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A Litigation-Oriented Approach to Teaching Federal Courts

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INTRODUCTION

Back in the day when Critical Legal Studies was riding high, one of its avatars ridiculed the course on Federal Courts, calling it "the purest of contentless legalist rituals, in which all 'policy' arguments are grounded in funhouse mirror versions of Competence and Federalism whether they can conceivably be brought to bear on particular cases or not."[1] Mark Kelman's putdown should not be taken too seriously. Twenty five years later, Critical Legal Studies has largely disintegrated,[2] while Federal Courts remains a key course in law school curriculums. I suspect, however, that many law students would agree, at least in some measure, with Professor Kelman's characterization. In my contribution to the symposium, I wish to argue that the traditional way of teaching Federal Courts, which draws heavily on ideas embodied in a fifty-five year old casebook, no longer serves the interests of law students as well as it once did. As an alternative, I propose an approach that emphasizes the knowledge and understanding that students will need in order to become effective litigators.

I. TWO WAYS OF TEACHING FEDERAL COURTS

A. The Legal Process Method

In 1953, Henry Hart and Herbert Wechsler published *The Federal Courts and the Federal System*[3] and revolutionized the teaching of Federal Courts.

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1. Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 319 n.65 (1984).

2. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 9 (1997) ("The social/ political/intellectual network that 'was' cls in the late 1970s and early 1980s came apart in the late 1980s . . . . But there are various successor networks that are as active as ever."); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 525 n.21, 527 (2000) (citation study documenting "the rise and fall of Critical Legal Studies").

3. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

Their emphasis on "the distribution of power between the states and the federal government,"[4] "what courts are good for," and "the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government"[5] marked a striking departure from earlier works, which had concentrated on federal procedure. Along with another set of materials Hart prepared in collaboration with Albert Sacks,[6] *The Federal Courts* "defin[ed] what has come to be one of the most important schools of legal thought in late twentieth–century America, typically described as 'the legal process school.'"[7] *The Legal Process* and the "Hart & Wechsler Paradigm" "focus[] primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made."[8] This model soon became the dominant mode for both teaching and scholarship in Federal Courts law.[9] At most schools, the course began to focus on the distribution of decision-making authority among the branches of the national government and between the states and the federal government. Judging by the organization and content of Federal Courts casebooks, this dominance continues today.

In *Hart and Wechsler*, now in its sixth edition,[10] and in other casebooks that follow its approach,[11] the threshold question is "[t]he [n]ature of the [f]ederal [j]udicial [f]unction,"[12] and the ways by which the scope and limits of federal judicial power are manifested in the doctrines of standing to sue and the justiciability of a given dispute. The power of Congress to regulate federal judicial power comes close behind.[13] These matters of basic theory are followed by examinations of narrower distribution-of-authority issues. Here, the books diverge on the sequence in which these matters are treated. *Hart and*

4. *Id.* at xi.

5. *Id.* at xii.

6. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). The book circulated in manuscript form for thirty-six years before its publication. *See id.* at xi.

7. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (book review).

8. *Id.*

9. *See* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 956 ("Hart and Wechsler defined the field as we now know it . . . .").

10. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009).

11. *See, e.g.*, DONALD L. DOERNBERG, C. KEITH WINGATE & DONALD H. ZEIGLER, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS (4th ed. 2008); *see also* MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS (6th ed. 2007).

12. FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 49.

13. *Id.* at 319; DOERNBERG, WINGATE & ZIEGLER, *supra* note 11, at 163; REDISH & SHERRY, *supra* note 11, at 106.

Wechsler begins with the Supreme Court's role in reviewing the state courts,[14] the scope of federal common law making,[15] federal district court jurisdiction,[16] federal judicial control over state governments,[17] sources of friction between federal and state courts, and ways of minimizing that friction.[18]

A premise underlying the examination of all of these topics is that "the central, organizing question of Federal Courts doctrine involves allocations of authority."[19] Some of these allocation issues are, so to speak, horizontal (i.e., they concern the distribution of power among the Legislative, Executive, and Judicial Branches). Others are vertical, in that they focus on state/federal relationships. What all of them have in common is that they can usefully be addressed by relegating issues of substantive federal law to secondary status. Richard Fallon, the leading academic spokesman for the *Hart and Wechsler* approach, acknowledges that such matters have some bearing on the allocation issues.[20] Still, the premise that ties the field together is the "principle of institutional settlement," which holds that courts can identify and implement trans-substantive principles for allocating decision making among the institutions of government,[21] and de-emphasizes the role of substantive values.[22] Taking this premise as their starting point, many of the finest minds in the legal profession have found Federal Courts to be the most intellectually stimulating course in law school, and a number of them have gone on to become scholarly experts in the field.[23]

14. FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 431.

15. *Id.* at 607.

