler* by “dumbing it down.”

7. See Fallon, *supra* note 1, at 960–61 & n.37.

8. The chapter titles are as follows: Chapter I: The Development and Structure of the Federal Judicial System; Chapter II: The Nature of the Federal Judicial Function: Cases and Controversies; Chapter III: The Original Jurisdiction of the Supreme Court; Chapter IV: Congressional Control of the Distribution of Judicial Power Among Federal and State Courts;

Although probably no Federal Courts teacher teaches all of the *Hart and Wechsler* chapters in a single course, two large generalizations likely apply to any curricular offering—including those taught out of other casebooks—that address more than a few of the book’s topics. First, the course will cover more doctrinally intricate subject areas than students could reasonably be asked to consider in a single semester if they did not begin with substantial learning from other, earlier law school classes.

A second generalization takes more unpacking. Whatever specific topics an instructor chooses to teach, a Federal Courts course will have a number of uniting themes or meta-themes that *Hart and Wechsler*’s definition of the field virtually forces onto the pedagogical agenda.

A. *Separation of Powers*

Hart and Wechsler’s definition of Federal Courts as embracing the federal courts *and the federal system* recurrently brings questions involving the separation of powers into consideration. These issues come in at least three varieties.

First are issues involving the roles federal courts *can* play within the federal separation of powers if duly authorized, or in some cases if not precluded, by Congress. Questions concerning the constitutional outer limits of judicial power come squarely into focus in Chapter Two, which deals with standing, mootness, ripeness, and political questions. Similar issues of constitutionally permissible power then resurface repeatedly, including in chapters addressing Supreme Court review of state court judgments, federal common law, constitutional remedies, and sovereign and official immunity, among others.

A second set of separation-of-powers issues involves the judicial role in determining which of the constitutionally permissible functions federal courts *ought* to perform within existing statutory frameworks. To a large extent, the questions in this category are ones of statutory interpretation. For example, how should the federal courts construe the myriad of statutes defining their jurisdiction? Interestingly, interpretation in the Federal Courts context does not always follow the same precepts observed in the interpretation of other

Chapter V: Review of State Court Decisions by the Supreme Court; Chapter VI: The Law Applied in Civil Actions in the District Courts; Chapter VII: Federal Common Law; Chapter VIII: The Federal Question Jurisdiction of the District Courts; Chapter IX: Suits Challenging Official Action; Chapter X: Judicial Federalism: Limitations on District Court Jurisdiction or Its Exercise; Chapter XI: Federal Habeas Corpus; Chapter XII: Advanced Problems in Judicial Federalism; Chapter XIII: The Diversity Jurisdiction of the Federal District Courts; Chapter XIV: Additional Problems of District Court Authority to Adjudicate; and Chapter XV: Obligatory and Discretionary Supreme Court Review. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, at xi–xiv (6th ed. 2009) [hereinafter HART & WECHSLER].

statutes. Among other things, the Supreme Court has often assumed, rightly or wrongly, that jurisdictional statutes should be interpreted to authorize the federal courts to make discretionary judgments about whether to exercise the jurisdiction that Congress has given them.⁹ Issues involving judicial discretion come up again and again.

The third set of constitutional issues revolves around the roles, if any, that the federal courts *must* play in the constitutional scheme. For example, when must decisions of lower courts be subject to Supreme Court review? And are there some issues that federal courts, rather than state courts, must resolve?¹⁰

B. Federalism

Hart and Wechsler's focus on the role of the federal courts *in the federal system* also highlights the significance of federalism within American constitutional and sub-constitutional law.¹¹ Questions concerning the status of states as sovereigns or quasi-sovereigns stand at the fore, as do worries about how respect for the states and their judiciaries should affect congressional decisions to assign cases to the federal courts and how the federal courts should construe their power to issue affirmative decrees to state officials.

Concern with federalism, and with the place of the federal courts in a federal system, inevitably—and in no sense ironically—makes *state* courts an important focus of a Federal Courts course.¹² In most (though not all) cases, the alternative to adjudication by a federal court is state court determination. What, then, are the differences? This is a subtle question, with both a constitutional and an empirical dimension. The constitutional issues involve when and for what purposes the Constitution either requires state court adjudication in preference to federal adjudication or regards the former as an adequate substitute for the latter. The empirical question is what actual, practical difference it is likely to make today whether a state or federal court decides a particular case or issue. Are federal courts more likely to decide federal questions correctly or be sympathetic to claims of federal rights?

9. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 585–87 (1985).

10. For a recent effort to link the principles defining what federal courts *must* do with those specifying limits on the permissible outer reaches of federal judicial power, see John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CAL. L. REV. 1367 (2007).

11. For a lucid and balanced introduction to the central issues, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

12. Indeed, one of the three sections of Chapter IV is entitled “Federal Authority and State Court Jurisdiction.” See HART & WECHSLER, *supra* note 8, at 383.

C. *The Necessary Functions of Courts and Constitutionally Necessary Remedies*

The side-by-side examination of state and federal courts in the federal system invites attention to a further, more generic question about judicial power: When does the Constitution require that a court of some kind, state or federal, be available to rule on the claims of aggrieved parties? This numbers among the most complex questions in constitutional law, closely linked to issues about constitutionally necessary remedies, which recur repeatedly in a *Hart and Wechsler* Federal Courts course. *Marbury v. Madison* says that for every right there must be a remedy.¹³ But *Marbury*'s assertion on this point should occasion close analysis in the face of doctrines such as those of sovereign and official immunity.¹⁴

Another complicating factor—brought to the fore by recent developments in the so-called war on terror—arises from decisions by Congress to employ non-Article III federal tribunals to resolve initially issues that could have been assigned to Article III courts. Although military tribunals are the most controversial example at the present time, the entire system of administrative adjudication raises similar (though not identical) questions involving when Congress can employ federal adjudicative bodies other than Article III courts and the extent to which those bodies' decisions can ultimately determine legal and constitutional rights without review—and without the opportunity for provision of remedies—by an Article III tribunal.

D. *The Relation Between Substance and Procedure*

It could perhaps go without saying that a recurring question in a Federal Courts course has to do with the relation between jurisdiction and procedure, on the one hand, and substantive rights, on the other. Cases arise again and again in which a party has a right but has failed to invoke it in the proper court or has no entitlement to the particular remedy that he or she seeks. In assessing such cases, a teacher must often press the question of the soundness of the rules under which courts deny particular remedies for the violation of legal and constitutional rights. But the *Hart and Wechsler* materials also raise the question whether the remedy being sought in some cases may be so practically or conceptually inseparable from the right that it must be awarded if the claim of right is not to be nullified.

13. 5 U.S. (1 Cranch) 137, 147 (1803).

14. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1781–86 (1991).

E. Appropriate Techniques of Constitutional and Statutory Interpretation

As my effort to identify some of the central themes in a Federal Courts course will already have made clear, many otherwise seemingly unrelated issues are ones of constitutional interpretation to which general theories of constitutional interpretation pertain. Many others involve statutory interpretation and thus give relevance to general theories of statutory interpretation. Issues of interpretive methodology are thus at the center of the kind of Federal Courts course that *Hart and Wechsler* invites faculty to teach.

II. WHY TEACH FEDERAL COURTS?

If the challenge is put “Why is it worthwhile to teach a Federal Courts course?” comprising the kinds of themes and topics that I have thus far described, the answer seems to me to be obvious: Federal Courts offers rich opportunities to broaden and deepen advanced students’ understanding of public law.

The strongest reservation about Federal Courts teaching that I can imagine rests on a false premise that the field is somehow mired inextricably in 1950s-era Legal Process assumptions that subsequent political science has overthrown. A related challenge or anxiety might be that the doctrinal focus of Federal Courts teaching conduces to the production of “doctrinal” or “merely doctrinal” scholarship that attracts and deserves disdain. But once this critique is examined closely, it plausibly condemns only work that Federal Courts professors should not aspire to produce anyway.

A. The Interest and Importance of the Subject Matter

In my view, it is obvious that many if not most of the issues in a Federal Courts course are extremely interesting and important. Some encompass aspects of Constitutional Law. These include parts of the course focused on Article III, federalism, and the separation of powers.

In addition, a pervasive Federal Courts concern involves the remedies through which the substantive rights studied in Constitutional Law are, and sometimes are not, enforced in practice. Sovereign immunity typically bars direct suits against the federal and state governments for constitutional violations. Damages actions against government officials often encounter official immunity barriers. Surveying the doctrinal landscape, my colleague Daryl Levinson argues that the idea of a constitutional right cannot be meaningfully separated from the remedies available for the right’s enforcement.¹⁵ Although I would not go quite so far,¹⁶ I completely agree that

15. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

16. See *infra* note 104 and accompanying text.

a study of Constitutional Law is incomplete without the critical examination of constitutional remedies that a Federal Courts course provides.

In another dimension, which is almost equally important, Federal Courts is an advanced course in the operation of the federal judicial system. It examines a host of doctrines about which future law clerks and litigators, in particular, ought to know.

Moreover, in the curriculum that now exists in most law schools, many of the issues that form the centerpiece of a Federal Courts course would otherwise go largely unexamined. For example, Constitutional Law courses already have enough to cover without probing deeply into issues of available remedies and without furnishing detailed examination of the aspects of federalism and the separation of powers that Federal Courts courses emphasize. Similarly, although habeas corpus could be studied in Criminal Procedure rather than in Federal Courts, a great deal of habeas corpus law is rooted in assumptions about federalism that most Criminal Procedure courses do not examine. I desist from offering further examples of legally important issues and doctrines that might otherwise go unaddressed only to avoid boring the reader further.

A related reason to locate the issues that form the traditional core of a Federal Courts course in that particular offering, which draws almost exclusively third-year students, is that Federal Courts can presuppose knowledge imparted by other courses, including Constitutional Law, Civil Procedure, Administrative Law, and Criminal Procedure. Students may need to know or learn something about bankruptcy law in order to understand issues involving the permissible use of non-Article III tribunals¹⁷ and the constitutional outer bounds of “arising under” jurisdiction.¹⁸ Leading cases on federal common law are easiest to grasp for those who know something about securities regulation.¹⁹ As I said earlier, Federal Courts functions as a capstone course in which students revisit a number of issues that they have encountered previously when the best students are ready to go further and deeper.

Finally, what I described above as the themes or meta-themes that run through the course are valuable ones for students to trace through a variety of legal doctrines. Unanticipated connections frequently emerge; doctrines that look discrete on the surface can often be fitted together like pieces of a puzzle.

17. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–55 (1989) (discussing Congress’s power “to commit adjudication of a statutory cause of action to a non-Article III bankruptcy court”); *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87 (1982) (plurality opinion) (holding that the Bankruptcy Reform Act’s broad grant of jurisdiction to bankruptcy courts violates Article III).

18. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 470–78 (1957) (Frankfurter, J., dissenting) (discussing possible explanations of how bankruptcy disputes “aris[e] under” federal law).

19. See, e.g., *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

When this is so, students may come to understand how the correct resolution of an issue under one doctrinal rubric depends on considerations more commonly located under another.

To take what seems to me the plainest example, questions involving the constitutionality of congressional withdrawals of judicial jurisdiction may depend on whether the parties who would like to bring suit have a substantive constitutional right to the remedy that they seek, and whether they have a right to a particular remedy may be bound up with doctrines of sovereign and official immunity.²⁰ In other words, questions arising under doctrines involving jurisdiction-stripping may get their answers from doctrines involving substantive rights and sovereign and official immunity. (The point about doctrinal interconnection would hold equally if the arrow of causal influence should run in the other direction.)

Another illustration of doctrinal connection comes from habeas corpus doctrine. Whether federal habeas corpus relief should be available to a prisoner convicted by a state court may depend partly on whether the Supreme Court would have had jurisdiction to review the underlying conviction—a question settled by what appears on the surface to be a wholly unrelated doctrine.²¹ If the state court committed no constitutional error that would have been reviewable by the Supreme Court, then it is difficult to say that the conviction was unlawful—even if, for example, the criminal defendant either knowingly or unwittingly waived a constitutional right that he or she would later like to claim. Or perhaps federal habeas review of state court convictions ought to serve a different function from that of backing up the Supreme Court. In either case, knowledge of one doctrine—that governing the availability of Supreme Court review, for example—may often illuminate another, such as habeas corpus.

One more example may suffice to illustrate the point. Champions of constitutional federalism frequently defend the view that federal courts ought not interfere with pending proceedings in state courts and administrative agencies. They assert that state courts, in particular, should be presumed as good as federal courts.²² But if respect for state courts depends on the premise that state courts should be presumed as competent as federal courts, hard questions arise about whether the Supreme Court should identify and enforce a

20. See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 332–38 (1993); Hart, *supra* note 4, at 1370–71.

21. See HART & WECHSLER, *supra* note 8, at 1281–82.

22. For discussion of this view and its familiar location in a “Federalist” model of thought about Federal Courts issues, see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

variety of constitutional and statutory obligations against state courts in order to ensure that reality aligns reasonably well with the premise.²³

To summarize: A reason to teach Federal Courts is that the course exposes students to much that is interesting and important and that the students are unlikely to learn anywhere else in the law school curriculum. Students can learn a great deal, and professors can help students to deepen their understanding of public law, even if nothing profound ever emerges.

B. *A Misplaced Objection*

When I try to reconstruct the more sophisticated version of the “Why teach Federal Courts?” challenge, I must suppose that it reflects the assumption—which I believe to be common—that little, if any, fundamental reconceptualization has occurred in Federal Courts scholarship since Henry Hart and Herbert Wechsler published their first edition in 1953, and that teaching and scholarship in the field must therefore subsist in stagnation.

This objection takes a little unpacking. As I have come to understand it, it reflects four assumptions.

First, Hart and Wechsler pioneered the so-called Legal Process School, which reflected cutting-edge thinking about public law in the 1950s.²⁴

Second, Hart and Wechsler, in common with the Legal Process School more generally, were centrally concerned with issues of institutional competence regarding which branches of government should have ultimate responsibility for resolving particular kinds of questions. As did others in the Legal Process School, Hart and Wechsler further assumed that issues of institutional competence should be regarded as distinguishable from the substantive merits of particular disputes.

Third, following in Hart and Wechsler’s Legal Process footsteps, much Federal Courts scholarship continues to be preoccupied with issues involving the appropriate assignment of decision-making responsibilities to federal courts, state courts, or other institutions.

Fourth, Federal Courts scholarship and teaching thus remain rooted in Hart and Wechsler’s Legal Process methodology²⁵ and must, therefore, have failed to make the kind of intellectual progress that has occurred in other fields, often through utilization of more sophisticated tools of analysis, many of them interdisciplinary, that have emerged since the 1950s.

23. *See id.*

24. On the Legal Process School, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li–cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Fallon, *supra* note 1 at 963–64.

25. I once suggested so myself. *See* Fallon, *supra* note 1, at 954–56.

In my view, the first three of these assumptions are correct, but the fourth—which is framed as a conclusion—does not follow, or at least does not follow necessarily. In order to see why, it is important to distinguish between the questions of comparative institutional competence that Hart and Wechsler framed and the techniques of analysis through which they sought answers to those questions. To be more concrete, the themes and questions that Hart and Wechsler put at the center of *The Federal Courts and the Federal System* continue to be themes and questions that any student of American public law ought to think hard about.

As should be clear from what I have said already, however, to assert the continuing relevance of the central themes and questions of a *Hart and Wechsler* Federal Courts course is not to say that Henry Hart and Herbert Wechsler answered all of their legendary questions correctly. It is not even to say that Hart and Wechsler pointed students and teachers in the right directions to seek answers. With respect to these matters, many of the original authors' 1950s-vintage assumptions, reflecting the teachings of then-current political science, may indeed be dated.

But, crucially, there is no obstacle to Federal Courts professors today pursuing the themes that Hart and Wechsler put at the course's center with any of the intellectual resources that are available in the twenty-first century. Class discussions about how to interpret statutes and the Constitution should reflect the best current theories of statutory and constitutional interpretation. Analysis of issues of federalism and the separation of powers should draw on the most up-to-date and sophisticated political scientific studies. Examinations of the relationship between substance and procedure should take account of relevant recent scholarship in philosophy, political science, and psychology. When history is relevant, we should be conversant with, and tell our students about, the best historical studies.