16. *Id.* at 743.

17. *Id.* at 869.

18. *Id.* at 1013 (abstention doctrines), 1153 (habeas corpus), 1311 (res judicata).

19. Fallon, *supra* note 9, at 962.

20. *See* Richard H. Fallon, Jr., *Comparing Federal Courts "Paradigms,"* 12 CONST. COMMENT. 3, 6 (1995) ("[T]he richness of the Legal Process approach resides in its sensitivity to the subtle interactions of and overlap between substantive and procedural interests in jurisdictional decisions.").

21. *See* William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2045 (1994) (discussing the crucial role of institutional settlement in Hart and Sacks's Legal Process materials); Fallon, *supra* note 9, at 964 n.48 (discussing the principle of institutional settlement and its key role in the Hart and Wechsler approach to Federal Courts law).

22. *See* Eskridge & Frickey, *supra* note 21, at 2050 ("The principle of institutional settlement suggested that legal process thinkers did not consider substantive fairness to be a primary element of political legitimacy.").

23. *See* Amar, *supra* note 7, at 691–93 (discussing scholars and scholarship inspired by the Hart and Wechsler casebook).

B. The Litigation-Oriented Approach

There is, however, another way to address the subject matter of Federal Courts, one that favors practical utility over academic theory. I favor a perspective that, for the lack of a better term, I shall call a "litigation-oriented approach." What I mean by this term is that the course concentrates on examining questions that would interest lawyers in their professional lives. These questions include, among others: "What are the opportunities for litigating a given dispute in federal court?"; "What obstacles may stand in the way?"; "What distinctive doctrines does one need to know in order to litigate federal claims, especially federal constitutional claims?"; "What types of problems come up when one litigates in state court?"; and "What are the advantages and disadvantages of litigating in federal rather than state court?"

This way of treating Federal Courts does *not* pay close and sustained attention to such "*Hart and Wechsler*" questions as these: "What is the role of the federal courts in our system of separation of powers?"; "Should the federal courts be used to reform society through public law litigation, and if so, how?"; "What principles of federalism should courts use to resolve conflicts between federal courts and state governments?" The choice of one set of inquiries rather than another is one of emphasis. The latter set of questions certainly needs to be addressed in order to understand the cases. Unlike the treatment they receive under *Hart and Wechsler*, however, they are not framed as freestanding topics. Instead, they are viewed as sources for arguments as to how to answer the issues a litigator is concerned with. By contrast, my sense is that in many Federal Courts courses that take *Hart and Wechsler* as their guide, the emphasis is reversed: the issues of interest to litigators are taken as occasions for taking up these larger issues of federalism and separation of powers.

II. HOW A LITIGATION-ORIENTED APPROACH WORKS

This difference in emphasis leads to a difference in the organization of the course. A course that follows the model set out in *The Federal Courts and the Federal System* would begin with questions about the role of federal courts in our system. But from a litigation-oriented perspective, the most important question is how one gets into federal court. The main federal statute for litigating constitutional challenges to state action is 42 U.S.C. § 1983. Yet examination of this statute is deferred until one is deeply into the course, after a thorough immersion in these general allocation-of-power principles.[24] In this conception of the course, the cause of action authorized by § 1983 is treated as

24. The current edition of Hart and Wechsler reaches § 1983 in the middle of chapter 9, after devoting over nine hundred pages to other matters. *See* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 942.

nothing more than a manifestation of the general principles governing the relations between the federal courts, on the one hand, and state officers and local governments on the other. Other books follow more or less the same structure.[25] Some give § 1983 only perfunctory treatment while others provide extensive coverage.[26] But for all of them, the premise behind organizing the course in this way seems to be that general propositions should come first, followed, if the teacher is so inclined, by the (comparatively less significant) particulars of § 1983 litigation. My sense is that most current casebook authors simply follow the path blazed by Henry Hart and Herbert Wechsler in 1953, before the rise of § 1983 and the rest of the modern law of constitutional litigation.

A. Beginning with § 1983

My litigation-oriented Federal Courts course starts from the opposite premise. It begins with 42 U.S.C. § 1983, then moves on to federal common law, federal question jurisdiction, standing, sovereign immunity, abstention, federal law in the state courts, Supreme Court review, habeas corpus, and concludes with the highly abstract, theoretically important, but largely unresolved issues raised by Congress's Article III power over the federal courts.[27] Section 1983 comes first because anyone who litigates in federal court will benefit from knowing it thoroughly. It is the statutory source of the cause of action litigants ordinarily use in order to challenge state action on federal constitutional (and some statutory) grounds. We study it not only because it is important in its own right, but also because § 1983 litigation is the context in which the Court typically addresses pressing questions of judicial federalism and because it provides a template for federal litigation which, once mastered, can readily be adapted to other contexts as well. Section 1983 is a powerful tool that, in my view, every future litigator should learn about in law school. It should be studied in Federal Courts because, in practice, many of the other doctrines examined in the course—including justiciability and standing, sovereign immunity, abstention, and res judicata—typically arise in

25. *See, e.g.*, DOERNBERG, WINGATE & ZIEGLER, *supra* note 11, at 509 (chapter 6 examines § 1983); REDISH & SHERRY, *supra* note 11, at 303 (chapter 6).

26. Though PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (6th ed. 2008), arrives at § 1983 rather late in the day, they accord it an especially detailed treatment. *See id.* at 1151–1379 (chapter 9). At the other extreme, in one casebook, § 1983 and Supreme Court cases interpreting it receive only passing mention in a footnote. *See* CHARLES ALAN WRIGHT, JOHN B. OAKLEY & DEBRA LYN BASSETT, FEDERAL COURTS 530–31 n.7 (12th ed. 2008).

27. My organization of the course follows the casebook on which I collaborate with two distinguished Federal Courts teachers. *See* MICHAEL L. WELLS, WILLIAM P. MARSHALL & LARRY W. YACKLE, CASES AND MATERIALS ON FEDERAL COURTS (2007). The opinions expressed in this paper, however, are solely my own.

the course of a § 1983 suit. Studying § 1983 at the outset gives students the context necessary for understanding how those doctrines actually work.

For these reasons we begin the course by discussing the breadth of the cause of action recognized in 1961 in *Monroe v. Pape*,[28] the leading modern case that revived the long-dormant statute. We then move on to limits on § 1983 recovery, including the official immunity doctrine that precludes the award of damages in many situations[29] and the rejection of vicarious liability for municipalities in *Monell v. Department of Social Services*.[30] The discussion turns next to such matters as the opportunities left open by *Monell* for suing municipalities,[31] and the prospects for using § 1983 to enforce federal statutes.[32] In the course of examining these matters, we stress the differences between the "offensive" remedy provided by the statute and "defensive" remedies of the kind that are typically available in the criminal process. It becomes evident that offensive remedies existed long before the rise of § 1983, going back at least to *Ex parte Young*.[33] Students learn that these offensive remedies raise a host of new questions that they may not have encountered in either Criminal Procedure or Constitutional Law. The discussion of official immunity, in turn, highlights the differences between two kinds of offensive remedies—prospective and retrospective. While immunity is rarely a problem when a prospective remedy is sought, it is a significant obstacle to retrospective relief. Introducing the prospective-retrospective remedy distinction early on provides necessary background for elaborating on the strengths and weaknesses of the two remedies later on in discussions of standing, sovereign immunity, and abstention.

Though the course begins with § 1983, it is not a "civil rights" course. The "federal courts" focus soon becomes apparent as we use the statute as a bridge to take us to federal common law. Section 1983 speaks in sweeping terms. Unlike modern statutes, it ignores most of the issues that arise in litigation. The gaps in the text invite a discussion of the process by which the Supreme Court fills in the gaps, and that analysis provides students with a concrete illustration of federal common law, situated in a context they fully understand. Given the highly abstract issues raised by the formation of federal common law, the pedagogical utility of the § 1983 example is considerable.

28. 365 U.S. 167, 183 (1961).

29. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982).

30. 436 U.S. 658, 691–92 (1978).

31. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 380 (1989); Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

32. *See, e.g.*, City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005); Gonzaga Univ. v. Doe, 536 U.S. 273, 284–85 (2002).

33. 209 U.S. 123 (1908). For pre-*Young* developments, see Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L. J. 77 (1997).