In making these claims, I am sketching an ideal of Federal Courts teaching, and by implication of Federal Courts scholarship, of which all of us who work in the field inevitably fall short to one or another degree. Yet I have no difficulty in identifying first-rate work about Federal Courts topics that is expressly interdisciplinary or otherwise employs cutting-edge research or analytical techniques. Examples include Nancy King's empirical study of habeas corpus cases filed by state prisoners since the Anti-Terrorism and Effective Death Penalty Act of 1996;²⁶ Eugene Kontorovich's economics-driven examination of alternative remedial regimes for constitutional

26. NANCY J. KING, FRED K. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, U.S. Dep't of Justice (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

violations, including intentional and ongoing deprivations of liberty;²⁷ Maxwell Stearns's application of public choice theory to illuminate standing law issues;²⁸ and a historical study by Ted White and Paul Halliday on the extra-territorial reach of English habeas corpus jurisdiction.²⁹ I also know from conversation that many, many Federal Courts teachers bring the insights of other disciplines into their teaching.

C. *An Aside on Doctrinalism*

A related anxiety that may afflict some Federal Courts teachers involves scholarship more than teaching, but it is one that my discussion so far may have done more to heighten than to alleviate. This is the worry that Federal Courts is such an intensely *doctrinal* course that absorption in its subject matter may conduce to, even if it of course does not force, the production of doctrinal scholarship. Without attempting a systematic study, I would guess that the proportion of doctrinal to non-doctrinal Federal Courts scholarship is very high, and I would further speculate that the intricacy of Federal Courts doctrine may tend to pull those who must master it in a scholarly direction that emphasizes doctrinal exposition and analysis.

There is undoubtedly a belief among some in the legal academy today that doctrinal scholarship—or “merely doctrinal” scholarship, as I often hear it labeled—is somehow retrograde or unworthy. In my view, however, the label “doctrinal” is almost maddeningly imprecise. When even a modicum of precision is achieved, I doubt that most of those who employ the label as a pejorative would wish to apply it to all cases that it might fit descriptively.

In thinking about doctrinal scholarship, I assume that nearly all modern law professors, including those who see their work as doctrinal, would agree that their scholarly writing should be judged by two overriding criteria. First, is what they say true or accurate? Second, is it illuminating, fresh, or surprising to those who already know something about the subject matter and satisfy reasonably high standards of intellectual sophistication?

If these two criteria are accepted, then much scholarship that could fairly be characterized as doctrinal undoubtedly registers low on the quality scale. Many articles summarizing and analyzing judicial opinions and lines of cases say little to advance the understanding of those who already know the relevant law and previously extant literature.

27. Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 758–61 (2004).

28. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1329–85 (1995).

29. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

Plainly, however, to say that a lot of scholarship devoted to analyzing cases and doctrine fails to qualify as illuminating does not by itself establish a quality-based contrast with interdisciplinary writing. Much of the scholarship that examines legal issues through the lens of other disciplines either labors the obvious, rests on unrealistic assumptions, or operates at a level of abstraction too far removed from actual legal problems to provide useful guidance to anyone.

Furthermore, to point out the banality of some or even much doctrinal scholarship is not to demonstrate that no work of that genre makes an intellectual contribution. To the contrary, it is almost self-evidently possible for scholarship analyzing legal doctrines to generate fresh insights by exposing previously unrecognized patterns, connections, assumptions, implications, tensions, symmetries, or asymmetries. Some contributions will be larger, some smaller, and the value of particular works of doctrinal scholarship will vary accordingly. But if our ambition as law professors is to advance understanding of law and legal processes, it would be almost foolishly self-defeating to rule out the possibility that we might gain a better understanding through close attention to legal reasoning and legal doctrine.

I think it is for this reason that when I hear work derided as “doctrinal,” the word “doctrinal” is typically preceded, either implicitly or explicitly, by the adverb “merely.” The critics mean to dismiss not all work that analyzes legal reasoning and doctrine, but only scholarship that is “merely doctrinal.” The qualifier signifies recognition that when a scholar has come to a deep understanding of a body of law or the relation of one doctrine to another, methodologies or insights drawn from other disciplines may drive the most interesting conclusions. For example, a scholar may find that a doctrine reflects the characteristic assumptions of particular schools of moral philosophy,³⁰ or has evolved in ways that only a complex analysis connecting legal with political or social history can bring to light,³¹ or embodies tensions that may be deeply rooted in human psychology.³²

Indeed, it seems to me ineluctable that scholars whose education and reading have equipped them to achieve insights made possible by knowledge of other disciplines are comparatively advantaged over scholars who are less learned. Accordingly, I would think it woefully misguided for Federal Courts

30. See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967) (assessing the “rules of decision” used by courts to determine “just compensation” in Takings Clause cases in light of utilitarian and fairness-based conceptions of justice).

31. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

32. See, e.g., Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 211–17 (1979).

scholars or those in any other field to disparage interdisciplinary analysis. I mean only to insist it would be at least equally wrongheaded to look disdainfully on legal scholarship that begins with close attention to legal doctrines—that is, with all work that is doctrinal in focus, as opposed to “merely doctrinal.”

Moreover, even within the category of “merely doctrinal” scholarship—defined for the moment as work that does not draw heavily on the methodologies of or conclusions generated within other disciplines—I have little difficulty identifying works that are almost universally regarded as being of highest quality. Within the fields of Constitutional Law and Constitutional Theory, which virtually no one takes to be intellectually backward, examples come from such books as Alexander Bickel’s *The Least Dangerous Branch*³³ and John Hart Ely’s *Democracy and Distrust*,³⁴ and from such articles as Sandy Levinson’s *The Embarrassing Second Amendment*³⁵ and Larry Sager’s *Fair Measure: The Legal Status of Underenforced Constitutional Norms*.³⁶ As these examples may help to establish, the value of at least *some* doctrinal scholarship in advancing understanding of particular areas of law seems practically indisputable.

This conclusion prompts me to think that a large majority of those who speak derisively of “doctrinal” scholarship really mean to refer only to “doctrinal scholarship that consists mostly of doctrinal summary and generates few if any fresh or surprising insights.” If, however, the critique of doctrinal scholarship were expressed in these terms, then no Federal Courts teacher or scholar should feel anxious on grounds distinctively related to subject matter, and none should take umbrage. Others in the legal academy, as well as others in Federal Courts, are surely entitled to demand that we who write in the field should produce insightful scholarship and that, in order to do so, we should be reasonably conversant with developments in some of the fields of study that might illuminate our own. We cannot claim simultaneously that Federal Courts is not an intellectual backwater *and* that the nature of the field somehow exempts us from generally applicable standards of scholarly excellence.

Overall, I am thus inclined to believe that those of us producing Federal Courts scholarship ought not in any event to be doing the kind of work to which the derisory characterization “merely doctrinal” fairly applies. And if we are not doing such work, but are instead advancing analyses that others

33. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

34. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

35. Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989).

36. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978).

within the field view as illuminating, then we should make no apologies that our inquiries often begin with a close examination of Federal Courts doctrine.

III. HOW TO TEACH FEDERAL COURTS

There is no single right or best way to teach Federal Courts. How to do so is a matter of individual judgment, interest, taste, and vision. Without pretense of prescribing for everyone, in this section I shall offer a few personal judgments about matters that bear emphasis in teaching some of the topics that the course comprises.

A. *Hart and Wechsler Chapter II: Cases and Controversies*

Although I have never had time to teach all of the materials on cases and controversies, the question of what constitutes a justiciable case lies at the conceptual core of a Federal Courts course.

1. *Marbury v. Madison*

Although students will already have read *Marbury v. Madison*³⁷ in Constitutional Law, it bears re-examination in Federal Courts. As Henry Monaghan has pointed out, Chief Justice Marshall's opinion includes at least two strands that usefully frame debates about the judicial role.³⁸ First, there is a "private rights" strand, which roots the exercise of judicial review in the courts' power and obligation to resolve concrete disputes between particular parties.³⁹ Under *Marbury's* private rights rationale, judicial review is a necessary incident of adjudication in cases in which the Constitution furnishes a rule of decision; the courts have no special, more general charge to pronounce on constitutional matters when traditional or "private" rights are not at stake.⁴⁰ Second, from *Marbury's* insistence that it is the function of the courts "to say what the law is,"⁴¹ it is possible to tease out a view of courts as having what Monaghan calls the "special function" of pronouncing on constitutional meaning for the benefit of the public as a whole.⁴²

Marbury's strands emphasizing the judicial role in vindicating individual rights and in saying "what the law is" provide useful lenses for examining controverted standing cases. In *Flast v. Cohen*⁴³ and *Allen v. Wright*,⁴⁴ for

37. 5 U.S. (1 Cranch) 137 (1803).

38. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-71 (1973).

39. *Id.* at 1365-66.

40. *Id.* at 1366-67.

41. *Marbury*, 5 U.S. at 177.

42. See, e.g., Monaghan *supra* note 38, at 1368-71 (introducing the "special function" model of the judicial role).

43. 392 U.S. 83, 99-102 (1968).

example, one can ask whether the plaintiffs suffered a sufficiently palpable harm to qualify for standing under *Marbury*'s "private rights" strand or whether justiciability rules should permit judicial involvement whenever a constitutional violation has allegedly occurred and no other plaintiff exists whose personal rights or interests are more directly affected.

Beyond *Marbury*'s "private rights" and "special functions" strands the case, in my view, has a third, generative aspect that emerges from examination of its political context. In *Marbury* and the contemporaneous case of *Stuart v. Laird*,⁴⁵ the Supreme Court found itself in a political context in which a ruling for the plaintiffs would have produced disastrous consequences for the Article III judiciary: The newly elected Jeffersonians would not only have refused to obey decisions against them, but also would likely have retaliated by eviscerating the power and independence of the Judicial Branch.⁴⁶ If this consideration influenced the Court's decisions—and there is good reason to believe that it did—then *Marbury*, which is the fountainhead for modern understandings of judicial review, also exhibits what I have called a "prudential face."⁴⁷

The idea that the Court might occasionally depart from principles of strict legality in the service of what it takes to be higher, long-term, prudential goals is an important one for students to consider in a number of doctrinal areas. Viewing that idea as traceable to *Marbury* may give it respectability that it otherwise would lack. Among other things, the notion that the Supreme Court might sometimes behave "politically" or "prudentially" may problematize easy student assumptions that Congress should not be able to limit the jurisdiction of the Supreme Court because otherwise politics would prevail over law. Focus on *Marbury*'s prudential aspect may also enrich thinking about the political question doctrine and about the propriety of judicial decisions claiming discretion to decline to exercise congressionally conferred jurisdiction.

2. Standing

Although the Supreme Court has built a body of standing jurisprudence with the concept of "injury-in-fact" at its core, it is almost child's play to show that the Court's standards for defining "injury" are pliable at best, manipulable at worst. In my experience, it risks demoralizing students to ask them to work

44. 468 U.S. 737, 751–52 (1984).

45. 5 U.S. (1 Cranch) 299 (1803).

46. On the political context of *Marbury*, see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 147–49 (2005).

47. See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 5, 16–18 (2003).

carefully through a sequence of intricately reasoned decisions only to generate the conclusion that the Court's pattern of analyses exhibits no coherence or integrity. For me, standing classes go better when I offer students an alternative framework. In articles that I find wholly persuasive, William Fletcher and Cass Sunstein have argued that the appropriate question in standing cases is not whether the plaintiff can demonstrate injury, but whether the plaintiff has pleaded a violation of his or her rights for which some provision of substantive law provides an entitlement to relief.⁴⁸ On this view, the question of standing essentially reduces to whether the plaintiff has a cause of action.

If standing cases are re-conceptualized as involving whether particular plaintiffs have alleged rights violations for which the substantive law affords a right to redress, it becomes possible to make sense of the dizzying pattern of outcomes in standing cases as reflecting judgments about what rights plaintiffs do and do not have under the Establishment and Equal Protection Clauses, for example. In *Allen v. Wright*,⁴⁹ for instance, the central question is not whether the parents of black school children have suffered a stigmatic injury from the failure of the Internal Revenue Service to deny tax benefits to racially discriminatory private schools, but whether the Equal Protection Clause gives those parents a right to have the government enforce the tax laws aggressively against third parties. This seems to me to be a question of excruciating difficulty, and many students who would otherwise be strongly disposed to support standing react similarly. When the issue is framed this way, it becomes easy to see why the Justices might divide largely along ideological lines, reflecting competing views of whether the Constitution would sensibly afford the plaintiffs a cause of action. By contrast, it is less easy to see why the Justices might so divide over what purports to be the factual question of whether the plaintiff has suffered an "injury."

A further point about the standing cases seems to me to be equally important. Students should understand that parties claiming invasion of common law liberty and property interests always have standing.⁵⁰ The result is an important asymmetry in cases arising from governmental regulation of private conduct: whereas the targets of governmental regulation invariably have standing to challenge the lawfulness of the limitations imposed on them, regulatory beneficiaries frequently encounter acute standing problems when they sue to enforce statutory mandates (such as environmental legislation). Students should be made to think about whether this disparity inheres in the

48. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474-75 (1988).

49. 468 U.S. 737 (1984).

50. See Sunstein, *supra* note 48, at 1439-40.

constitutional structure. Does the Constitution, by making it difficult for the federal government to legislate, privilege those who wish to maintain the pre-regulatory status quo? Or is current standing doctrine the reflection of a largely conservative ideology that judges and Justices have imposed on the Constitution?

A final thematic point to make about standing doctrine involves the connections among rights, justiciability, and remedies. I think it is no accident that many of the most controverted standing cases in the Supreme Court have involved fact patterns in which plaintiffs ask a court to compel executive branch officials to enforce the law against a third party (*Allen v. Wright*, which I briefly discussed above, exemplifies cases fitting this mold). In these cases, there seems to me to be a real question (however the question should ultimately be resolved) of whether the remedy sought—a federal judicial intervention into executive decisions about how and against whom to enforce the law—should be forbidden or at least presumptively disfavored, under the separation of powers. In *O’Shea v. Littleton*,⁵¹ the Court acknowledged that considerations bearing on whether plaintiffs have satisfied the case-or-controversy requirement sometimes “shade into those determining whether the complaint states a sound basis for equitable relief.”⁵² In my view, the phenomenon of remedial concerns influencing justiciability determinations is more widespread than has usually been recognized.⁵³

B. *Hart and Wechsler Chapter IV: Congressional Control of Jurisdiction*

1. Restrictions on Federal Court Jurisdiction

Against the background of historically broad grants of federal jurisdiction, the central topics for discussion in a unit on congressional regulatory power concern jurisdiction-stripping legislation enacted in response to judicial decisions with which Congress disagrees—for example, proposed legislation purporting to deprive federal courts of jurisdiction to entertain challenges to the constitutionality of the Pledge of Allegiance. For purposes of constitutional analysis, the precise form of jurisdiction-stripping legislation may matter enormously. The first task in teaching congressional control of federal jurisdiction is thus to insist on the importance of “thinking like a lawyer” by parsing out the issues along at least two dimensions. First, be clear exactly what limitation on federal jurisdiction is under consideration. Different issues arise under different language of Article III depending on whether Congress (i) is withdrawing federal district court jurisdiction while retaining

51. 414 U.S. 488 (1974).

52. *Id.* at 499.

53. This is a central theme of Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

Supreme Court jurisdiction to review state court decisions,⁵⁴ (ii) is withdrawing Supreme Court jurisdiction while leaving district court jurisdiction in place,⁵⁵ or (iii) is withdrawing all *federal* jurisdiction while the state courts remain open.

Second, it is important to identify the possible bases for constitutional challenges to jurisdiction-stripping. Analysis conventionally starts with Article III, but due process and equal protection arguments also may be available. Equal protection challenges in particular may raise complex questions about how to integrate the original understanding of Article III with bodies of constitutional law—such as those enforcing equal protection norms against the federal government—that have no basis in founding-era understandings.

Issues of interpretive theory thus assume large importance, and teachers should deal with those issues in sophisticated terms. With respect to Article III, the *Hart and Wechsler* casebook emphasizes the Madisonian Compromise at the Constitutional Convention, which gave Congress the option whether or not to create any lower federal courts at all.⁵⁶ But it is worth considering whether issues involving congressional control of federal jurisdiction are ones on which the original understanding of Article III ought to be dispositive. And even if that is the case, there may be pertinent historical evidence besides the Madisonian Compromise. For example, Akhil Amar has provided historical and textual support for Justice Story's thesis⁵⁷ that the Constitution requires that some federal court have either original or appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States.⁵⁸ The evidence on this point is contested,⁵⁹ but it is an important question of constitutional theory—well worth discussing in this context—how courts should respond to less than wholly conclusive evidence regarding the original constitutional understanding.