Our examination of judge-made law in § 1983 lays a foundation for turning to a more systematic treatment of federal common law. Just as the courts must make a considerable amount of federal law in § 1983 litigation, the same need for federal common lawmaking arises in other contexts for a number of distinct reasons. By now we have left § 1983 behind and are dealing with general problems of judicial federalism. The focus here is on *when* and *why* courts should make federal common law. Accordingly, one of the aims of examining federal common law is to identify as concretely as possible what those reasons are. These intensely practical issues can be addressed quite successfully without a detailed examination of *United States v. Hudson & Goodwin*,[34] *Swift v. Tyson*,[35] or even *Erie Railroad Co. v. Tompkins*.[36] Here, as throughout the course, emphasis should be placed on the exposition of the doctrine. To that end, Justice Marshall's opinion for the Court in *United States v. Kimbell Foods, Inc.*,[37] which is a model of clarity, should be highlighted rather than buried in the notes, as it is in *Hart and Wechsler*.[38]

Studying the remedial law developed under § 1983 at the beginning of the course lays the groundwork for identifying another link between § 1983 and federal common law. Besides substantive law, there is a remedial dimension to federal common law, illustrated by the cause of action for Fourth Amendment violations recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[39] This aspect of federal common law provides an opportunity to illustrate the differences between constitutional litigation and federal statutory litigation, where access to an implied remedy is quite limited.[40] On the constitutional side, the *Bivens* remedy against federal authorities dovetails with the § 1983 remedy against state officers and local governments. By studying the foundations for *Bivens*, students enhance their understanding of the policy rationale for *Monroe*, a rationale that is not fully articulated in Justice Douglas's majority opinion in *Monroe*.

We then put aside for a time the distinctive features of constitutional litigation and move to a higher level of generality, examining the availability of federal district court for federal question and diversity cases. Here, too, the focus of attention is on the aspects of the doctrine that matter to someone who

34. 11 U.S. (7 Cranch) 32 (1812); *see* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 608.

35. 41 U.S. (16 Pet.) 1 (1842); *see* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 550.

36. 304 U.S. 64 (1938); *see* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 558.

37. 440 U.S. 715 (1979).

38. *See* FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 10, at 628.

39. 403 U.S. 388 (1971).

40. *See* Alexander v. Sandoval, 532 U.S. 275, 290 (2001).

may actually use it to get into or stay out of federal court. With that goal in mind, *American Well Works Co. v. Layne & Bowler Co.*[41] should receive comparatively more attention and doctrines like the "well-pleaded complaint" rule should take a back seat. The point is that there is no modern case at odds with the affirmative principle for which *American Well Works* stands—that a litigant asserting a federal cause of action will have access to federal court.[42] Taking that rock solid principle as a starting point clarifies the issues raised by other cases as to whether and when a litigant may get to federal court even though his cause of action is created by state law. The possible exceptions can then be identified with some specificity and taken up one at a time: (a) the principle illustrated by *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing* that "a federal court ought [sometimes] to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law,"[43] so long as (b) the federal issue appears on the face of a well-pleaded complaint;[44] (c) the limits on the well-pleaded complaint principle, for example, where the federal issue appears on the face of a compulsory counterclaim,[45] or where the litigation is for a declaratory judgment;[46] and (d) the principle that the plaintiff is ordinarily, but not always, "the master of the complaint."[47]

All of these matters concern the statutory scope of federal jurisdiction. For several reasons, the *constitutional* issue of how far Congress may go under Article III in expanding federal jurisdiction ought to be saved for later in the course. One reason for putting the constitutional issue elsewhere is that some students are confused by the juxtaposition of materials on the constitutional issue, which generally recognize broad congressional power, and the limits imposed by the jurisdictional statutes and the Court's interpretation of them. In addition, the constitutional issue has little practical significance, as very few real-world jurisdictional issues involve a need to determine the outer limits of Congress's power. Finally, the "outer bounds" issue has more in common with other Article III issues, notably Congress's power to *restrict* federal jurisdiction in favor of either the state courts or non-Article III federal tribunals.

41. 241 U.S. 257 (1916).
42. *Id.* at 259–60.
43. 545 U.S. 308, 312 (2005).
44. *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).
45. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830–32 (2002).
46. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 17–19 (1983).
47. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6–8 (2003).

B. Discussing Potential Obstacles to Federal Court Access

Having examined the primary vehicles for obtaining access to federal court for federal questions in general and constitutional claims in particular, we turn to a variety of obstacles that may arise, principally but not exclusively in constitutional cases. I begin with justiciability and standing to sue. Here, we have one of the big differences between a litigation-oriented approach and the traditional organization of a Federal Courts course. In the latter, the center of attention in cases on justiciability and standing is the separation of powers between the Executive, Congress, and the federal judiciary. The "case" requirement of Article III defines the boundaries of judicial power, and the task at hand is to identify the attributes of a "case." When one does this at the outset of the course, as in *Hart and Wechsler*, students must undertake that project as though it were a freestanding inquiry with, for all they know, significant implications for a wide range of disputes. Lacking grounding in the standard principles of constitutional litigation, they do not have a firm idea as to what is, and is not, at stake in deciding standing and justiciability issues.