In my experience, students typically recoil at the notion that Congress might be able to manipulate the jurisdiction of the federal courts for “political” ends. But the behavior of the Supreme Court in *Marbury v. Madison* suggests that courts, too, can sometimes act strategically. In a post-Realist world, nearly everyone acknowledges that the Justices' ideological outlooks influence

54. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850).

55. Cf. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–14 (1868) (holding that the Constitution's “express words” give Congress the power to make exceptions and to regulate the Supreme Court's appellate jurisdiction).

56. See HART & WECHSLER, *supra* note 8, at 7–9.

57. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816).

58. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

59. For searching criticism of Amar's central conclusions, see Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585–1608 (1990).

their views about constitutional issues.⁶⁰ Students should be challenged to consider whether Realist and post-Realist insights are pertinent to issues involving congressional control of federal jurisdiction.

2. Simultaneous Restrictions on State and Federal Court Jurisdiction

Suppose Congress purported to strip the jurisdiction of all courts—state as well as federal—to rule on particular claims of violations of constitutional rights (as, for example, in challenges to the constitutionality of the Pledge of Allegiance). If Congress could preclude all courts from ruling on assertions of constitutional rights violations, it could leverage its power over jurisdiction into a power to nullify rights—a conclusion against which Henry Hart protested vehemently in his magisterial *Dialogue*.⁶¹ As I have noted already, however, it will not suffice to establish the unconstitutionality of jurisdiction-stripping schemes simply to insist that for every rights violation plaintiffs are entitled to a fully efficacious remedy: The doctrines of sovereign and official immunity, which are well entrenched, frequently deny plaintiffs the only remedies that would make them “whole.” In attempting to reconcile his theory that Congress cannot use its power over jurisdiction to eviscerate rights with historically settled doctrine, Professor Hart relied heavily on the notion of the “substitutability” of remedies: Although plaintiffs may have no right to their preferred remedy, there must at least be *some* remedy available to them when their rights are violated and, thus, some court with jurisdiction to provide a remedy.⁶² But whether this suggestion will hold up doctrinally may depend on the scope historically accorded to sovereign and official immunity.

The complexities attending these doctrines are vast. No student could sort them all out in an initial pass at issues involving the relationships among rights, jurisdiction that may be subject to limitation, and remedies. Nevertheless, students should begin to see how issues of congressional power to limit judicial jurisdiction are bound up with issues involving constitutionally necessary remedies.⁶³

The great text on these matters remains Hart’s *Dialogue*, originally published in 1953.⁶⁴ Anyone struggling with the deepest issues surrounding executive and congressional efforts to limit judicial review of executive detentions in post-9/11 cases arising from the war on terror would hunt in vain for a richer analysis.

60. That courts are strategic or ideologically motivated actors is a staple in much modern political science literature. For a survey by a law professor and Federal Courts teacher, see Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

61. Hart, *supra* note 4, at 1371.

62. *See id.* at 1366–70.

63. For a more in-depth discussion, see Fallon, *supra* note 20.

64. *See* Hart, *supra* note 4.

3. Congressional Reliance on Non-Article III Federal Tribunals

Although many Federal Courts teachers skip the materials involving non-Article III adjudicative bodies such as legislative courts and administrative agencies, I do not. Administrative adjudication plays an enormous role in modern American law. As Judith Resnik has maintained, a Federal Courts course that turns a blind eye to administrative adjudication conveys an almost inherently misleading impression of the role of the Article III courts in the modern federal system.⁶⁵

The doctrines bearing on permissible uses of legislative courts and administrative agencies are extraordinarily complex, but students will have some relevant background from Administrative Law. It is therefore possible not only to analyze the leading cases but also to focus on larger themes. For example, can the schemes of administrative adjudication that characterize the modern administrative state be reconciled with the original constitutional understanding? And if not, is it tenable to treat the original understanding as dispositive of some questions involving congressional power to control jurisdiction (such as those supposedly governed by the Madisonian Compromise) but not others? At the most general level, my own view is that when the original understanding can be identified, courts should follow it in the absence of sufficiently good reason not to do so—and that sufficiently good reason exists in the case of the modern administrative state.⁶⁶

When issues involving administrative adjudication arise in a course in Administrative Law, the surrounding context lends an aura of inevitability to sharp limits on the role of Article III courts. In Administrative Law, the agencies occupy center stage. Viewed from the perspective of Article III, adjudication by agencies charged with implementing policy goals can appear a good deal more problematic. There is much to be learned about legal and constitutional evolution from the accommodation that has developed between Article III and the modern administrative state.

In an article published twenty years ago, I argued that the constitutional validity of schemes of administrative adjudication should depend on the availability of sufficiently searching appellate review by an Article III court.⁶⁷ The article's principal claim of constitutional theory was that administrative adjudication can be made consistent with, rather than treated as an exception to, Article III's guarantees of disinterested adjudication by independent judges—which, I argued, can come on appellate review as well as through the exercise of original jurisdiction. My ambition in that article was to rationalize much of the existing doctrinal framework while suggesting judicially

65. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 842 (1984).

66. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

67. See *id.* at 933, 944.

enforceable limits on possible future developments. Since then, I have sometimes worried that scholarship trying to rationalize existing bodies of doctrine casts the author in the role of apologist for the law as it is. Yet it also seems to me that the central art of lawyers and judges is to impose patterns that show cases in a normatively attractive light and that indicate how the norms that best rationalize them ought to be extended into the future.⁶⁸ Students might usefully be asked to respond to this claim in assessing the constitutionality of a federal scheme that substitutes legislative courts or administrative agencies for Article III courts.

C. *Hart and Wechsler Chapter V: Review of State Court Decisions by the Supreme Court*

Although complexity is omnipresent, the leading cases of *Martin v. Hunter's Lessee*⁶⁹ and *Murdock v. Memphis*⁷⁰ nicely embed the central premises of constitutional federalism in a post-*Erie*⁷¹ legal universe: The Supreme Court of the United States can review state court decisions of *federal* law, and pronounce conclusions that thereafter bind the state courts, but the Supreme Court ordinarily cannot review state court rulings on state law questions, concerning which state courts are the highest authorities. To students, the conclusions of *Martin* and *Murdock* tend to seem obvious, the alternative results unimaginable. I try to inject interest by asking students to imagine the different pictures of constitutional federalism that the losing parties in those cases presented. How would the constitutional system work if there could be no Supreme Court review of state court judgments? (At the least, there would be enormous pressure on Congress to expand the jurisdiction of the lower federal courts and to give them exclusive jurisdiction in more cases. But without Supreme Court review, how would mandates of federal exclusivity be enforced?) And would it be a sensible, or even a constitutionally permissible, state of affairs for the Supreme Court routinely to review state court rulings on state law issues?

Against the background of the conceptually elegant framework that the conjunction of *Martin* and *Murdock* creates, nearly all of the interesting questions about Supreme Court review of state court judgments involve how to identify controlling legal norms as either federal or state in character. Many of

68. Cf. RONALD DWORKIN, *LAW'S EMPIRE* 225–38 (1986) (arguing that legal interpretation aims to cast legal materials in the best normative light).

69. 14 U.S. (1 Wheat.) 304, 351–52 (1816).

70. 87 U.S. (20 Wall.) 590, 626–27 (1874).

71. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

these questions turn out to be surprisingly difficult and surprisingly interesting,⁷² though I seldom have time to delve into many of them.

D. Hart and Wechsler Chapter VII: Federal Common Law

Many students fail to understand why *Erie*'s banishment of the specious category of "federal general common law"—the "brooding omnipresence in the sky"⁷³ that was neither federal law binding on state courts under the Supremacy Clause, nor state law to be applied by federal courts under the Federal Rules of Decision Act⁷⁴—did not sound the death knell for all federal common law. The conceptual explanation comes readily: The "real" federal common law that endures today, although judge-made, is federal law binding on state courts under the Supremacy Clause.

Once real, post-*Erie* federal common law is distinguished conceptually from the spurious pre-*Erie* "federal general common law," the daunting task is to figure out when it is constitutionally permissible and appropriate for federal courts to craft federal common law in light of principles of federalism and the separation of powers. An earlier generation of legal scholars, under the influence of Henry Hart and Albert Sacks's famous *Legal Process* materials, suggested that federal courts properly crafted federal common law to promote the "purposes" manifested by the federal Constitution and federal statutes.⁷⁵ By contrast, recent "public choice" literature debunks the notion of statutory purposes that are imagined to stand independent of enacted statutory language.⁷⁶ The Public Choice school instead views all legislation as the product of bargains or tradeoffs among interest groups that are embodied in enacted statutory language. From this perspective, federal common law that purports to implement statutory purposes instead upsets the terms of the explicit compromises that statutory language inevitably reflects and gives some party or coalition more than it could achieve in the legislature.

Although the Legal Process and Public Choice schools disagree about nearly all else, they concur that the nature of the legislative process has important implications for judicial judgments about whether to craft federal common law (as well as about how to interpret statutes). Accordingly, it is impossible to teach about federal common law without testing old Legal Process ideas against modern public choice scholarship and without introducing more recent theories of statutory interpretation and the legislative

72. The classic study remains Henry M. Hart, Jr., *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

73. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

74. 28 U.S.C. § 1652 (2006) (originally enacted as section 34 of the Judiciary Act of 1789).

75. See Eskridge & Frickey, *supra* note 24, at c-cxxxiv.

76. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1 (1991) (providing an explication of public choice theory).

process that might justify a continued, substantial role for federal common lawmaking.⁷⁷ In my experience, students divide deeply in their reaction to public choice theory's portrayal of statutes as reflecting deals that courts should not revise, but nearly all agree that public choice theory presents challenges that educated lawyers and judges need to confront. Many want help.

A further challenge to the teacher is to explore whether federal courts do and should have a different role in crafting federal common law to implement constitutional values than in developing federal common law under federal statutes. The founding generation almost certainly expected the courts to implement the Constitution through a scheme of common law remedies⁷⁸—but in a pre-*Erie* conceptual universe in which it was apparently not understood (as it is today) that law is necessarily the product of some duly authorized state or federal lawmaker. Among the issues to be explored is how the movement from pre- to post-*Erie* jurisprudential assumptions may have affected the relationship between constitutional rights and constitutional remedies: Does the idea of a constitutional right, as it has been understood in our tradition, imply a legitimate judicial authority to craft remedies that are necessary or appropriate to vindicate the right? My own view is that it does.⁷⁹

E. Hart and Wechsler Chapter VIII: The Federal Question Jurisdiction of the District Courts

Article III authorizes federal jurisdiction of cases “arising under” the Constitution, laws, and treaties of the United States.⁸⁰ This language generates subtle questions concerning the outer limits of congressional power to confer federal jurisdiction. But students, in my experience, have a tendency to view those questions as abstract and inconsequential, perhaps because Congress, since *Osborn v. Bank of United States*⁸¹ and the companion *Planters' Bank* case,⁸² has not often pushed into doubtful territory.⁸³ (It is for this reason that the Supreme Court has never pronounced squarely on the validity of theories defending congressional power to confer “protective jurisdiction.”) In order to keep students focused, I follow two tracks. First, I press the students to identify reasons why, as a practical matter, anyone should care if Congress

77. See *Introductory Note on the Existence, Sources, and Scope of Federal Common Law*, in HART & WECHSLER, *supra* note 8, at 616–26.

78. See Fallon & Meltzer, *supra* note 14, at 1779–87.

79. See *id.*

80. U.S. CONST. art. III, § 2.

81. 22 U.S. (9 Wheat.) 738 (1824).

82. *Bank of the U.S. v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824).

83. This is not of course to say that it has never done so. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (upholding the constitutionality of the jurisdiction conferred by § 301(a) of the Taft-Hartley Act).

could confer federal jurisdiction in all cases in which it wished to do so. Second, I force the students to develop arguments about whether hypothetical statutes (that I distribute in advance) would or would not be constitutionally permissible.

A number of jurisdictional statutes, centrally including 28 U.S.C. § 1331, employ the same language as Article III in conferring federal jurisdiction over actions “arising under” the Constitution, laws, and treaties of the United States. Despite the identity of language, the Supreme Court has consistently construed those statutes to stop short of the Constitution’s outer bounds—almost surely for reasons involving the Court’s sense of sound jurisdictional policy: The Court does not think it prudent for the lower courts to exercise a statutory jurisdiction as broad as the Constitution would permit. In teaching the scope of statutory “arising under” jurisdiction, I thus begin by discussing issues of sensible jurisdictional policy, issues of the judicial role in construing jurisdictional statutes that the Court might think unwisely drafted, and their relation to one another.

Then, to provide an intellectual framework within which to discuss the leading cases, I emphasize that the principal dialectic within the Supreme Court has involved competing claims for a rule-like and a standard-like approach to the determination of jurisdiction over particular cases. Rules—sharp, clear, easily administered prescriptions for inclusion or exclusion of cases—promote certainty and predictability but are inherently over- or under-inclusive as measured against their underlying purposes.⁸⁴ Standards—vaguer formulations that call for more judgment in application—would in principle yield more fine-grained judgments of appropriateness, but may lead to uncertainty and inconsistency in practice. Third-year students will have encountered debates about the comparative merits of rules and standards in other courses.⁸⁵ A brief review enhances understanding both of the doctrinal framework for determining “arising under” jurisdiction and of the general conceptual distinction between rules and standards.

F. Hart and Wechsler Chapter IX: Suits Challenging Official Action

1. Federal Sovereign Immunity

The idea of sovereign immunity deserves both a historical and a conceptual introduction. What is a sovereign? Why might it be thought that a sovereign should not be suable without its consent? In the framework of American

84. On the nature of rules, see FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991).

85. The rules-standards dichotomy has enormous explanatory value in private as well as in public law contexts. On rules and standards in private law, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

constitutionalism, who or what—if anyone or anything—should be regarded as a sovereign?

In American constitutional history, the government of the United States has long possessed sovereign immunity from unconsented suits, but citizens have often, indeed typically, been able to enforce rights against the government by suing the individual officers through whom the government acts⁸⁶—as is illustrated by, and can be drawn out in a discussion of, the leading case of *United States v. Lee*.⁸⁷ When sovereign immunity and the tradition of officer suits are juxtaposed, one plausible view holds that sovereign immunity is the truly fundamental rule, while officer suits constitute an exception based on a legal “fiction” that government officials are not the government.⁸⁸ But it is also plausible to think that the constitutional regime is committed even more fundamentally to a principle of accountability for constitutional violations, historically enforced through officer suits, with sovereign immunity being the more nearly fictional, honorific notion.⁸⁹

In my view, the ideas that the sovereign is immune from unconsented suit and that either the government or its officials must be accountable for constitutional violations exist in an ongoing tension. Although federal sovereign immunity is by no means unimportant, it can be well understood and perspicuously assessed only in the context of a broader scheme of remedies for governmental wrong-doing. In order to assess the significance of sovereign immunity, students need to know what alternate remedies may be available to people whose rights have been violated.

2. State Sovereign Immunity and the Eleventh Amendment

Issues of *state* sovereign immunity and the Eleventh Amendment have grown embarrassingly rich as the result of recent Supreme Court decisions and a surrounding outpouring of scholarship.⁹⁰ An impressive body of literature explores the history of state sovereign immunity and its relationship to the perplexing language of the Eleventh Amendment. Another historically inflected but also pragmatic literature examines the problematic nature of state sovereignty in the context of American federalism and the Supremacy Clause of Article VI, which proclaims the Constitution, laws, and treaties of the

86. See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 20 (1963).

87. 106 U.S. 196, 220 (1882) (“All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.”).

88. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984).

89. See Henry P. Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 122 (1996).

90. Thus, the sixth edition of *Hart and Wechsler* accords seventy-two pages to this topic, in comparison with ten pages in the first edition. Compare HART & WECHSLER (6th ed.), *supra* note 8, at 869–941, with HART & WECHSLER (1st ed.), *supra* note 2, at 810–20.

United States to be the supreme law of the land, binding on state courts, anything in state law to the contrary notwithstanding.⁹¹

Issues of state sovereign immunity are so interesting and topical that it is hard to know what to cover and what to omit. Whatever specific choices an instructor makes, I think it important to emphasize three large points.

First, analysis of current problems should begin, even if it should not end, with the language of the Eleventh Amendment—which, strikingly, makes no reference to state sovereign immunity. Contrary to the Supreme Court’s assumption in *Hans v. Louisiana*,⁹² the Eleventh Amendment could plausibly be read as establishing only that Article III does not of its own force strip the states of sovereign immunity from suits asserting state law causes of action that could otherwise have been brought against them under the federal courts’ diversity jurisdiction.⁹³ (Under this so-called “diversity interpretation,” the Eleventh Amendment merely corrects the Supreme Court’s error in *Chisholm v. Georgia*,⁹⁴ which held that Article III stripped the defendant state of immunity from suit against it in a breach of contract claim arising under state law.)