In my view, it is more effective simply as a matter of pedagogy to take up these matters *after* studying § 1983. By the time one arrives at standing and justiciability, students already understand that these obstacles only apply to suits seeking prospective relief. Litigants who can show past injury will have access to federal court at least for their damages claims.[48] They are also familiar with the limits on the utility of damages actions and can appreciate the factors that give rise to efforts to obtain prospective relief. They have encountered enough examples of constitutional litigation to have learned that in the ordinary course of things persons complaining about government action that adversely affects them will have no difficulty with standing and justiciability. Knowing the basics equips them to appreciate the range of circumstances, involving widely shared or hypothetical or arguably dated harms that give rise to justiciability and standing problems. They are familiar with the terrain and can quickly grasp the means one may employ to avoid many of the problems. Thus, the issue of congressional power to confer standing is an interesting and important one, but students should learn that sometimes there are ways to sidestep the problem altogether. For example, the plaintiffs in *Lujan v. Defenders of Wildlife* evidently could have established "injury" without Congress's aid by buying plane tickets to visit the environmentally sensitive areas they were concerned about.[49] The ripeness issue raised by an anticipatory challenge to an enforcement statute may be avoided by asking the prosecutor what he would do in the event of a violation.

48. City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

49. 504 U.S. 555 (1992).

Sovereign immunity is another obstacle to winning a federal constitutional or statutory challenge. In the traditional approach to Federal Courts law, this topic is treated as a major issue in federal-state relations. One discusses the nature of sovereignty, the lessons of history, and the significance of the adoption of the original Constitution and of the post-Civil War amendments. As a matter of theory, it is hard to argue with this way of dealing with the area, for Supreme Court decisions according constitutional status to sovereign immunity do in fact shield state governments from suit for violations of federal law. But, theory is one thing and practice is another. In the everyday world of litigation, the doctrine has less impact than the theory behind it may imply.[50] Students who have become familiar with § 1983 know going into the chapter that, with very few exceptions, the doctrine does not apply to suits against local governments and officials. They have learned that a suit for prospective relief, aimed at the state officials who administer the relevant state law, can assure state compliance with federal mandates going forward. They see sovereign immunity for what it is—a barrier to obtaining backward-looking relief against a state government. In my teaching experience, this ability to situate the doctrine in real world remedial context significantly aids students in understanding and evaluating the Eleventh Amendment case law.

Litigants who avoid both justiciability and sovereign immunity problems may still have to contend with abstention, res judicata, and related doctrines. The abstention doctrine from *Railroad Commission of Texas v. Pullman Co.* needs to be examined,[51] but that doctrine receives somewhat different treatment under my approach than in the *Hart and Wechsler* paradigm. For a devotee of *Hart and Wechsler*, *Pullman* is an archetypal case. It has a complex, trans-substantive Legal Process-based underpinning, drawing on the principle that state courts should decide state law issues as well as the policy of avoiding unnecessary constitutional rulings. The whole *Pullman* doctrine is a feast for anyone interested in the principles of federalism and separation of powers, with its referral to state court, its requirement that the litigants reserve their right to return to federal court, and its questions as to what happens if state courts balk at doing just what they are told and no more. Unsurprisingly, *Hart and Wechsler* lavishes attention on it.[52] But in practice, the *Pullman* doctrine has been largely superceded by the practice of certification, which is both broader in scope (applying to state law as well as federal issues) and less

50. *See* Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 215 (2006); Jesse H. Choper & John C. Yoo, *Effective Alternatives to Causes of Action Barred by the Eleventh Amendment*, 50 N.Y.L. SCH. L. REV. 715, 727 (2006).

51. 312 U.S. 496, 501 (1941).

52. *See* FALLON, MANNING, MELTZER & SHAPIRO , *supra* note 10, at 1057–72.

complex in operation (one simply sends a letter to the state court).[53] *Burford*,[54] *Colorado River*,[55] *Thibodaux*,[56] the anti-injunction act,[57] and other narrow abstention doctrines come next.

The most complex and important abstention doctrine, of course, is the one set forth in its modern form in *Younger v. Harris*.[58] Here again, studying § 1983 first has pedagogical advantages. A student who reads *Younger* without first having mastered § 1983 may infer from the *Younger* Court's rhetoric about "comity" and "Our Federalism"[59] that state courts are the favored forums for constitutional claims. At any rate, that is the inference I drew when I read the case as a student. In my course, however, students are better prepared to put the case in proper perspective because they learn the first week of class that exhaustion of state remedies is not required before bringing a § 1983 suit. It is easy for them to grasp that despite *Younger*'s rhetoric, efforts to apply its principle outside the context of pending state proceedings of some kind have generally fallen short. With the basic principle in place, one achieves clarity in presenting the doctrine by minimizing discussion of history and theory in favor of identifying obstacles and opportunities available to litigants. To that end, we organize the examination of *Younger* by identifying the variety of circumstances that may count in either aiding or hindering access to federal court and by taking them up one at a time.

The ultimate impact of *Younger* can be grasped only by understanding how it works in combination with the principles of issue and claim preclusion.[60] Accordingly, the best time to address that topic (along with the famously obscure *Rooker-Feldman* doctrine)[61] is immediately after *Younger*. Having already become familiar with the general principles of § 1983 litigation, students have the tools necessary to not only master the interplay between *Younger* and collateral estoppel but to also appreciate both the reach and the limits of *Younger* and its progeny.

53. To its credit, after fifteen pages on the largely outmoded *Pullman* doctrine, *Hart and Wechsler* discusses certification briefly but adequately. *See id.* at 1072–75.

54. Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943).

55. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 825–26 (1976).

56. La. Power & Light Co. v. Thibodaux, 360 U.S. 25, 27–30 (1959).

57. *See* Mitchum v. Foster, 407 U.S. 225 (1972); Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281 (1970) (interpreting 28 U.S.C. § 2283).

58. 401 U.S. 37 (1971).

59. *Id.* at 44.

60. Allen v. McCurry, 449 U.S. 90 (1980).

61. Here, emphasis should be placed not on *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), or *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), but on the Supreme Court's recent efforts to clarify and limit the doctrine. *See, e.g.*, Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005).

C. Discussing State Court Prerogatives and Jurisdiction in § 1983 Inquiries

The course then turns to the distinctive statutory and constitutional issues that arise when federal issues are litigated in the *state* courts. These include, among others, questions as to whether state courts can decline jurisdiction over federal claims and whether states may apply their own procedural law in resolving them. Since the resolution of disputes on these matters depends on whether the state court's approach will interfere with federal policy, the nature of the substantive rights at issue in these cases heavily influences the resolution of the "Federal Courts" issues as to limits on the state courts. The advantage of beginning the course with § 1983 is that students are already well-schooled in the ways and means of constitutional litigation.

Consequently, cases like *Howlett v. Rose*[62] and *Felder v. Casey*,[63] which raise issues of state court prerogatives in the § 1983 context, are especially effective teaching tools. In similar fashion, the earlier discussion of federal question jurisdiction prepares students for studying exclusive federal jurisdiction and removal from state to federal court. By contrast, it seems to me that *Hart and Wechsler* needlessly baffles students by discussing situations in which federal jurisdiction may be exclusive *before* explaining its general scope.

Supreme Court review of state judgments is a necessary part of any Federal Courts book. In my conception of the course, the best time to treat it is immediately after the discussion of federal law in the state courts; every case subject to Supreme Court review is one in which there is some federal issue either in the foreground or the background of state court litigation. The time has also come for discussion of the subtle questions raised by the adequate and independent state ground doctrine.[64] Students may have greater difficulty with these matters when they are raised early in the course, as they are when one follows *Hart and Wechsler*.

Article III recognizes some power in Congress to favor state courts over federal lower courts and to even restrict Supreme Court jurisdiction to review state court rulings. Rather than taking up questions of congressional power over federal jurisdiction at the beginning, as in the *Hart and Wechsler* approach, I address them at the end. My premise here is that the issues are hard, and students who know more about Federal Courts law are probably better prepared to tackle them than students who know less. However, a potential objection to my approach needs to be acknowledged. Since Congress rarely interferes in a problematic way with federal jurisdiction, these issues

62. 496 U.S. 356 (1990).

63. 487 U.S. 131 (1988).

64. For a discussion of some of the issues I have in mind, see Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919 (2003).

cannot easily be integrated into a litigation-oriented course that emphasizes the issues routinely faced by lawyers. At the same time, the anti-theoretical thrust of the course must give way before the critical separation of powers issues raised by the few cases we have in the area. My hope is that they can be dealt with more effectively at the end rather than at the beginning of the course, simply because students can now approach them with a broader base of knowledge as to how the federal system actually operates.