Second, within the structure of constitutional federalism, state sovereign immunity is at most immunity from suit, not immunity from constitutional and legal obligation. In such leading modern cases as *Seminole Tribe of Florida v. Florida*⁹⁵ and *Alden v. Maine*,⁹⁶ no one doubted that Congress could enact legislation creating rights against and imposing duties on the states. The only question involved whether the states could claim immunity from suits seeking to enforce their undoubted obligations.

Third, although state sovereign immunity frequently bars suits for money damages, prospective injunctive relief from ongoing violations of the Constitution and laws of the United States is almost always available in suits against state officials acting in their official capacities. In other words, state sovereign immunity and the Eleventh Amendment do not withdraw all mechanisms for enforcing federal law against the states. My own conclusion is

91. U.S. CONST. art. VI, cl. 2.

92. 134 U.S. 1, 15 (1890).

93. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258–60 (1985) (Brennan, J., dissenting). Justice Brennan’s dissent in *Atascadero* built on several works of pioneering scholarship, including William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), and John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

94. 2 U.S. (2 Dall.) 419, 428 (1793).

95. 517 U.S. 44, 55–56 (1996).

96. 527 U.S. 706, 730–31 (1999).

that state sovereign immunity, like federal sovereign immunity, is, accordingly, less important in practice than many of its critics have assumed.

3. Suits Against State Officers and § 1983

Judicial doctrine interpreting and implementing § 1983 is stupefyingly intricate. In my opinion, the chief pedagogical challenge is to sort out as many complexities as possible without losing sight of underlying methodological and policy issues. On the methodological front, the largest issue involves how the courts should interpret a Reconstruction-era statute that, if read literally, would create a cause of action against all state officials who violate any federal statutory or constitutional right.⁹⁷ Although superficially attractive, a literalist approach would often yield untenable consequences. For example, it would imply that state judges should be suable for damages whenever higher courts reverse their rulings on appeal on the ground that they deprived a party of constitutional rights. History sheds some light on interpretive questions, but historic understandings and expectations are often debatable. In the face of uncertain history, policy concerns would seem especially relevant. Indeed, it is hard to understand the pattern of outcomes except on the assumption that the Justices tend to rule in accordance with their policy views. However one may judge this claim, students should consider a variety of methodological questions involving how the Supreme Court does and should interpret § 1983.

A second large theme concerns the relationship between § 1983 and substantive constitutional law. If the Supreme Court believes that § 1983, read literally, would let too many of the “wrong” kinds of cases into federal court, it has at least three options: (i) enforce the statute literally anyway, (ii) develop a non-literal interpretation that would exclude some sub-set of suits seeking remedies for officials’ violations of the Constitution and laws of the United States, or (iii) narrowly construe the constitutional and statutory rights for violations of which § 1983 furnishes a cause of action. On my reading, cases such as *Parratt v. Taylor*⁹⁸ adopt the third approach by cutting back on constitutional rights under the Due Process Clause as a way to stem the flood of cases into federal court that § 1983 would otherwise authorize.⁹⁹ If so, further evidence emerges that the Supreme Court tends to take a holistic view of the overall acceptability of packages of substantive rights, jurisdictional authorizations to sue, and judicial remedies.¹⁰⁰

97. For a lucid and helpful discussion, see Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982).

98. 451 U.S. 527, 544 (1981).

99. See Fallon, *supra* note 20, at 309.

100. See *supra* notes 51–53 and accompanying text.

4. Official Immunity

Besides being intricate and important, the doctrines governing official immunity call attention once more to issues involving rights and remedies and the question whether there are constitutionally necessary remedies for constitutional rights violations. Under current immunity doctrine, it occurs frequently that victims of constitutional rights violations will have no individually effective remedy: Sovereign immunity will preclude a direct suit against the government, while official immunity will bar damages relief from governmental officials. Dan Meltzer and I once described, and tried to rationalize, the resulting state of affairs in the following terms:

Few principles of the American constitutional tradition resonate more strongly than one stated in *Marbury v. Madison*: for every violation of a right, there must be a remedy. Yet *Marbury*'s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained.

. . . Within our constitutional tradition . . . the *Marbury* dictum reflects just one of two principles supporting remedies. . . . Another principle, whose focus is more structural, demands a system of constitutional remedies adequate to keep government generally within the bounds of law. Both principles sometimes permit accommodation of competing interests, but in different ways. The *Marbury* principle that calls for individually effective remediation can sometimes be outweighed [as, for example, when adequately powerful practical reasons call for the recognition of official immunity that will preclude some victims of rights violations from recovering damages]; the principle requiring an overall system of remedies that is effective in maintaining a regime of lawful government is more unyielding in its own terms, but can tolerate the denial of particular remedies [such as damages in cases in which immunity doctrines bar them], and sometimes of individual redress [as long as other remedies that are not barred by immunity doctrines and are available to other plaintiffs—such as injunctions—suffice to ensure that the right is not effectively nullified on a systemic basis].¹⁰¹

Among the considerations supporting a regime in which official immunity can sometimes leave plaintiffs without individually effective redress for constitutional rights violations is a point advanced by John Jeffries: If every recognition of a novel constitutional right entailed that officials who had violated the right in the past were liable for damages, courts would face a powerful disincentive to adapt the substantive law in progressive directions.¹⁰² For example, if the effect of *Brown v. Board of Education*¹⁰³ would have been

101. Fallon & Meltzer, *supra* note 14, at 1778–79.

102. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 88–90 (1999).

103. 347 U.S. 483 (1954).

to render school officials liable for damages for maintaining segregated schools, the Supreme Court might have found it impossible to decide *Brown* as it did.¹⁰⁴

G. *Hart and Wechsler Chapter X: Abstention Doctrines*

The *Hart and Wechsler* casebook styles the chapter on abstention doctrines as one on “Judicial Federalism.” This label is apt: By abstaining, a federal court typically cedes authority to a state court, and considerations of federalism will sometimes weigh heavily in favor of a federal court’s doing so.

Nevertheless, more is at stake. Another important theme, related to the separation of powers, concerns the appropriateness of federal judicial assertions of “discretion” in determining whether to exercise statutorily conferred jurisdiction. The indispensable article on this topic is David Shapiro’s *Jurisdiction and Discretion*.¹⁰⁵ In recent years, the Supreme Court has asserted that federal courts may properly abstain only in suits in equity, in which, the Court says, Congress must be assumed to have authorized the exercise of judicial discretion;¹⁰⁶ otherwise, the federal courts have an unflagging obligation to exercise the jurisdiction that Congress has given them.

In my view, the Court’s assertion that abstention is proper only in the exercise of equitable jurisdiction is misleading, if not disingenuous, insofar as the Justices assert—as they do—that it is a permissible exercise of jurisdiction, rather than abstention, for a federal court to “stay” proceedings at law until a state court action has run its course.¹⁰⁷ In situations in which state court judgments would effectively terminate the “stayed” federal litigation under *res judicata* doctrine, a stay has the same practical effect as would a decision to abstain. The policies that would support unapologetic and unconcealed abstention, and issues involving the appropriateness of judicial claims of discretion to decline to exercise jurisdiction granted by Congress, should thus be very much on the table in discussions of abstention doctrine.

When these topics are discussed historically and doctrinally, the conclusion seems irresistible that it has been one of the traditional roles of the federal courts to craft doctrines—not readily viewed as authorized by Congress

104. This thought experiment fortifies my judgment—contrary to the view of my colleague Daryl Levinson—that for some purposes it is extremely helpful analytically to distinguish rights from remedies and to consider how appropriate packages of rights and remedies would best be constructed. *But see* Levinson, *supra* note 15, at 858 (arguing that it is a mistake to regard rights as meaningfully distinguishable from the remedies through which they are enforced). Nevertheless, I very much agree with Levinson that for *some* purposes it is the overall package that matters most. Indeed, this is the central theme of my article *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, *supra* note 53.

105. Shapiro, *supra* note 9.

106. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996).