III. THE CASE FOR A LITIGATION-ORIENTED APPROACH

It is a truism, but one worth repeating here, that in determining how to teach a course, the first step is to decide what the teacher aims to achieve with it. The choice of materials, how to organize them, what to spend more or less time on, and every other decision depend on what one hopes to accomplish. My objective in teaching Federal Courts is to prepare students for the jurisdictional and remedial problems they will face in litigating federal constitutional and statutory issues in federal and state courts, no matter which side of the case they represent. In my view, this goal is best accomplished by: (a) focusing on matters that lawyers are most likely to encounter; (b) emphasizing the general principles governing constitutional litigation more than the odd intellectual puzzles that sometimes arise; (c) identifying in terms that are as concrete as possible the obstacles lawyers face when they seek to raise federal issues; and (d) identifying in similarly specific terms the means by which those obstacles may be overcome. In pursuing these ends, it seems to me that the teacher ought to spend comparatively more time on matters that students cannot pick up on their own and that are not taught in other courses.

A. Foregoing the Theoretically Stimulating for the Pragmatically Significant

With these aims in mind, the case for putting § 1983 first and fitting as much of the course as possible into its framework emerges from the foregoing discussion of how the sequencing of topics radically diverges from *Hart and Wechsler*. Today, § 1983 is not merely *a* tool, but rather, is *the* tool for constitutional claimants to go on the offense, raising federal constitutional (and some statutory) claims as plaintiffs rather than merely using them as defensive shields.[65] Whatever other means may be available, its dominance is assured by the availability of attorney's fees for successful plaintiffs in § 1983 suits under the Civil Rights Attorney's Fees Award Act of 1976.[66] For this reason, it

65. The metaphor is borrowed from Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972). "Public law litigation" has distinctive features because cases are often conducted through § 1983 by plaintiffs who are seeking access to federal court to challenge state actors on federal constitutional and statutory grounds. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

66. 42 U.S.C. § 1988(b) (2006).

seems to me that *everyone* who plans to litigate federal issues as counsel for plaintiffs or defendants ought to know the basics of § 1983. Federal common law should come next because the lawmaking powers of the federal courts influence everything they do, not just in § 1983 litigation but across the whole range of federal statutory law and in matters ostensibly governed by state law. Federal district court jurisdiction comes third because the ground has been prepared for showing students the full range of opportunities for access to federal court as well as limits on access (such as the well-pleaded complaint rule).

Learning these basic and broadly relevant principles prepares students for their encounter with the sometimes opaque, confusing, and intricate set of obstacles set up by doctrines of justiciability, standing, sovereign immunity, abstention, and res judicata. Students who have mastered the general principles governing § 1983 litigation are well-prepared to understand and deal with the specific circumstances that give rise to this whole range of problems. Students who study these doctrines *before* studying § 1983 and federal question jurisdiction may struggle to place matters like "standing" or "abstention" into real world context. Students who come without that background to the Supreme Court's Establishment Clause standing cases may easily conclude that standing is rarely available to bring Establishment Clause challenges. They may fail to appreciate the importance of the "pendingness" predicate of *Younger* abstention, and thus infer that *Younger* is a bigger stumbling block than it actually is for a litigant seeking to challenge a state statute on constitutional grounds. Students may think that sovereign immunity is a major—rather than a comparatively minor—obstacle to most efforts to enforce federal law against state governments, at least prospectively.

Emphasizing these matters necessarily requires giving less attention to others. Under a litigation-oriented approach to Federal Courts, the primary criteria for deciding how much time to devote to a particular topic are: (a) relevance to law practice; (b) difficulty; and (c) unfamiliarity. A litigation-oriented approach invests comparatively less time in theoretically interesting matters like Congress's power over the Supreme Court's jurisdiction. This approach also foregoes a systematic treatment of doctrines like "justiciability and standing," "judicial federalism," and "suits challenging official action." They are examined with the specific aim of identifying their impact on the opportunities available for litigating federal claims. The policies on which they rest are introduced only to the extent those policies bear on current issues. One largely ignores the historical development of these topics, except insofar as history informs current debates. The equitable origins of abstention and the common law background of standing receive little attention. On the other hand, some historical matters cannot be avoided. Thanks to the Supreme

Court's obsession with historical analysis of state sovereign immunity,[67] one cannot avoid discussing eighteenth century understandings of that doctrine.

B. Distinguishing § 1983's Teaching Function from Its Scholarly Function

A Hartian critic may object that a litigation-oriented approach falls short because it fails to explore all of the implications of Legal Process theory for issues of judicial federalism and separation of powers. It is true that a litigation-oriented approach concentrates on working within the current jurisdictional framework. Its agenda is to identify a range of concrete issues as to the availability of a given court and a given body of law—state or federal as the case may be. By highlighting large questions of federal-state relations and the role of courts vis-à-vis the other branches, *Hart and Wechsler* treats current jurisdictional law as one among many alternatives. As such, it invites speculation as to how principles of federalism and separation of powers may play out over a range of historical and potential future problems *before* taking up § 1983 and other well-established features of our system. A litigation-oriented approach sacrifices that opportunity when it recognizes up front that § 1983, federal common law, and the federal question jurisdiction provide a framework for addressing many of the problems that come up in the workaday world of law practice. A discrete set of sovereign immunity, abstention, justiciability, and standing principles provide tools for dealing with most of the remaining issues that arise in federal litigation.