107. *Id.* at 722–23.

if one uses “ordinary” modes of statutory interpretation—to promote what judges view as the sensible operation of judicial federalism. Interestingly, however, this role makes the current Supreme Court, which has grown much more methodologically self-conscious about statutory interpretation than its predecessors, palpably uncomfortable, as witnessed, for example, by its insistence that the federal courts have no authority to abstain in suits at law. Recognition that the “conservative” Rehnquist and Roberts Courts have largely eschewed claims of federal judicial discretion to “abstain” in actions at law, even when doing so would promote state-federal comity, invites discussion of historically evolving varieties of judicial “conservatism.”¹⁰⁸ It is often said that we have a conservative Supreme Court, but what, exactly, is judicial conservatism with respect to Federal Courts issues, and does the term contribute anything to our capacity to explain or predict patterns of judicial decision in Federal Courts cases?

H. *Hart and Wechsler Chapter XI: Federal Habeas Corpus*

In recent years I have closed my Federal Courts course with a unit on federal habeas corpus combined with a brief re-visitation of questions of congressional power to preclude or withdraw federal jurisdiction.

1. Federal Habeas Corpus Review of State Court Judgments

In teaching habeas corpus, I begin with “collateral review” cases brought by state prisoners challenging the lawfulness of their convictions in state court. In considering the role of federal habeas corpus in cases arising from state court convictions, students should confront three large policy issues while also learning the details of the current jurisdictional scheme.

The first policy issue involves whether federal habeas review should occur at all—and if so, why—in cases brought by petitioners who have raised their federal claims in, and nevertheless been convicted by, state courts. The paradigmatic case is *Brown v. Allen*.¹⁰⁹ In cases involving petitioners whose claims have been raised in and rejected by *federal* criminal courts, affording an opportunity for *de novo* relitigation on habeas would seem a profligate waste of resources. The question whether *de novo* habeas review should occur in cases arising from state court convictions thus presents important issues of judicial federalism.

The second policy issue is whether criminal defendants who failed to raise their federal claims properly in state court, and therefore could not have invoked the Supreme Court’s appellate jurisdiction on direct review, should be

108. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 432–34 (2002).

109. 344 U.S. 443 (1953).

able to present those claims for the first time on federal habeas.¹¹⁰ In this type of case, permitting habeas review would inevitably generate state-federal frictions by excusing prisoners' failure to comply with sensible state rules governing the raising of federal issues in state court. But there is a competing interest in fairness to criminal defendants whose failure to raise their constitutional claims properly in state court will almost always have resulted from bad lawyering. If a wealthy defendant with a first-rate lawyer would have benefited from a federal constitutional defense, is it fair to deny an impecunious defendant with a second-rate or badly overworked trial lawyer the same opportunity? It is far from obvious how the balance should be struck—especially because even if one worries about the unfairness of impoverished defendants having inadequate legal representation, the authorization of habeas review of constitutional claims represents a clumsy response to the problem (in contrast with, for example, the establishment of rules or policies that would tend to ensure criminal defendants better representation in the first instance).

The third policy issue involves the question whether, following a change of law as a result of Supreme Court decisionmaking, those who have previously been convicted of crimes should be able to use habeas as a vehicle to have the newly declared law applied retroactively to their cases.¹¹¹ Significantly, this is *not* distinctively a problem of federalism; retroactivity issues would equally arise in a unitary system. A tangled mix of policy issues bears on this question—among them, the worry that mandatory retroactivity on habeas would make it extremely difficult if not impossible for the Supreme Court to expand the rights of criminal defendants in the ways that it did, for example, in *Mapp v. Ohio*¹¹² and *Miranda v. Arizona*.¹¹³ The Court almost certainly could not have decided *Miranda* as it did if its decision implied that the prison doors would need to swing open for every criminal defendant whose conviction rested on a confession obtained without a *Miranda* warning.

Beyond understanding the central policy issues, students should of course learn the current rules governing the availability of federal habeas, which the

110. The currently leading case on this topic, which provides a good ventilation of the issues, is *Wainwright v. Sykes*, 433 U.S. 72 (1977).

111. For discussion, see generally Fallon & Meltzer, *supra* note 14, at 1813–20.

112. 367 U.S. 643, 655 (1961) (holding that the right to privacy embodied in the Fourth Amendment is enforceable against the states and that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.”).

113. 384 U.S. 436, 444 (1966) (holding that prosecution cannot admit into evidence statements by defendant obtained from custodial interrogation by law enforcement officers “unless it demonstrates the use of procedural safeguards effective to secure the [Fifth Amendment’s] privilege against self-incrimination.”).

1996 Antiterrorism and Effective Death Penalty Act¹¹⁴ (AEDPA) straitened dramatically. It is little exaggeration to say that the AEDPA turned a writ that was traditionally regarded as a guarantor of fundamental fairness into a procedural maze that very few petitioners can hope to navigate successfully. According to an important recent study of cases in the district courts, the post-AEDPA success rate for habeas petitions by state prisoners is down to 0.3% in non-capital cases.¹¹⁵ Another study, this one involving cases in the courts of appeals, concludes that the rate of dismissals on procedural grounds rose from 73% to 82% between 1997 and 2004.¹¹⁶ These empirical findings strike me as a particularly depressing variation on the recurring Federal Courts theme of the relation between substance and procedure.

2. Federal Habeas Review of Executive Detentions

The historically most fundamental office of habeas corpus was not to review state criminal convictions, but to examine the legality of detentions by executive officials in the absence of prior judicial authorization.¹¹⁷ Executive actions and congressional enactments in connection with the war on terror have given issues involving habeas jurisdiction to review executive detentions new currency.

As Dan Meltzer and I have written,¹¹⁸ habeas cases arising from executive detention present at least three issues, all with both a statutory and a constitutional dimension. First, does a federal court have statutory jurisdiction to entertain a petition for habeas corpus and, if not, does the Constitution's Suspension Clause¹¹⁹ mandate the availability of habeas jurisdiction?¹²⁰

Second, what are the substantive and procedural grounds on which a court possessing habeas jurisdiction can issue the writ?¹²¹

Third, to the extent that a detention rests on prior determinations by a non-Article III tribunal that a detainee satisfies criteria adequate in principle to

114. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, secs. 101–108, 110 Stat. 1214, 1217–26 (codified as amended at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2006)).

115. See KING ET AL., *supra* note 26, at 8. Pre-AEDPA studies had shown a success rate of 1% to 4% in non-capital cases. See HART & WECHSLER, *supra* note 8, at 1219.

116. See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 286 (2006).

117. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens,* 98 COLUM. L. REV. 961 (1998).

118. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror,* 120 HARV. L. REV. 2029 (2007).

119. U.S. CONST. art. I, § 9, cl. 2.

120. *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008), presented a question of this kind.

121. Issues of this kind were at stake in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

justify a detention, to what extent are the administrative determinations reviewable by a federal habeas court? In other words, what is the statutorily specified or constitutionally mandated scope of review?

Although merely sorting out these issues both takes work and advances students' understanding, discussion of their appropriate resolution is likely to prove difficult and contentious. Treating these issues at the end of the course allows the instructor to pull together a variety of themes involving the separation of powers and notions of constitutionally necessary remedies at a time when—if the course has gone well—students will be prepared to reason with, rather than shout at, one another.

CONCLUSION

There is a lot to teach in a Federal Courts course—and a lot for students to learn. Inescapably, the subject matter is difficult, but the rewards can be great.

In conclusion, I would stress three points. First, instructors should structure the course to permit cumulative learning. Students should achieve both breadth and depth of understanding by building on what they have learned before, often in other courses, and by coming to appreciate connections among Federal Courts issues and doctrines.

Second, both teaching and learning should be thematic. Doctrinal topics should not just yield doctrinal learning, but should be portrayed as exhibiting variations on recurring themes involving the separation of powers, federalism, necessary and contingent connections between rights and remedies, the relationship of procedure to substance, the proper exercise of judicial discretion, and appropriate techniques of constitutional and statutory interpretation.

Third, Federal Courts teachers should draw on the best available contemporary historical scholarship, political science, political theory, and theories of constitutional and statutory interpretation. We may continue to examine issues and ask questions first linked as defining the content of a Federal Courts course by Henry Hart and Herbert Wechsler. But we can and should utilize new sources of learning and give answers to old questions that Hart and Wechsler would have found horrifying. It is time for those of us who teach and write in the field to get over old anxieties and move ahead unapologetically with our teaching and our scholarship.