The choice between *Hart and Wechsler* and a litigation-oriented approach turns on whether, from a pedagogical perspective, the benefits of greater attention to the Legal Process are worth the cost. The cost is difficulty in clarifying current jurisdictional arrangements. For example, students in courses following the *Hart and Wechsler* model typically do not reach § 1983 until late in the course. Even then, the statute receives only cursory attention in many of the casebooks. In the meantime, students are asked to work their way through the thicket of history, policy, and detail demanded by the effort to apply Legal Process principles to such matters as the attributes of a "case," the identifying features of a federal "question," the nature of "injury," and "federal-state court parity." If the benefits of putting a theoretical treatment of judicial federalism and separation of powers issues in the forefront are great enough, the cost is worth bearing. But that cost should not be minimized. It consists of the lost opportunity to give systematic attention to the distinctive set of concrete federalism and separation of powers issues raised in litigation under § 1983 and other federal statutes. To be sure, students need to learn the

67. *Compare* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) (history supports congressional authority under Article I bankruptcy power to subject states to monetary liability) *with* Alden v. Maine, 527 U.S. 706 (1999) (history supports state immunity from such congressional efforts under Article I commerce power).

lessons that Hart and Wechsler and their descendants can teach about "what is sayable and unsayable, relevant and irrelevant, persuasive and unpersuasive in legal arguments about Federal Courts issues."[68] A litigation-oriented course easily satisfies that need. However, it is a poor use of class time to extensively analyze topics that pique the interest of academics but that do not actually count for much in the resolution of real-world Federal Courts questions. That time is better spent on issues students will surely encounter in litigation.

My argument against the traditional focus of Federal Courts is limited in two ways. First, I focus here on the *teaching* of Federal Courts law to law students. How we should approach Federal Courts *scholarship* is a separate matter. While I believe that the approach I sketch here will maximize the value of the course for students, it certainly should not control anyone's scholarly agenda. In that arena, there is no reason at all to curb one's interest in legal theory or ambition to contribute to it. No topic, no matter how academic it may be, should be excluded from that agenda. Second, I am concerned with how to teach the *basic* Federal Courts course. Schools with sufficient resources should offer advanced courses or seminars on the application of Legal Process theory and the *Hart and Wechsler* Paradigm to address the problems students studied in the basic course on Federal Courts law. Students with a firm grounding in the basics of federal jurisdiction would be well prepared for such a course. An additional advantage of a specialized course is that other perspectives besides *Hart and Wechsler* could also be explored. As Professor Fallon has recognized, "anyone with a critical agenda might wish to broaden the framework, to attempt to describe a systematic relationship between Federal Courts doctrine and, for example, the class interests or characteristic biases of dominant groups."[69]

CONCLUSION

Deciding how to teach a course always involves some balance between the professor's scholarly interests and the needs of law students.[70] Federal Courts teachers are the heirs to a great intellectual tradition. Yet, they should be cautious and not allow their own fascination with the subject matter of the course exercise too much influence over what they choose to teach. I submit

68. Fallon, *supra* note 20, at 10.

69. *Id.* at 12.

70. I should note that my preference for building the course around § 1983 reflects my scholarly interests in that area. A teacher disenchanted with the *Hart and Wechsler* approach and coming to the course from a procedural background may well prefer to concentrate on the relations between civil procedure and judicial federalism. Casebooks amenable to that approach include WRIGHT, OAKLEY & BASSETT, *supra* note 26, and HOWARD P. FINK, LINDA S. MULLENIX, THOMAS D. ROWE, JR. & MARK V. TUSHNET, FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS (3d ed. 2007).

that they may have paid too little attention to the growth of § 1983 as a vehicle for litigating public law questions and the consequent need for students to thoroughly understand it. In addition, I believe that students benefit from an approach that integrates many other topics covered in the course—including justiciability and standing, sovereign immunity, and abstention—into a § 1983 framework. It is time to rethink the teaching of Federal Courts law, put § 1983 at the center, and relegate concepts of "Federalism" and "Separation of Powers" to a supporting, though still significant, role.